

Polluter Pays Principle: Essential Element of Environmental Law and Policy

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ABSTRACT:

Environmental Law is one of the fastest growing aspects of law. It is commonly accepted that those who cause damage or harm should pay, in one way or another for such damage. Such damage can be to body, society or our environment. Due to absence of sanctions in environmental law, it became difficult to keep a check on harmful activities. This required the introduction of a penalty to punish people who caused harm to the environment. This gave rise to what we know today as “Polluter Pays Principle”. The principle means that the cost of pollution should be paid by the polluters and not by their governments. This principle is considered to be the most efficient environment policy and has been included in various regional and international agreements on pollution. The concept of polluter pays has been in existence even before the Organisation for Economic Co-operation and Development (OECD) adopted it as a recognised principle of environmental law. The research paper explores the applicability, advantages and disadvantages of the polluter pays principle while also looking at the incorporation of the principle in the Indian environmental domain.

I. INTRODUCTION

Most of us agree to that fact that those who cause damage or harm should pay, in one way or another for such damage. Such damage can be to body, society or our environment.

Environmental Law is one of the fastest growing aspects of law. This has come about mainly due to the increasing destruction of the environment by humans as well as the growing concern for protection of the environment. Various laws have been enacted domestically and internationally prohibiting certain practices that harm the environment or ways to conduct activities that might potentially harm the environment in an environmental friendly way. Thus to create a balance between development and environmental protection the concept of sustainable development was introduced. However, because of absence of sanctions, it became difficult to keep a check on harmful activities. This required the introduction of a penalty to punish people who caused harm to the environment. This gave rise to what we know today as “Polluter Pays Principle”. It is one of the fundamental principles of modern environmental law. Basically, the principle means that the cost of pollution should be paid by the polluters and not by their governments.¹ This principle is considered to be the most efficient environment policy and has been included in various regional and international agreements on pollution.

The concept of polluter pays has been in existence even before the Organisation for Economic Co-operation and Development (OECD) adopted it as a recognised principle of environmental law.

¹ Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search For An International Response*, 8 Harv Envtl. L. Rev.89, 97 (1984).

However, the devil lies in understanding the concept, challenges, advantages and disadvantages of the polluter pays principle. This research paper will attempt at clearing the air regarding five concepts, firstly, the definition and meaning of pollution, secondly, the meaning, history and background of the polluter pays principle, thirdly, the acceptance of the principle in Indian law, fourthly, the role of market based instruments on the principle and will finally conclude with the advantages and disadvantages.

II. WHAT IS POLLUTION?

Pollution usually occurs when acts that disturb the peace of nature are carried out, unchecked. The commonly accepted definition or meaning of pollution is

*“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.”*²

In terms of regional legislation the Water (Prevention and Control) Act, 1974 defines pollution as *“such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to create a nuisance or liable to render such water harmful and injurious to health”*³

The Environment (Protection) Act, 1986 defines pollution as *“presence in the environment of an environmental pollutant”*⁴ and further defines environmental pollutant as *“any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment”*⁵

Other legislations like the Air (Prevention and Control of Pollution) Act 1981 have similar definitions of pollution. Thus it is evident from these regional as well as international definitions that the emphasis is on the fact that pollution must have a tendency to cause harm, or must actually cause harm. Thus basically, pollution is a trespass as under common law. If the trespass is so nominal that it creates no harm, it will normally be tolerated. Hence, as the definition of pollution is commonly understood, for the pollutant to result in or cause pollution there must be some consequent harm or threat of harm.

III. BACKGROUND OF THE PRINCIPLE

Polluter pays principle falls under the umbrella of absolute liability. The principle of absolute liability is

² OECD, Recommendations C (74) 224 (1974).

³ Water (Prevention and Control) Act, 1974, No. 6, Acts of Parliament, 1974 (India) Art. 2(e).

⁴ Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India) Art. 2(c).

