
USING POLLUTER PAYS PRINCIPLE TO ENFORCE ENVIRONMENTAL REMEDIATION AND COMPENSATION OF POLLUTION VICTIMS IN TANZANIA

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Abstract

Polluter Pays Principle (PPP) is perhaps the commonest environmental law principle. It is enforced, inter alia, through environmental remediation and compensation of pollution victims. These are the two significant aspects of PPP. This article discusses mainly the challenges and prospects of using PPP to enforce laws governing environmental remediation and compensation of pollution victims in Mainland Tanzania. The article begins by conceptualising key notions underlying PPP. It also highlights the interrelationship between PPP, environmental remediation and compensation of pollution victims. The implementation of laws governing these two PPP aspects is also assessed in this article. It has generally been observed in this article that laws are not adequately implemented by environmental enforcement agencies. Thus, the article provides several recommendations including the establishment and strengthening of the environmental compensation fund.

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1.0. INTRODUCTION

Environmental pollution is a concern of the world at large. In Mainland Tanzania, complaints from the public about environmental pollution are increasing year after year. For instance, from 2015-16, a total of 171 environmental pollution complaints were received by the National Environment Management Council (NEMC).¹ From 2017-18, the number of pollution complaints increased to 207;² whereas from 2018-19 they raised up tremendously to 701.³

Essentially, environmental pollution is among the major human rights concerns which violate various fundamental human rights in Tanzania.⁴

¹ NEMC, the Annual Report and Audited Accounts for the Year Ending 30 June 2016, at p. 6.

² Jamhuri ya Muungano wa Tanzania, (JMT), “Hotuba ya Waziri wa Nchi, Ofisi ya Makamu wa Rais, Muungano na Mazingira, Mhe. January Y. Makamba (Mb), Wakati wa Kuwasilisha Bungeni Makadirio ya Mapato na Matumizi kwa Mwaka wa Fedha 2018-19”, p. 31. [Unofficially translated as the United Republic of Tanzania (URT), “Speech of the Minister, Vice President’s Office Union and Environment, Hon. January Y. Makamba, (MP) at the Parliament when Presenting the Budget for the Financial Year 2018-19”], available at <<https://vpo.go.tz/cmdownloads/hotuba-ya-bajeti-kwa-mwaka-wa-fedha-20182019/>> (accessed 15 July 2019).

³ JMT, “Hotuba ya Waziri wa Nchi Ofisi ya Makamu wa Rais, Muungano na Mazingira, Mh. January Y. Makamba (Mb), Wakati wa Kuwasilisha Bungeni Makadirio ya Mapato na Matumizi kwa Mwaka wa Fedha 2019/2020”, p. 14. [Literally meaning the URT, “Speech of the Minister, Vice President’s Office Union and Environment, Hon. January Y. Makamba, (MP) at the Parliament when Presenting the Budget for the Financial Year 2019/2020”], available at <<https://www.vpo.go.tz/cmdownloads/hotuba-ya-waziri-wa-nchi-ofisi-ya-makamu-wa-rai-kuhusumakadirio-ya-mapato-na-matumizi-kwa-mwaka-20192020/>> (accessed 18 April 2019).

⁴ The Legal and Human Rights Centre (LHRC), *Tanzania Human Rights and Business Report*, Dar es Salaam, LHRC Publishers, 2017, at p. 118.

These include .e.g, the right to a clean and healthy environment, the right to life and the right to property.

In dealing with pollution, there are various international and regional environmental instruments.⁵ In Africa, there are several instruments that protect the environment, such as the African Charter on Human and Peoples' Rights, 1981⁶ and the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa, 1991.

Most of the Multilateral Environmental Agreements (MEAs) contain principles of environmental management, Polluter Pays Principle (PPP) being one of them. PPP can provide remarkable incentives in controlling pollution caused by bodies corporate. As such, environmental enforcement agencies have a legal duty to fully enforce it. Principally, PPP is based on the absolute liability for environmental harm, viz., restoration of the polluted environment and compensation of pollution victims.⁷ These are significant aspects of PPP. In order to understand clearly PPP, it is imperative to conceptualise key notions characterising it.

2.0. WHAT IS POLLUTION?

Pollution is the central theme of PPP. It is perhaps the oldest and most common risk encountered daily by human beings.⁸ In essence, pollution is a problem that has impacts on the environment and health of every

⁵ For instance, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters, 1972, and the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal, 1989.

⁶ Art. 24.

⁷ Myneni, S.R., *Environmental Law*, Hyderabad, Asia Law House, 2008, at p. 227.

⁸ Ashour, A.J., and Wahab, H.A., "Criminal Liability of Corporate Bodies for Polluting the Environment: Sharia and Law Perspectives", *International Journal of Management and Applied Science*, Vol. 2, Issue No. 9, 2016, p. 222, at p. 224.

person. It is generally considered by the public as an unwanted phenomenon.⁹

Defining pollution or environmental pollution is a very complex task. One of the difficulties is due to the fact that pollution is not restricted only to illegal acts. In some cases, pollution is defined as the legal activity that is authorised, controlled or regulated by the State.¹⁰ Another challenge in defining pollution is the fact that pollution is not altogether anathema. Certain pollution level is necessary for the life of humankind.¹¹ Moreover, pollution in one country is not automatically pollution in another country. This is because the standards of the two countries may not be equivalent.

Two concepts are usually involved in defining pollution: threshold-based and impact-based concepts.¹² In most cases, pollution especially caused by emission and discharge, is measured based on established standards or thresholds. An industry is considered to have polluted the environment when its emission or discharge is above standards. The assumption is that emitting or discharging below the threshold is a lawful activity even though such emission or discharge has some effects on the environment.

The impact-based concept of pollution applies in a situation where emission or discharge causes damage to humankind or the

⁹ Coyle, S., and Morrow, K., *The Philosophical Foundation of Environmental Law: Property Rights and Nature*, Oxford, Hart Publishing, 2004, at p. 130.

¹⁰ Louka, E., *International Environmental Law; Fairness, Effective and World Order*, Cambridge, Cambridge University Press, 2006, at p. 450.

¹¹ Bugge, H.C., "The Polluter Pays Principle: Dilemma of Justice in National and International Context", in Ebbesson, J., and Okowa, P., (eds.), *Environmental Law and Justice in Context*, Cambridge, Cambridge University Press, 2009, at p. 420.

¹² De Sadeleer, N., *Environmental Principles- From Political Slogans to Legal Rules*, Oxford, Oxford University Press, 2005, at p. 39.

environment.¹³ Whether the potential polluter emits or discharges pollutants below established standards is immaterial. Based on this notion, a polluter is still liable to have caused environmental pollution if such emission or discharge has negative effects on environmental components.

The definition of pollution based on its impact may be seen in the Environmental Management Act (EMA). The Act defines pollution as:-

any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing of wastes so as to adversely affect any beneficial use, to cause a condition which is hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to cause contravention of any condition, limitation, or restriction which is the subject to a licence.¹⁴

From this definition, it may be conceived that pollution has the tendency of changing the original state of the environment to a non-natural one. Moreover, pollution may directly or indirectly affect the environment. The artificial environment created may jeopardise the ecosystem and the existence of living things in case there will be no remedial measures to ameliorate the situation. The above definition squarely affiliates with damage, risks, or threats to the health and life of human beings, other living creatures and the environment.

In a nutshell, it can be argued that it is not simple to conceptualise the term 'pollution'. This is because defining pollution depends on the context, prescribed standards and place of its applicability. Thus, the term pollution implies something harmful and non-natural introduced by a person to the environment that may have negative effects on

¹³ Ibid.

¹⁴ EMA, s. 3.

humankind and the environment. There is no pollution without a polluter. The concept of 'polluter' is accentuated below.