⁵ *Id.* Art. 2(b).

invoked regardless of whether or not the person took reasonable care and it makes him liable to compensate those who suffered on account of his inherently dangerous activity.⁶

A. V. Kneese and J H Dales were the first persons to discuss this principle. They spoke about the ways and means, especially economic to reduce pollution in the 1960s.⁷ J. H. Dales proposed in 1968, tradable discharge permits, considered to be the best economic instruments for reducing pollution.⁸ Further, the polluter pays principle was hinted at by the Committee of Ministers of the Council of Europe issued a Draft Declaration of Principles on Air Pollution Control. Article 6 of the Declaration states:

“The cost incurred in preventing or abating pollution should be borne by whoever causes the pollution. This does not preclude aid from Public Authorities.”⁹

The Organisation for Economic Co-operation and Development held a seminar in 1971, in Paris on environmental economics where polluter pays principle was the primary topic of discussion. This was the first instance of polluter pays principle being discussed on an international forum. In 1972, the Organisation for Economic Co-operation and Development formally recommended on 26 May 1972 the polluter pays principle to be the ‘Guiding Principle Concerning the International Economic Aspects of Environmental Policies’.¹⁰

The recommendation clearly lays out the usage of the principle stating:

“The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so called "Polluter Pays Principle".

This principle means that the polluter should bear the expenses of carrying out the abovementioned 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 cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.”¹¹

IV. THE PRINCIPLE AS AN ASPECT OF CUSTOMARY INTERNATIONAL LAW

After the Organisation for Economic Co-operation and Development recommendations in the 1970s, there was a boom in public interest in environmental issues which resulted in pressure on the various Governments and other institutions to introduce rules and regulations to protect the environment.

⁶ M.C. Mehta v. Union of India, (1987) 1 SCC 395.

⁷ ALLEN. V. KNEESE THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT, 35-119 (1964).

⁸ J. H. DALES, POLLUTION, PROPERTY AND PRICES, 93-97 (University of Toronto Press) (1968).

⁹ Council of Europe, Council of Ministers, Declaration of Principles on Air Pollution Control, Res. (68) 4 (1968).

¹⁰ OECD, Recommendations, C(72) 128 (1972).

¹¹ *Id.*

This led to various international level discussions and conferences where nations got together to find solutions to environmental degradation. The polluter pays principle as we know today was first incorporated in Principles 21 and 22 of the Stockholm Declaration, 1972.¹² Thereafter, various documents like the Rio Declaration¹³ in its Principle 15 provided for the application of the polluter pays principle.

The International Court of Justice in its landmark decision in the *Case Concerning the Continental Shelf*¹⁴ between Libya and Malta determined as to when a particular rule or provision acquired the status of being a part of customary international law. The Court held that the provision in question should have state practice i.e. consistent and general behaviour of states as regards the provision in question and *opinio juris* i.e. a subjective obligation, a sense on behalf of a state that it is bound to the provision in question. The Court in the same paragraph, further goes on to say those multilateral conventions also play an important role in developing and defining rules of customary international law.

The basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities could be traced back as early as the *Trail Smelter Arbitration* case between the United States and Canada.¹⁵

Since then numerous treaties, some important decisions, and extensive national law and practice which have evolved giving considerable weight to claims for compensation in respect of trans-frontier pollution and damage. Some commentators even regard this as a customary law obligation.¹⁶

However, the polluter-pays principle has not received the same degree of support or attention accorded over the years to the principle of preventive action, or the attention more recently accorded to the precautionary principle, although its use is now being taken up in other regional agreements.¹⁷

The strong objections of some countries to the further development of the polluter-pays principle, particularly for international relations, are evident from the compromise language adopted by Principle 16 of the Rio Declaration¹⁸, which provides that:

“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 costs of pollution, with due regard to the public interests and, without distorting international trade and investment.”