3.0. WHO IS THE POLLUTER?

Whenever the environment is polluted, it is evident that there is someone or something responsible. This is what is called a 'polluter'. Nevertheless, the concept of polluter is not always clear. Its meaning is evolving and varies according to the context.¹⁵

Pollution may be caused by human activities or may occur naturally. Certainly, acts of God cannot be regarded as polluters under PPP.¹⁶ This is because they cannot be prosecuted either in courts of law or administratively.¹⁷ This explains why pollution occurring independently from human activities in most environmental instruments gives no liability under the *force majeure* rule. As such, it is obvious that a polluter is a person, viz., a natural or legal person.

It is not always easy to identify a person responsible for pollution when the environment has been damaged. No wonder to find the word polluter being used synonymously with words such as originator, manufacturer, operator, seller, user, consumer, etc. The producer of a certain product that results in waste may also be termed the polluter.¹⁸

¹⁵ Schwartz, P., "The Polluter Pays Principle", in Fitzmaurice, M., David M., and Merkouris, P., (eds.), *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar Publishing Ltd, 2010, at p. 247.

¹⁶ McGuire, C.J., *Environmental Law from the Policy Perspective: Understanding how Legal Frameworks Influence Environmental Problem Solving*, London, CRC Press Taylor&Francis Group, 2014, at p. 58.

¹⁷ Ezeanokwasa, J.O., "Polluter Pays Principle and the Regulation of Environmental Pollution in Nigeria: A Major Challenge", *Journal of Law, Policy and Globalisation*, Vol. 70, 2018, p. 45, at p. 47.

¹⁸ De Sadeleer, N., "Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims", *Journal of Environmental Law*, Vol. 21, Issue No. 2, 2009, p. 299, at p. 303.

Moreover, a polluter can be a State, a business entity, an individual person or even a public authority.

It is sometimes argued that a polluter is any “economic agent who plays a determinative role in pollution.”¹⁹ This definition focuses on any party who took an active role when pollution occurred. One of the advantages of this definition is that it implicates all parties who are involved in the production process, *i.e.*, from the cradle to the grave.²⁰ Thus, both manufacturers and consumers of polluting substances may be implicated.

The European Commission (EC), defines a polluter as “someone who directly or indirectly damages the environment or who creates conditions leading to such damage.”²¹ This definition seems to identify three types of polluters. Firstly, are persons that directly contaminate the environment. An industry that discharges untreated effluents may fall into this category because it pollutes the environment directly. Secondly, the people who indirectly damage the environment. The industry that produces certain goods, e.g., plastic carrier bags which end up in the soil and ocean is a good example.

Thirdly, include persons who create conditions for harm to occur in the environment. This group of persons does not cause any kind of pollution, rather it creates opportunities or influences the first two groups to directly or indirectly pollute the environment.²² The

¹⁹ Vandekerckhove, K., “The Polluter Pays Principle in European Community”, 2015, at p. 205, available at < <https://academic-oup-com.eres.qnl.qa/yel/article/13/1/201/1701351> > (accessed 23 July 2019).

²⁰ *Ibid.*

²¹ EC, Council Recommendation of 3 March 1975 Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, 18 O.J. EUR. CoMM. (No. L194) 1 (1975) the Annex to Recommendation 75/436, OJL 194/1, 1975, Pt III.

²² Ezeanokwasa, *Polluter Pays Principle*, above note 17, at p.47.

Government, environmental regulator or enforcement agencies may squarely fall under this category.

In summary, it can be argued that there is no hard and fast rule for determining who the polluter is. A polluter may be identified based on specific economic activity that results in pollution. The notion of polluter may range from the manufacturer of the products to the ultimate consumer. When the polluter is identified, it is necessary to determine what or how much he has to pay as the costs of pollution. This concept is explained below.

4.0. WHAT OR HOW MUCH SHOULD THE POLLUTER PAY?

It is important to determine the type of costs encompassed in PPP.²³ The reason is that the identified polluter is responsible to bear pollution costs. Even so, the extent of payment in PPP is not clear. Pertinent questions to ponder at this juncture are whether all pollution costs should be borne by the polluter or whether costs include only monetary payments or other responsibilities such as environmental cleanup.

Kind of costs that the polluter has to bear include costs to prevent and control pollution. This means that every measure deployed in accordance with the law or as an order from the environmental regulator or agency, for the purpose of preventing and controlling pollution, has to be borne by the polluter.²⁴

²³ Gaines, S., “The Polluter Pays Principle: From Economic Principle to Environmental Ethos”, *Texas International Law Journal*, Vol. 26, 1991, p. 463, at p. 473.

²⁴ OECD, the Polluter Pays Principle: OECD Analyses and Recommendations, 1992, at para. 1.1(a), available at <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En)> (accessed 11 March 2018).

What has to be paid by the polluter was summarised in *Imperial Oil v. Quebec*.²⁵ The court stated that PPP “assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution.” Costs of remediating the damaged environment and compensating victims of pollution may be envisioned from the above decision as direct and immediate costs.

Payment to victims of pollution is also called compensatory damages. Depending on the gravity of environmental harm, in some incidents courts of law may order exemplary or punitive damages. They are awarded in addition to compensatory damages which are regarded sometimes as trifling remedies and have no deterrent effect.²⁶

Therefore, in determining what or how much should be paid by the identified polluter, it is necessary to make a thorough valuation in order to establish the extent of payment following environmental damage. The valuation should include the total damage, *i.e.*, injury to ecology and the non-use values.²⁷ Nonetheless, it is complex to give a monetary value to the damaged environmental elements.

5.0. WHAT IS THE POLLUTER PAYS PRINCIPLE?

PPP is among the principles that form a basis for environmental policy.²⁸ Economists and lawyers have taken a great role in developing it. As such, PPP is used by different people in diverse disciplines. PPP or liability for environmental damage is regarded as the bedrock of environmental

²⁵ [2003] 2 SCR 624.

²⁶ *Wilkes v. Wood* (1763) 98 Eng. Rep 489.

²⁷ Schwartz, *The Polluter Pays Principle*, above note 15, at p. 255.

²⁸ Faure, M., “Balancing of Interests: Some Preliminary (Economic) Remarks”, in Faure, M., and Du Plessis, W., (eds.), *The Balancing of Interests in Environmental Law in Africa*, Pretoria, Pretoria University Law Press, 2011, at p. 11.

law.²⁹ This is because it is reflected in most MEAs and legislation governing environmental matters. It is now a cornerstone principle of environmental law, although it is difficult to provide its accurate legal definition.³⁰

PPP is mainly associated with rules governing environmental liability.³¹ It may have different connotations not only for economists but also among environmental lawyers depending on the context. For instance, in instruments dealing with climate change, PPP is largely construed as the Contributor Pays Principle.³² This implies that those who contribute to emitting greenhouse gases are responsible to pay for their effects.

PPP is also interpreted by some developing countries to include the aspect of Governmental liability.³³ The emphasis of this interpretation is based on the restoration of the injured environment and compensation for pollution victims by the Government, especially when the polluter is unidentified or unable to pay.³⁴ As it can be viewed, it is the Government, its agency or regulator that should pay and not the polluter. This variation of PPP shifts the liability from polluters to the Government. This

²⁹ Pyhala, M., Brusendorff, A., and Paulomaki, H., "The Precautionary Principle", in Fitzmaurice, M., Ong, D.M., and Merkouris, P., (eds.), *Research Handbook on International Environmental Law*, Cheltenham, Edward Elgar Publishing Limited, 2010, at pp. 203-4.

³⁰ Joseph, S.A., "The Polluter Pays Principle and Land Remediation: A Comparison of the United Kingdom and Australian Approaches", *Australian Journal of Environmental Law*, Vol. 1, Issue No. 1, 2014, p. 24, at p. 26.

³¹ Sands, P., *et al.*, *Principles of International Environmental Law* (3rd Edn), Cambridge, Cambridge University Press, 2015, at p. 280.

³² Kirby, R., "The Beneficiary Pays Principle and Climate Change", PhD Thesis, Australian National University, 2016, at p. 23.

³³ Luppi, B., *et.al.*, "The Rise and Fall of Polluter Pays Principle in Developing Countries", *International Review of Law and Economics*, Vol. 32, 2012, at p.135.

³⁴ *Ibid.*

explains why it is sometimes called the 'Government pays regime'.³⁵ This notion defeats the spirit behind PPP.

The role of the OECD and the European Community in transforming PPP from economic rule to legal principle cannot be overlooked.³⁶ In fact, PPP has been transformed from a mere recommendation into an enforceable and substantive part of international environmental instruments as well as national environmental legislation. As a guiding principle, PPP safeguards the right to a clean, decent and healthy environment. Fully enforcement of PPP is important in Tanzania where the Constitution does not expressly provide for substantive environmental rights.

Against that backdrop, it is clear that the concept of PPP is subject to various interpretations. It is like an empty shell.³⁷ The meaning of PPP to economists may not be the same as to lawyers. The growing trend in the application of PPP to lawyers centres on adopting essential remedial measures by the polluter to rectify the spoiled part of the environment.³⁸ Under this version of PPP, the polluter is enjoined to pay the full costs of remedying the damaged environment.

According to Sunkin,³⁹ PPP applies on two levels: specific and general. Specific level deals with civil or State liability. The polluter is fully responsible to restore the polluted environment as much as possible to its natural state and also to compensate victims of pollution. The second

³⁵ Ibid.

³⁶ Schwartz, *The Polluter Pays Principle*, above note 15, at p. 244.

³⁷ Faure, M.G., and Grimeaud, D., "A Report of Financial Assurance Issues of Environmental Liability", 2000, at p. 20, available at <http://ec.europa.eu/environment/legal/liability/pdf/insurance_gen_finalrep.pdf> (accessed 15 September 2019).

³⁸ Sunkin, M., Ong, D.M., and Wight, R., *Sourcebook on Environmental Law* (2nd Edn), London, Cavendish Publishing Ltd, 2002, at p. 52.

³⁹ Id. at pp. 53-4.

aspect of compensating pollution victims is an extension of PPP especially by developing countries. India is a good example at this juncture. Liability and compensation is sometimes called application of PPP in a legal sense.⁴⁰ PPP as a legal principle is regarded as a curative measure. A specific level applies PPP after the occurrence of environmental damage.

The general application of PPP concerns the internalisation of environmental costs or externalities. This means that the price of goods should reflect the extent of pollution they cause to the environment.⁴¹ The higher the price of goods the higher pollution they cause to the environment and vice versa. As a result, corporations may try to absorb environmental external costs associated with production. This version makes PPP one of the Economic Instruments (EIs). Essentially, both the OECD guidelines and the Rio Declaration of 1992 contain this version of PPP.⁴²

PPP was also conceptualised in *India Council for Enviro-Legal Action and Others v. Union of India and Others*.⁴³ In describing PPP, Justice Reddy stated that “the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution.”⁴⁴ From this statement, it may be understood that PPP denotes both preventive and curative aspects. The curative aspect of PPP was made lucidly in *M.C Mehta v. Kamal Nath and Others*.⁴⁵ In this case, the court interpreted PPP as an absolute liability principle where the polluter is bound to

⁴⁰ Bugge, *The Polluter Pays Principle*, above note 11, at p. 420.

⁴¹ Sunkin, Ong, and Wight, *Sourcebook on Environmental Law*, above note 38, at p. 53.

⁴² See, for instance, Principle 16 of the Rio Declaration, 1992.

⁴³ (1996) 3 SCC 212.

⁴⁴ *Id.* at para. 67.

⁴⁵ AIR 1997 SC 388.

compensate pollution victims as well as remediate the injured environment.

The EMA conceptualises PPP to mean:-

a mechanism whereby the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution and beneficial uses as a result of an act, of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law.⁴⁶

The wordings in the above definition suggest that PPP is based on curative or *ex-post* measures only. The preventive aspect of PPP or *ex-ante* does not come out clearly. Further, the definition seems to focus on the restorative function of PPP than the internalisation of environmental negative externalities. Using the word ‘conviction’, the above provision also appears to conceptualise PPP as a part of the liability regime. The definition of PPP in EMA limits itself to unlawful acts. It appears not to cover those who lawfully pay fees or charges as EIs for preventing the occurrence of pollution.

It may also be argued from the above provision that, a polluter is duty-bound to clean up the harmed environment as well as provide compensation to the pollution victims. Thus, whoever causes adverse or irreversible consequences on the environment is obliged to fully pay all social and environmental costs of avoiding, mitigating and remedying the negative effects he has caused.⁴⁷

⁴⁶ EMA, s. 3.

⁴⁷ *Ibid.*, s. 7(3)(d).

5.1. Polluter Pays Principle *vis-à-vis* environmental remediation

PPP as a legal liability principle is associated with environmental remediation or restoration. The notion of environmental remediation is a relatively novel phenomenon in some jurisdictions, including Tanzania.⁴⁸ It is now gaining popularity due to the increasing pollution damage as a result of industrial development.⁴⁹ An obligation to remediate the environment may be provided in the environmental legislation or through private arrangements in the production covenant. The same may be enforced administratively or by a court of law.

Environmental remediation is said to be an effective way of putting PPP into actual operation.⁵⁰ It entails various measures or mechanisms that are employed to neutralise and eliminate contaminants in the environment.⁵¹ These techniques may be either physical or biological and may comprise, restoring the land, replacement of the soil, replanting of trees or removing any waste or refuse that has been dumped on the land.

The main purpose of environmental restoration is to ensure, as far as possible, that the environment is free from contamination. This intends to reduce risks to human health caused by the polluted environment. It can generally be argued that restoration of the environment has the objective of ensuring that the ecosystem is not affected for the benefit of the present and future generations.

⁴⁸ Ortolani, A., “Environmental Damage Remediation in Japan: A Comparative Assessment”, in Nakanishi, Y., (ed.) *Contemporary Issues in Environmental Law: the EU and Japan*, Tokyo, Springer, 2016, at p. 185.

⁴⁹ *Ibid.*

⁵⁰ EC, “White Paper on Environmental Liability, COM (2000) 66 Final”, 9 February 2000, at p. 18, available at <http://ec.europa.eu/environment/legal/liability/pdf/el_full.pdf> (accessed 9 February 2019).

⁵¹ Benidickson, J., *Environmental Law* (4th Edn), Toronto, Irwin Law Inc., 2013, at p. 233.

Remedying the damaged environment is said to have greater deterrence than imposing fines, especially against giant corporate polluters.⁵² This explains why in the developed world actual restoration of the environment is more preferred than monetary compensation. This is because restoration of the environment ensures its sustainability. Non-restoration of the damaged environment by the polluter implies that the environment continues to jeopardise the right to life; hence the Government at some point may be required to restore it by using public funds.⁵³

The entrenchment of PPP into MEAs and legislation has shifted that duty to the polluter. Thus, the polluter is compelled to repair the environment damaged through his economic activities. The payment may be in terms of reparation or monetary compensation. The money paid is expected to be used by the environmental agencies to redress pollution effects.