¹² Report of the U.N. Conference on the Human Environment, from the U.N. Conference in Stockholm, Sweden (Stockholm, 16 June 1972), U.N. Doc. A/CONF.48/14).

¹³ United Nations Rio Declaration on Environment and Development (13 June 1992).

¹⁴ *Continental Shelf (Libya v. Mal.)*, Judgment, 1985 I. C.J. Rep 13, ¶ 27 (3 June)

¹⁵ *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1941)

¹⁶ PHILLIPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 231 (2d ed. 2003); BIRNIE et. al., *INTERNATIONAL LAW AND THE ENVIRONMENT* 89 (3d ed. 1992).

¹⁷ See e.g. North-East Pacific Convention Art. 5(6)(b), Feb 18, 2002

¹⁸ Rio Declaration, *supra* note 13.

All in all the growing acceptance of the polluter pays principle is indication that it is not long when it definitely becomes a part of customary international law.

V. POLLUTER PAYS PRINCIPLE IN INDIA

Despite the existence of this principle since 1960s, the concept was introduced in Indian law as late as 1996 in the *Indian Council for Enviro-Legal v. Union of India*¹⁹ case. In this case the court affirmed the principle of absolute liability as stated in the *M. C. Mehta v. Union of India*, also known as the *Oleum Gas Leak*²⁰ case and extended it. The court stated that:

“The polluter pays principle demands 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. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer.”

This principle was further re-affirmed again in 1996 in *Vellore Citizens Welfare Forum v. Union of India*.²¹ In these cases the polluter pays principle has been justified through the constitutional mandate under Article 21 and Article 47 of the Constitution of India, statutory provisions²² and international customary law.

VI. THE ROLE OF MARKET BASED INSTRUMENTS IN SHAPING THE POLLUTER PAYS PRINCIPLE

The application and implementation of the polluter pays principle must include a framework to safeguard against its potentially harmful effects while reducing uncertainties about its economic impact. The polluter pays principle is closely tied to policies usually grouped under “market based” or “economic” instruments. These instruments are further divided into two classes, namely, taxes and tradable permits.

The taxation approach is most direct. The tax would be paid either in the form of an emissions fee or an excise tax on the sales of products that are associated with pollution. The tradable permits approach would first have the government establish an overall acceptable level of emissions for an industry and would then distribute permits for that level of emissions to companies within the industry. The companies could then buy and sell these emissions permits based on their needs to emit the pollutant and their abilities to find pollution abatement techniques.²³

¹⁹ (1996) 3 SCC 212 at 215.

²⁰ M.C. Mehta v. Union of India, (1987) 1 SCC 395.

²¹ (1996) 5 SCC 647.

²² Air (Prevention and Control of Pollution) Act 1981, No. 14, Acts of Parliament, 1981 (India), Water (Prevention and Control) Act, 1974, No. 6, Acts of Parliament, 1974 (India), Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

Economists have cited four reasons to question the viability of the polluter pays principle:²⁴

- The application of the principle in urban areas where the industrial sector is dominated by medium, small and tiny enterprises operating in a highly competitive market is risky as any higher costs from emission or other effluent clean up charge might adversely affect their competitiveness in relation to large firms that are capable of affording the installation of necessary equipment.
- Even though the polluter pays principle does not prohibit the polluter from passing on the additional costs that he might incur in terms of increased costs, thereby increasing price of his product, the reality in developing nations may not always be this way. These nations which rely heavily on exports of primary commodities for which demand in the international market is elastic may find that the costs are entirely borne by the producers in the form of damage to human health, property and ecosystems.
- Representing a larger objection to the inclusion of polluter pays principle in Indian law is the consequences it will have in the realm of the common property resource. The application of the principle will lead to the appropriation of rights by wealthy landlords to the disadvantage of the small land owners, if curbs are imposed on the manner in which a resource can be used, in this instance land.
- The Court has not dealt with the fact that the level of charges to be imposed on the polluter are extremely difficult to estimate and therefore will give rise to difficulties.