Nevertheless, not always polluters are compensating for environmental pollution. Sometimes, the general environmental public fund is used for that purpose. This has been the case for the past damage that has been recently discovered whereby it is not easy to prove the nexus between pollution and polluters.⁵⁴ Long-lasting, historical and widespread pollution are good examples of this shifting trend from private to public compensation. The US superfund established under the Comprehensive Environmental Responsibility Compensation and Liability Act

⁵² Beder, S., *Environmental Principles and Policies: An Interdisciplinary Approach*, Sydney, University of New South Wales Press Ltd, 2006, at p. 41.

⁵³ De Sadeleer, *Environmental Principles*, above note 12, at p. 42.

⁵⁴ Faure M., and Velheij, A., "Introduction", in Faure, M., and Velheij, A., (eds.), *Shifts in Compensation for Environmental Damage*, New York, Springer, 2007, at p. 2.

(CERCLA)⁵⁵ is a classic example at this juncture. This fund is mostly used for environmental remediation caused by hazardous waste.

5.1.1 Implementation of laws on environmental remediation in Tanzania

It is important to note at the outset that there is no single piece of legislation providing for environmental remediation in Mainland Tanzania. Most of the pieces of legislation related to the environment have some provisions that compel the polluter to clean up the affected environment. It is also significant to note that not every environmental damage requires remediation. It is the duty of the environmental regulator or enforcement agency to use judiciously its discretion in identifying those contaminated sites which require remediation.

The EMA and its Regulations, for instance, have provisions with regard to environmental restoration.⁵⁶ In fact, the definition of PPP entrenched in section 3 of the EMA encompasses an aspect of environmental cleaning up. Provisions demanding environmental restoration are also provided by the Water Resources Management Act, 2009,⁵⁷ the Water Supply and Sanitation Act, 2019⁵⁸ and the Industrial and Consumer Chemicals (Management and Control) Act, 2003.⁵⁹ Other legislation enjoining environmental remediation are the Merchant Shipping Act, 2003⁶⁰ and the Marine Parks and Reserve Act, 1994.⁶¹

According to those statutes, environmental remediation may be carried out through court or administrative orders. This means that it is the duty

⁵⁵ 42 U.S. Code Chapter 103 of 1980.

⁵⁶ See, for example, ss. 5(2)(e), 7(3)(d), 102(1), 110(3)(a)(6)(b), 122(1), 133(4)(h), 151(2)(a)(4)(b), 187(2), 196(2)(d), 197(2)(c) and 198(3)(a).

⁵⁷ Act No. 11 of 2009, ss. 19, 40 and 64.

⁵⁸ Act No. 5 of 2019, s. 69(4).

⁵⁹ Act No. 3 of 2003, s. 46(7).

⁶⁰ Act No. 21 of 2003, s. 377.

⁶¹ Cap. 146 RE 2002, s. 32.

of either an environmental regulatory, enforcement agency or judiciary to enforce laws on environmental remediation. Generally, there is weak enforcement of the aforementioned laws by environmental enforcement agencies.⁶² In mining areas, pollution of water and degradation of land has been a common phenomenon and the degraded environment has been left un-remedied.⁶³ It is further noted that no Environmental Restoration Orders were issued by agencies such as NEMC against the corporate polluters.⁶⁴

Furthermore, it is established that neither civil nor criminal cases enforcing environmental restoration were instituted before the courts of law either by NEMC or members of the public in the study areas.⁶⁵ Thus, to a great extent, laws or provisions providing for environmental restoration are not adequately enforced by environmental enforcement agencies in Mainland Tanzania either administratively or through judicial actions.

Restoration of the damaged environment and compensation of victims of environmental pollution are conjoined principles that are worthy to be entrenched in the framework environmental law.⁶⁶ Having discussed environmental restoration, the next part assesses compensation of pollution victims in Tanzania as an aspect of PPP.

⁶² NEMC, the National Environmental Research Agenda for Tanzania 2017-22, at p. 20.

⁶³ Ibid.

⁶⁴ NEMC officials and victims of pollution, interviewed by the author (various dates from May to November 2019, Dar es Salaam, Geita, Mara, Mwanza and Mbeya).

⁶⁵ Ibid.

⁶⁶ Kakuru, K., and Ssekyana, I., *Handbook on Environmental Law in Uganda*, (2nd Edn), Vol. I, Kampala, Greenwatch, 2009, at p. 34.

5.2. Polluter Pays Principle vis-à-vis compensation of pollution victims

Damage to any environmental media has either direct or indirect effects on human beings. On the one hand, environmental damage can negatively affect the health of an individual person. Consequently, he may become feeble to perform day-to-day economic activities. This can also be termed as personal injury. On the other hand, environmental damage may result in loss of livelihood. This may go parallel with diminishing property value, which is also indirectly associated with economic loss.⁶⁷ Types of impact suffered by the victims may be grouped as health impacts, economic impacts as well as social and cultural impacts.⁶⁸

Against that background, the need to compensate victims of environmental pollution arises. Actually, identification and compensation of pollution victims is regarded as the application of PPP.⁶⁹ PPP as a principle of corrective justice creates a duty of the polluter to compensate victims of pollution.⁷⁰ This is fair especially when the polluter gains profit resulting from the polluting activity. The rule is that “nobody should have the right to damage others without the duty to compensate victims.”⁷¹

NEMC, as an environmental regulator and enforcement agency, has mandates under the EMA, especially through Environmental

⁶⁷ Velheij, A., “Shifts in Governance: Oil Pollution”, in Faure, M., and Velheij, A., (eds.), *Shifts in Compensation for Environmental Damage*, New York, Springer, 2007, at p. 135.

⁶⁸ Hall, M., *Victims of Environmental Harm, Rights, Recognition and Redress under National and International Law*, New York, Routledge, 2013, at p. 34.

⁶⁹ Cordato, R.E., “The Polluter Pays Principle: A Proper Guide for Environmental Policy”, 2001, at p. 4, available at <<https://www.heartland.org/publications-resources/publications/the-polluter-pays-principle-a-proper-guide-for-environmental-policy>> (accessed 24 January 2018).

⁷⁰ Bugge, *The Polluter Pays Principle*, above note 11, at p. 420.

⁷¹ *Ibid.*

Restoration Order, to compel the polluter to pay compensation to the victims of pollution.⁷² This is administrative enforcement of PPP without involving court proceedings.

The other avenue where compensation to the victims of pollution may be provided is through civil laws. Compensation of pollution victims under the civil laws regime, as a curative aspect of PPP, applies where there is harm to individuals. However, it is flimsy when there is no causal link between the polluter and the damage or when the operator's liability is limited.⁷³

Primarily, the compensation of persons affected by pollution is now a growing trend in many parts of the world. In this trend, the polluter has to bear all consequences of compensating pollution victims in addition to remediation of the injured environment. In Uganda, for instance, a person is not issued with a pollution licence if he is incapable of compensating people affected by pollution as well as cleaning up the damaged environment.⁷⁴

5.2.1. Laws governing the right to compensation of pollution victims in Tanzania

There are several laws on the compensation of pollution victims in Mainland Tanzania. As such, it is the duty of the environmental regulator and enforcement agencies to implement and enforce them. The EMA contains various provisions based on administrative and judicial compensation of pollution victims. Basically, PPP as defined by EMA entails compensation of pollution victims, compensation of cost of

⁷² EMA, s. 151(2).

⁷³ Schwartz, *The Polluter Pays Principle*, above note 15, at p. 253.

⁷⁴ S. 58(6) of the Uganda National Environmental Act, Cap. 153 of 1995.

beneficial uses lost as well as compensation of incidental costs resulting from pollution.⁷⁵

Fortunately, the EMA provides *locus standi* for compensation of victims of environmental pollution. Whenever the right to a clean and healthy environment is infringed, the law permits any person to bring an action against the responsible person for the latter to compensate any victim of environmental damage.⁷⁶ These provisions widen the *locus standi* even to the persons who are not directly affected by environmental harm to bring action on behalf of victims. Environmental rights defenders are given legal standing in this section to assist indigent and mediocre victims, especially through Public Interest Litigations (PIL).

Further, the Act empowers NEMC to file proceedings before a court of law against the holder of the Environmental Impacts Assessment (EIA) certificate who fails to comply with its requirements. In this proceeding, NEMC may pray, inter alia, compensation for any injury brought by the non-compliance.⁷⁷ This provision envisages a civil case. Moreover, a person who is convicted of discharging into the environment any hazardous substance, chemical, oil or its mixture may be ordered by the court, in addition to the general punishment, to pay compensation to the third parties.⁷⁸

Compensation to persons whose environment or livelihood has been damaged by pollution is among the components of an Environmental Restoration Order that may be served either by NEMC or a court of law.⁷⁹ Furthermore, section 228(2) of the EMA states briefly that the one who causes environmental damage has to be responsible to compensate

⁷⁵ EMA, s. 3.

⁷⁶ Ibid., ss. 5(2)(f) and 202.

⁷⁷ Ibid., s. 100(2).

⁷⁸ Ibid., s. 110(3)(b).

⁷⁹ Ibid., ss. 151(2)(c), 4(h) & 193(5).

the victims and pay the costs of remedying the damage. Taking recourse through criminal law does not prevent the victim of pollution or injured person to use other avenues provided by civil laws for the purpose of seeking compensation.⁸⁰

The Mining Act⁸¹ and the Water Resources Management Act⁸² also provide on compensation of pollution victims. Other environmentally related laws governing compensation of pollution victims comprise the Merchant Shipping Act,⁸³ the Industrial and Consumer Chemicals (Management and Control) Act⁸⁴ and the Marine Parks and Reserve Act.⁸⁵

Despite the range of provisions governing the compensation of pollution victims, thorough enforcement of those provisions administratively or legally is of utmost importance. On this aspect, Benidickson argues that “legal implementation of the polluter-pays principle is also often assumed to create an incentive for preventive measures and alternative approaches that serve to avoid environmental harm in the first place.”⁸⁶

Nonetheless, it is established that people who suffer damage due to environmental pollution caused by industrial and mining facilities are not compensated.⁸⁷ In other words, neither administrative compensation orders have been issued by NEMC nor civil or criminal cases have been instituted against corporate polluters.⁸⁸ This signifies that laws or

⁸⁰ Ibid., ss. 225 and 226(d).

⁸¹ Cap. 123 RE 2018, s. 108.

⁸² No. 11 of 2009, s. 105.

⁸³ No. 21 of 2003, s. 380.

⁸⁴ No. 3 of 2003, s. 46.

⁸⁵ Cap. 146 RE 2002, s. 36.

⁸⁶ Benidickson, *Environmental Law*, above note 51, at p. 336.

⁸⁷ NEMC officials and victims of pollution, interviewed by author (various dates from May to November 2019, Dar es Salaam, Geita, Mara, Mwanza and Mbeya).

⁸⁸ Ibid.

provisions on the compensation of pollution victims are not adequately enforced by environmental enforcement agencies against polluters.

The above findings are justified by the LHRC report, which indicates expressly that, “PPP has not been effectively enforced. Taking an example of mining sites... the adversely affected people have never been compensated in Mara, Geita or elsewhere in Tanzania.”⁸⁹ It is also reported that 60% of the respondent Companies did not compensate people who were adversely affected by pollution resulting from Company’s activities.⁹⁰

6.0. CHALLENGES OF IMPLEMENTING LAWS ON ENVIRONMENTAL REMEDIATION AND COMPENSATION OF POLLUTION VICTIMS IN TANZANIA

The understanding that PPP implies compensation and restoration of the environment is a relatively recent notion.⁹¹ These obligations against the polluter were reiterated by the African Commission on Human and Peoples Rights in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic Social Rights (CESR) v. Nigeria*.⁹² Even so, the implementation of laws providing for environmental restoration and compensation of victims of pollution in Mainland Tanzania is faced with a number of challenges as delineated below.

⁸⁹ LHRC, *Human Rights and Business Report*, Dar es Salaam, LHRC Publishers, 2014, at p. 131.

⁹⁰ LHRC *Human Rights and Business Report*, above note 4, at pp. 118-9.

⁹¹ Adsheed, J., “The Application and Development of Polluter Pays Principle across Jurisdictions in Liability for Marine Oil Pollution, The Tales of the ‘Erica’ and the Prestige”, at p. 4, available at <<https://academic.oup.com/jel/advance-article-abstract/doi/10.1093/jel/eqy020/5094964>> (accessed 12 June 2019).

⁹² Communication No. 155/96 decided in 2001.

6.1. Insufficient coordination among the environmental enforcement agencies

Coordination among the environmental enforcement agencies is inadequate.⁹³ Particularly, there is weak coordination between NEMC, sectors Ministries, Local Government Authorities (LGAs) and other Government institutions.⁹⁴ This can be manifested in terms of monitoring, inspections and restricted sharing of environmental enforcement outcomes. Due to a lack of coordination, there is also inconsistent implementation and enforcement of laws among environmental enforcement agencies.⁹⁵

Inadequate coordination is sometimes the cause of overlapping mandates among the functionaries.⁹⁶ Essentially, the environmental performance or rehabilitation bond stipulated in section 227(1) of the EMA is regulated and collected in mining areas by the Ministry of minerals.⁹⁷ It is worth noting that this Ministry is not overall charged with environmental issues.

There is also inadequate coordination between the Ministry responsible for the environment, Director of the Environment and NEMC on the one hand and the Environmental Officers appointed or designated in

⁹³ Ntakamulenga, R., *The Basics of Environmental Compliance and Enforcement*. (Paper Presented at the Training on the Principles for Environmental Compliance and Enforcement), Arusha, 3-7 June 2013, at p. 49.

⁹⁴ United Republic of Tanzania (URT), National Audit Office of Tanzania (NAOT), *A Performance Audit on the Enforcement of Environmental Control Systems in the Mining Sector in Tanzania*. VP's Office Division of Environment and National Environmental Management Council. A Report of the Controller and Auditor General (CAG) of the United Republic of Tanzania, March 2015, at p. 58.

⁹⁵ The Senior Legal Officer at the Vice President's Office, interviewed by author (29 May 2019, Dar es Salaam).

⁹⁶ *Ibid*.

⁹⁷ The NEMC's Senior Legal Officer and NEMC's Environmental Compliance and Enforcement Officer, interviewed by author (30 May 2019, Dar es Salaam).

LGAs on the other hand.⁹⁸ These officers also perform duties related to compliance and enforcement of environmental activities. On implementation and enforcement of the framework law, they are obliged to report to the Director of Environment and the Director General of NEMC.⁹⁹ It was noted that, in practice, their inspections and enforcement reports are directed to the Ministry responsible for the Regional Administration and Local Governments via the District Executive Director (DED) of the respective district.¹⁰⁰ This implies that reports, e.g., related to sanctions imposed by LGAs against polluters are not coordinated by the Ministry responsible for the environment or NEMC.¹⁰¹

6.2. Lack of Regulations to implement and enforce laws

Implementation and enforcement of laws on environmental remediation and compensation of pollution victims depend on the availability of environmental regulations. Regulations made by the Minister or any other designated public authority are crucial to providing details not covered in the principal Acts. They sometimes provide procedures or operationalisation of the parent Acts.

The EMA prescribes various regulations to be made by the Minister responsible for the environment and other agencies. In fact, some of the envisioned regulations are vital enabling statutory instruments in enforcing PPP. Nonetheless, only a few of them have been made. It is reported that 21 sets of regulations were made from 2008-13.¹⁰²

⁹⁸ (URT), Speech of the Minister, Vice President's Office Union and Environment, above note 3, at p. 51.