The implementation of the polluter pays principle has significant economic consequences, especially in the Third World where trade is carried out in commodities that are the products of pollution intensive industries.²⁵ To prevent the potential economic harm, the principle must be implemented via Market Based Instruments.

One mechanism suggested by Attilio Bissio, who is a principal in Atro Associates, a consulting firm specializing in the development and evaluation of petroleum refining and petrochemical processes, and Sharon Boots who was an engineering advisor and program manager at Exxon's Corporate Research Laboratory, to achieve the aforementioned object is an environmental assurance bond.²⁶ This bond would act as a contractual guarantee that the principal would act in an environmentally friendly manner and would be charged a present accurate estimate of the maximum future environmental damage.

However, as there are two sides to each coin, there are arguments against such bonds. One would be that it would favour large firms that could afford to handle the financial responsibilities of activities potentially

²³ Roy E. Cordato, *The Polluter Pays Principle: A Proper Guide for Environmental Policy*, Institute for Research on the Economics of Taxation Studies in Social Cost, Regulation, and the Environment: No. 6 (2001).

²⁴ KIRIT S. PARIKH, *The Polluter-Pays and User-Pays Principles for Developing Countries: Merits, Drawbacks and Feasibility*, in FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT: ESSAYS ON ENVIRONMENTAL POLICY AND DEVELOPING COUNTRIES 81 (Edward Dommen ed. 1993)

²⁵ Gupta, *Opt for Market Based Instruments*, The Economic Times, Sept. 9 1997, at 6.

²⁶ ATTILIO BISSIO & SHARON BOOTS, *ENCYCLOPAEDIA OF ENERGY AND THE ENVIRONMENT* 685 (The Wiley 1997) (1995).

damaging to the environment. Moreover, this will prevent firms that cannot handle the financial burden from passing on the cost of the environmental degradation to the public.²⁷

VII. CONCLUSION

The polluter pays principle has had a long journey. From being a concept propounded in the 1960s to being internationally discussed in 1971 to being a part of various international agreements since the Declaration of the United Nations Conference on the Human Environment in 1972 to its strong affirmation during the United Nations Conference on Environment and Development in 1992. Enforcement of any law requires strict sanctions to ensure that the law is being complied with. Thus laws regarding protection of environment were difficult to enforce as the defaulters did not fear any punishment or penalty. This gave birth to the concept of the polluter pays principle.

The clear advantages of the polluter pays principle are as states above that it helps in enforcing the environmental laws and makes sure that development does the harm the environment beyond the necessary limit. Thus the polluter pays principle goes hand in hand with the concept of Sustainable Development.

One of the disadvantages of the polluter pays principle is that there is no gradation mechanism prescribed so that the polluter pays principle can also have a deterrent effect on the industries. In addition to evaluating the cost of reparation of the destruction caused, the capability and size of the industry must also be considered so that the penalty can be determined according to that. As discussed before, larger industries would not face any trouble in passing on the cost of environmental damage to the public.

In summary of the observations on market instruments, three aspects need to be determined by the International Courts and Conferences at the international level and by regional courts at the domestic level. These are:

1. Development of scientific methods to determine the potential costs of uncertainty with reference to environmental damage.
2. To adjust incentives so that the relevant parties pay the cost of this uncertainty.
3. To offer enough incentives to reduce the adverse effects of high risk activity.

As mentioned before, the polluter pays principle is an extension of the strict or absolute liability principle as it does not take into account due diligence before the potentially harmful act. Since it is a part of strict liability, governments, firms and other factions whose activities might adversely affect the environment will be forced to be a notch more careful in conducting tests like the Environmental Impact Assessment (EIA) before undertaking such activities.

²⁷ Robert Costanza, *Three General Policies to Achieve Sustainability*, 7.

Therefore, in terms of feasibility, the polluter pays principle promises to help in the fight against environmental degradation and preventing the ongoing environmental crisis.