⁹⁹ EMA, s. 36(30)(h).

¹⁰⁰ The Chunya District Environmental Officer, interviewed by author (23 July 2019, Chunya, Mbeya).

¹⁰¹ Ibid.

¹⁰² URT, Vice President's Office, *State of the Environment Report 2*, 2014, at p. 68.

Regulations governing compensation of pollution victims, restoration of the damaged environment and the National Environmental Trust Fund (NETF) are yet to be developed. The list also comprises regulations on the Environmental Appeals Tribunal and EIs.¹⁰³

Moreover, the EMA gives powers to the Minister to make regulations prescribing activities that require environmental performance bonds.¹⁰⁴ Unfortunately, the said Regulations are yet to be made.¹⁰⁵ Regulations governing Integrated Pollution Prevention and Control (IPPC) systems are also not in place. Equally, there are no regulations governing liability for pollution or damage consequent to mining operations as envisaged in the Mining Act.¹⁰⁶ This makes it difficult to enforce compensation and restoration resulting from environmental damage in mining areas. Furthermore, regulations envisaged under the Mining Act for restoring damaged environments are yet to be promulgated.¹⁰⁷

6.3. Weak enforcement of laws and limited institutional capacity

Generally, enforcement of environmental laws in Mainland Tanzania is weak.¹⁰⁸ EMA and other environmental legislation are not adequately enforced by relevant enforcement agencies.¹⁰⁹ Strict administration of environmental legislation is lacking among environmental law enforcers.¹¹⁰ Due to this problem, bodies corporate and individual

¹⁰³ The Senior Legal Officer at the Vice President's Office, interviewed by author (29 May 2019, Dar es Salaam).

¹⁰⁴ EMA, s. 227.

¹⁰⁵ The Senior Legal Officer at the Vice President's Office, interviewed by author (29 May 2019, Dar es Salaam).

¹⁰⁶ S. 108(2).

¹⁰⁷ Mining Act, s. 129(2)(j).

¹⁰⁸ LHRC, *Human Rights and Business Report*, above note 4, at p. 202

¹⁰⁹ URT, *State of the Environment Report 2*, above note 102, at p. xxiv.

¹¹⁰ Mtaki, C.K., "Legal Aspects of Environmental Protection in Tanzania: The Case of Industrial Waste Management", PhD Thesis, University of Ghent, 1999, at p. 178.

persons are polluting the environment with impunity and without remediating it or compensating victims of pollution.¹¹¹

In essence, environmental inspectors play a recognisable role in enforcing environmental laws and general compliance with environmental regulations. It may be argued that the more environmental inspectors, the higher compliance with environmental standards. However, there are only 448 environmental inspectors in Mainland Tanzania.¹¹² This number is argued to be very small compared to the actual demand of at least 2000 environmental inspectors.¹¹³

Apart from the shortage of manpower, the financial resources allocated to the environmental enforcement agencies, especially NEMC have always been insufficient.¹¹⁴ This is due to the fact that these agencies mainly depend on Government subvention as the main financial source for undertaking environmental compliance and enforcement.

The World Bank report in respect to Tanzania, unequivocally indicates that "...ability to enforce legislation is jeopardised by insufficient resources, insufficient/obsolete tools and inspection kits, and a significant shortage of environmental inspectors needed to do the work."¹¹⁵ This observation is cemented by the International Peace

¹¹¹ The Executive Director of the Lawyers Environmental Action Team (LEAT), interviewed by author (27 May 2019, Dar es Salaam).

¹¹² The NEMC's Director of Environmental Compliance and Enforcement, interviewed by author (29 May 2019, Dar es Salaam).

¹¹³ Ibid.

¹¹⁴ (URT), Speech of the Minister, Vice President's Office Union and Environment, above note 2, at p. 77.

¹¹⁵ World Bank (WB), "Tanzania 2019 Country Environmental Analysis: Environmental Trends and Threats, and Pathways to Improved Sustainability", Washington DC, 2019, at p. 130, available at <<http://documents.worldbank.org/curated/en/356211556727592882/pdf/Tanzania-Country-Environmental-Analysis-Environmental-Trends-and-Threats-and-Pathways-to-Improved-Sustainability.pdf>> (accessed 16 June 2019).

Information Service's (IPIS) study which shows clearly that imperfect enforcement of environmental regulations and laws, especially in mining areas, is among the biggest challenges facing the country.¹¹⁶

6.4. Difficulties in establishing a causal link between polluting activity and environmental damage

In order to successfully hold the polluter liable either to restore the environment or to pay compensation to the pollution victims, it is imperative to establish a nexus between the environmental damage and the polluter or wrongful act.¹¹⁷ This is mandatory in both strict liability and fault-based liability. This proposition was emphasised in *Ministero dell'Ambiente e della Tutela de Territorio e del Mare and Others v. Fipa Group Srl and Others*.¹¹⁸ Without proving such nexus, a polluter may be completely exonerated from the liability.

It is sometimes very complicated for victims of pollution to do so.¹¹⁹ In the end, victims are not compensated and the environment remains polluted. It has been established that 60(80%) out of 75 victims of industrial and mining pollution could not claim compensation either administratively or through civil regime simply because they were unable to establish causation.¹²⁰

Principally, people living adjacent to the industrial and mining facilities complained that their livestock died after drinking polluted water due to

¹¹⁶ Merket, H., and Foubert, E., *Dissecting the Social License to Operate: Local Community Perceptions of Industrial Mining in Northwest Tanzania*, Antwep, IPIS, August 2019, p. 16.

¹¹⁷ Yusuf, A. A., "Contribution of the Recent Case Law of the International Court of Justice to the Legal Regime Applicable to Compensation for Environmental Damage", *Journal of International Law*, Vol. 7, 2018, p. 1, at p. 3.

¹¹⁸ Case C-534/13 [2015] (ECJ 4 March 2015).

¹¹⁹ Vandekerckhove, *The Polluter Pays Principle*, above note 19, at p. 233.

¹²⁰ Victims of pollution, interviewed by author (various dates from May to November 2019, Dar es Salaam, Geita, Mara, Mwanza and Mbeya).

chemical discharges from facilities.¹²¹ Nevertheless, one livestock keeper was administratively compensated by the Company.¹²² Victims who were not compensated did not have direct evidence, especially from the experts to prove that the death of their livestock was a direct consequence of the pollution caused by the industries or mines.¹²³

According to the victims, officials of the Companies demanded clear evidence from Government's qualified experts to justify the bases of their claims for compensation.¹²⁴ Those who were compensated were sometimes necessitated to institute civil cases based on the tort of negligence. A good example at hand is *Geita Gold Mine (GGM) Ltd v. Michael Z. Ludigija*.¹²⁵ In this case, the respondent sued successfully GGM both at the District Court in Geita and High Court registry in Mwanza following the death of nineteen (19) cows that drank contaminated water from the tailing dam belonging to the mining Company.

6.5. Wide discretionary powers of the agencies on the choice of enforcement mechanisms

Environmental enforcement agencies are given the necessary powers in order to bring compliance with environmental laws. They may invoke either administrative or judicial mechanisms.¹²⁶ The use of administrative civil orders, compounding of offences and imposition of fines assist in bringing compliance with the environmental directives issued by them.

¹²¹ Ibid.

¹²² It was revealed during the field study at Matundasi ward in Chunya, Mbeya on 23 July 2019 that Sunshine Mining Co. Ltd amicably compensated one villager following death of his 23 cows after drinking poisoned water from the defective tailing pond.

¹²³ Victims of pollution, interviewed by the author (various dates from May to November 2019, Dar es Salaam, Geita, Mara, Mwanza and Mbeya).

¹²⁴ Ibid.

¹²⁵ Civil Appeal No. 21 of 2012, High Court of Tanzania Mwanza Registry (unreported).

¹²⁶ The Manager of NEMC Southern Highlands zone, interviewed by author (7 August 2019, Mbeya).

Equally, instituting criminal or civil proceedings for the purpose of enforcing environmental laws is at their disposal.

NEMC as the key implementer of environmental law is entrusted with all necessary powers against polluters.¹²⁷ In most cases, NEMC has invoked administrative sanctions or orders, simply because they can be easily enforced, with low costs and within a short time.¹²⁸ Instituting civil or criminal cases, as among the ways of implementing PPP, is not much preferred by NEMC, because court proceedings involve a lot of technicalities, costs and are time-consuming.¹²⁹ This explains why NEMC prefers to compound offences and impose fines than instituting civil or criminal trials against corporate polluters.

The wide discretionary powers over the choice of a sanction to be inflicted against a polluter have influenced environmental enforcers to use punishment that may be easily enforced than ordering compensation or remediation.¹³⁰ In addition, it is argued that administrative sanctions imposed by environmental enforcement agencies have not exhibited a deterrent effect against corporate polluters.¹³¹

6.6. Lack of Government's political will to enforce environmental laws

Incorporation of PPP in the Tanzanian environmental legal framework is the first and vital step. The government's political will to enforce it through adopting various measures as prescribed in the Acts and fully enforcing them is another critical step. In fact, NEMC's performance,

¹²⁷ *Ibid.* See also EMA, s. 25.

¹²⁸ The NEMC's Director of Environmental Compliance and Enforcement, interviewed by author (29 May 2019, Dar es Salaam).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

especially enforcing PPP against giant bodies corporate largely depends on Government's political will.

A good example may be seen in the North Mara Gold Mine (NMGM) pollution saga. The mine has been polluting the environment since 2009.¹³² Stern actions, including its closure, took place in 2019, ten years of continuous damage to the environment and people's health. In fact, pressure to punish the mine for environmental pollution came immediately following an order from the President of the United Republic of Tanzania.¹³³ This indicates that pollution of the environment especially by giant corporate, such as Acacia, could only be contained where there is a strong Government's political will.

The effect of the lack of the Government's political will to enforce environmental remediation and compensation of pollution victims may conceivably send a wrong message to other potential polluters that compliance is not imperative.¹³⁴ Therefore, to a great extent, the implementation of laws governing environmental remediation and compensation of pollution victims rests on Government's political will.¹³⁵

¹³² URT & NEMC, Taarifa kwa Vyombo vya Habari Kuhusu Maamuzi ya Serikali Kufuatia Uchafuzi wa Mazingira Unaotokana na Uvujaji wa Bwawa la Kuhifadhia Topesumu (TSF) Katika Mgodhi wa Dhahabu wa North Mara", issued on 16 May 2019. [Literally meaning URT & NEMC, Public Notice on Government's Decision Related to Environmental Pollution Caused by Leakage of Tailing from the Tailing Storage Facility (TSF) at North Mara Gold Mine] issued on 16 May 2019, available at <<https://www.nemc.or.tz/uploads/publications/en-118675-taarifa%20north%20mara.pdf>> (accessed 25 May 2019).

¹³³ Guardian Reporter, "JPM Tough on NEMC over Water Chemicals Pollution by Gold mine", *The Guardian* (Dar es Salaam), 8 September 2018, at p. 1.

¹³⁴ U.S Environmental Protection Agency (EPA), *Principles of Environmental Enforcement*, Washington DC, 1992, at p. 5.

¹³⁵ Joseph, *The Polluter Pays Principle*, above note 30, at p. 30.

6.7. Public ignorance on environmental laws, rights and Polluter Pays Principle

Awareness of the public on the protection of the environment against polluters is of utmost importance. An individual cannot enforce his right to live in a clean and safe environment unless he is aware of the same. Similarly, the consciousness of the public on the institutions and procedures governing enforcement of environmental rights and laws is also vital.¹³⁶ A well-informed public assists business entities not only to comply with environmental laws but also to engage actively in protecting the environment.

It has been noted that most victims of environmental pollution caused by bodies corporate are ignorant of environmental laws, rights and PPP.¹³⁷ As a result, they are silent sufferers of pollution effects from industries and mines without engaging in legal action.¹³⁸ They are uninformed that, they could take the business entities before courts of law seeking, among others, compensation and restoration orders as per the EMA.¹³⁹ Many pollution victims are not active in instituting environmental legal actions before a court of law.¹⁴⁰

These findings are collaborated with several reports which unequivocally indicate that environmental pollution in Tanzania is exacerbated by

¹³⁶ Twinomugisha, B.K., Some Reflections on Judicial Protection on the Right to Clean and Health Environment in Uganda, *Law Environment and Development Journal* (LEAD), Vol. 3, Issue No. 3, 2007, p. 246, at p. 258.

¹³⁷ Victims of pollution, interviewed by author (various dates from May to November 2019, Dar es Salaam, Geita, Mara, Mwanza and Mbeya).

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid. Exception is found in the case of *Geita Gold Mine Ltd v Michael Z. Ludigija*, Civil Appeal No. 21 of 2012, High Court of Tanzania, Mwanza Registry (unreported).

inadequate public knowledge on environmental issues.¹⁴¹ This concludes that there is generally a limited understanding of environmental law in the country.¹⁴² Such limitation blurs the possibility of victims taking legal action against the polluters.

6.8. Voluntary assumption of pollution risks

It has been noted that some of the pollution victims voluntarily built their houses closer to the polluting facilities, such as industries and mines. They knew the existence of those polluting facilities but they decided to move into the area and establish their settlements. In Tarime, for example, some unscrupulous persons, especially from other localities bought land closer to the NMGM plant and built houses thereto. They did so knowingly that in future the Company will relocate and compensate them. This practice is popularly known in Tarime as ‘tegesha’.¹⁴³

The right of compensation to these victims, in one way or the other, is limited.¹⁴⁴ This is because there is a voluntary assumption of risks. Corrective justice and ‘time priority rule’ justify the assertion that the one “who moves into the area after the polluting industry has no or limited right to compensation.”¹⁴⁵

¹⁴¹ See, for instance, URT, Vice President’s Officer, *State of the Environment Report 3*, August 2019 at p. 55, and URT Vice President’s Office, *State of the Environment Report 2*, 2014 at p. ix .

¹⁴² Majamba, H.I., An Assessment of the Framework Environmental Law of Zanzibar, *LEAD Journal*, Vol. 1, Issue No. 1 of 2005, p. 20, at p. 21.

¹⁴³ Merket and Foubert, *Dissecting the Social License to Operate*, above note, 116 at p. 48.

¹⁴⁴ Bugge, *The Polluter Pays Principle*, above note 11, at p. 421.

¹⁴⁵ *Ibid.*

7.0. RECOMMENDATIONS

Based on the challenges discussed above, environmental enforcement agencies are enjoined to enhance effective cooperation and coordination among themselves. The Government on its part is needed to make the envisaged environmental regulations to facilitate the implementation of the principal Acts. It should also adequately fund and strengthen the environmental enforcement agencies with human resources. As such, strong Government political will is required.

The entrenchment of strict or absolute liability rules against corporate polluters is also recommended to assist compensation of victims and environmental restoration. This would also help to limit the wide discretionary powers of enforcement agencies. Public education on environmental laws and rights and the strengthening of environmental Public Interest Litigation (PIL) are also significant in the country.

It is also recommended for the establishment of specialised courts or tribunals to handle environmental disputes. The belief is that environmental regulations are effectively and better enforced by specialised environmental courts or tribunals.¹⁴⁶ This has to go *in tandem* with the operationalisation of the Environmental Appeals Tribunal envisaged in the EMA.¹⁴⁷ The National Environmental Tribunal in Kenya¹⁴⁸ and the National Green Tribunal in India are good examples of functional environmental Tribunals.¹⁴⁹

¹⁴⁶ Amirante, D., Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India, *Pace Environmental Law Review*, Vol. 29, Issue No. 2, 2012, p. 442.

¹⁴⁷ EMA, s. 204.

¹⁴⁸ Established by s. 125 of the Environmental Management and Co-ordination Act, Cap. 387 RE 2012.

¹⁴⁹ Established by s. 3 of the National Green Tribunal Act, No. 19 of 2010.

8.0. PROSPECTS FOR ENVIRONMENTAL REMEDIATION AND COMPENSATION OF POLLUTION VICTIMS IN TANZANIA

Despite the fact that laws providing for environmental remediation and compensation of pollution victims are not fully enforced in Mainland Tanzania, the establishment of environmental compensation fund, as discussed below may be an ideal solution.

8.1. Compensation fund and its role in restoring the damaged environment and compensating pollution victims

A compensation fund is an arrangement of public and private institutions to compensate for environmental harm.¹⁵⁰ It may happen sometimes that the polluter is insolvent and unable to compensate victims of pollution or repair environmental damage. Under this scenario, compensation funds may play a significant role to meet the said purposes. Actually, a compensation fund is considered a way to complement the liability regime.¹⁵¹ It is viewed as an indirect compensation by the polluter against the victims of pollution.¹⁵² The fund is mostly applicable in a situation where insurance does not cover historical or gradual pollution.¹⁵³

Environmental compensation funds have several merits. Firstly, they ensure that the deposited fund is specifically used for environmental conservation.¹⁵⁴ Having a specific fund that is contributed by the potential polluter and is used to compensate victims of environmental damage or restore damaged environment may be a perfect solution.

¹⁵⁰ Faure and Grimeaud, *A Report of Financial Assurance Issues*, above note, 37 at p. 204.

¹⁵¹ EC, White Paper on Environmental Liability, above note 50, at p. 43.

¹⁵² Hall, *Victims of Environmental Harm*, above note 68, at p. 114.

¹⁵³ Vandekerckhove, *The Polluter Pays Principle*, above note 19, at p. 247.

¹⁵⁴ Kakuru and Ssekyaana, I., *Handbook on Environmental Law*, above note 66, at p. 34.

Secondly, the environmental sector in most developing countries like Tanzania is underfunded. The Government's annual budget is not sufficient to enable smooth enforcement of environmental issues.¹⁵⁵ Therefore, strengthening of environmental funds is the alternative option to reduce the massive underfunding of environmental institutions.

Thirdly, it is also believed that ordinary civil courts do not provide adequate compensation in case of large accidents.¹⁵⁶ As such, the Government based fund may play a great role in dealing with environmental liability. Actually, the said scheme is argued to have simplified the restoration of the damaged environment and compensation to people who are affected by the polluter's activities.¹⁵⁷ Such kind of fund is not legislated in the Tanzanian environmental statutes.

8.2. Environmental Fund in Mainland Tanzania

The EMA establishes a National Environmental Trust Fund (NETF).¹⁵⁸ It has several objects including facilitating research on environmental management, conferring environmental awards, issuing environmental

¹⁵⁵ JMT, Bunge la Tanzania, "Taarifa ya Mwaka ya Shughuli Zilizotekelezwa na Kamati ya Kudumu ya Bunge ya Viwanda, Biashara na Mazingira kwa Kipindi cha Kuanzia Februari, 2019 Hadi Januari, 2020", [Unofficially translated to mean the United Republic of Tanzania, "Annual Report of the Activities Implemented by the Standing Parliamentary Committee on Industries, Trade and Environment from February 2019 to January 2020"] at p. 19 indicates that in the Financial Year 2018-19 the Parliament allocated to the VP's Office Division of Environment Tshs. 8, 118, 498,000.00. Up to the end of March, 2019, *vizi*, the third quarters of the Financial Year, only Tshs. 4,167,969,635.79, *i.e.*, (51.3%), were received from the treasury.

¹⁵⁶ The Secretary of NETF's Board of Trustees, interviewed by author (17 May 2019, Dar es Salaam).

¹⁵⁷ *Ibid.*

¹⁵⁸ EMA, s. 213

publications and providing scholarships and promoting community-based environmental management programs through grants.¹⁵⁹

Its purpose is neither to remediate environmental damage nor to compensate pollution victims. The Fund is very general. Such generality may reduce its efficiency in dealing with environmental conservation. More so, contributors to the Fund are not specifically possible polluters. To a great extent, the Government, its agencies and other donors are the main contributors to this Fund.

It is evident that the Government's contribution to the Fund is peanuts compared to the needs of the Fund.¹⁶⁰ The Fund has not started performing its statutory functions.¹⁶¹ This is attributed, *inter alia*, to the fact that the Fund does not have its own permanent personnel. Its secretariat consists of staff from the Vice President's (VP's) Office Division of Environment (DoE).¹⁶²

In order for the NETF to play a significant role in compensating pollution victims or remediating the damaged environment, legal and structural improvements have to be made. Objectives of the NETF should be extended to cover the above aspects of PPP. Potential polluters should also be the major contributors and other revenues of the Fund may be obtained from fees and environmental pollution taxes. Further, it is imperative for the Fund to be entrenched as a body corporate because currently, it does not have such status under the

¹⁵⁹ *Ibid.*, s. 214(1).

¹⁶⁰ According to the report of the Parliamentary Committee on Industries, Trade and Environment From March 2017 to January 2018, 2 billion Tsh. was allocated to the NETF in the Financial Year 2016-17 by the Parliament. Nonetheless, the Government contributed only 34 million Tsh.

¹⁶¹ The Secretary of NETF's Board of Trustees, interviewed by author (17 May 2019, Dar es Salaam).

¹⁶² *Ibid.*

EMA.¹⁶³ The EMA may also be amended to establish a new Environmental Restoration and Compensation Fund. Alternatively, the Parliament may enact an Environmental Fund Act, which establishes both the NETF and the Environmental Restoration and Compensation Fund as bodies corporate.¹⁶⁴

Therefore, the operationalisation and strengthening of the environmental compensation fund as recommended above seems to be appropriate in Tanzania. The reason is that the majority of the pollution victims are ignorant of the environmental issues and are indigent to institute legal actions, especially against giant corporate polluters.

9.0. CONCLUSION

Implementation of PPP requires the polluter to pay the costs of pollution he has caused, which include performing environmental cleanup. Moreover, the polluter is obliged to compensate victims of pollution. All these need to be adequately entrenched in environmental pieces of legislation and it is the duty of environmental enforcement agencies to fully enforce them.

This article has revealed that there are several provisions in the environmental legal framework governing the two aspects of PPP. Furthermore, the article has noted that the said provisions are not fully enforced by environmental enforcement agencies. In this regard, the main problem is not the absence of relevant environmental legislation, but rather weak enforcement of the applicable laws. This weakness is attributed, *inter alia*, to insufficient coordination, lack of some regulations,

¹⁶³ Ibid.

¹⁶⁴ A leaf may be borrowed from Kenya where the Environmental Management and Co-ordination Act, Cap. 387 RE 2012 has both the NETF and the National Environmental Restoration Fund.

limited institutional capacity, lack of Government political will and public ignorance of environmental laws, rights and PPP.

Since Tanzania is striving to be a semi-industrialised country, it is important to strongly enforce laws governing environmental remediation, compensation of pollution victims and PPP generally. This is indispensable so as to have both a vibrant economy and a healthy environment.