

Application of the Polluter Pays Principle in Environmental Management

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ABSTRACT

The polluter pays principle (PPP) is an international environmental law rule which requires a person, private or corporate, whose acts results in environmental damage to bear the cost of rectifying and preventing future occurrence of the damage. The principle has been adopted by more than 183 states and domesticated in the municipal laws of various states and is the rationale for environmental laws and policies for environmental protection in those states. The principle, also known as extended polluter responsibility (EPR) is one of the precautionary principles for prevention of environmental damage. The principle started out as economic principle adopted by Organisation for Economic Cooperation and Development (OECD) in 1972. It was first incorporated in Principles 21 and 22 of the Stockholm Declaration, 1973 and in The United Nations Conference on Environment and Development, 1992. The essence is to place further liability on the polluter and to alleviate the economic burden which pollution places on the authorities. This paper argues that, whereas, the principle has enjoyed widespread acceptance and practice by very many states, it has become state practice, properly so called, and has acquired the legal status of customary international law, the *jus cogens*. The paper recommends that issues of the human environment should be treated strictly to make producers and environmental actors to bear the cost of damage which their operation may cause the environment. The paper further recommends among others, that the UN should negotiate legally binding agreement to set up policy framework for implementation of PPP as a precautionary means of environmental protection in line with global best practice.

Keywords: Polluter Pays Principle, environmental protection, environmental laws

INTRODUCTION

The polluter pays principle is based on a common sense approach for the mitigation of environmental degradation. It implies that s/he who damages the environment should bear the cost of rectifying that damage. In a broader sense producer of goods and other items should be responsible for any pollution which the production causes and must pay for prevention or rectification of the damage caused to the environment by such pollution.¹ Underlying the meaning of the PPP is the belief that when public authorities adopt measures to prevent potential and actual environmental damage, the expenses incurred should be borne by the person responsible for the pollution.²

The principle, in the event of environmental pollution, requires the producer and/or resource user to meet the costs of implementing environmental standard and also meet the necessary expenses for implementation of technical regulations.³

¹ S. Ball and S. Bell, *Environmental Law*, 2nd edition, Delhi: Universal Law Publishing, 1994, p. 97

² H. Smets, 'The Polluter Pays Principle in the Early 1990s', in L. Campiglio, L. Pineschi, D. Siniscalco and T. Treves (eds.) *The Environment After Rio: International Law and Economics*, London: Martinus Nijhoff, 1994, pp. 136-7

³ C. Coffey and J. Newcombe, *The Polluter Pays Principle and Fisheries: The Role of Taxes and Charges*, London: Institute for European Environmental Policy, p. 1. Online. Available HTTP: <
<http://www.ieep.eu/assets/238/thepolluterpaysprincipleandfisheries.pdf>> (accessed 27 January 2021).

Historical Development of Polluter Pays Principle

The principle evolved in 1972 in a Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies of the Organisation for Economic Co-operation and Development (OECD) and later incorporated in Principle 16 of the Rio Declaration.⁴ The 1972 Recommendation did accommodate costs of environmental damage, hence, in 1974; the Council adopted a further Recommendation on the 'Implementation of the Polluter Pays Principle' which reaffirmed that the principle constituted a 'fundamental principle' for member countries and urged them to strive for uniform observance of the principle.

Applicability of the Polluter-Pays Principle

The Polluter Pays Principle is a key legal and policy principle of international environmental law, designed to shape the development of environmental law. Other key principles include the principle of sustainable development, precautionary principle, the principle of common but differentiated responsibility among others.

These principles seek to maintain a balance between development, the preservation of a healthy environment, as well as the allocation of liability.⁵ It envisages that polluters would internalise the costs of the pollution which results from their action, so that the cost of their goods and services would reflect the true costs of the measures which the state adopts to eliminate, reduce and treat the polluters' emissions. The principle enables the state to charge the cost of rectifying environmental damage to the relevant polluter, provided that the polluter can be identified.⁶

The Organisation for Economic Cooperation and Development (OECD)⁷ guiding principles defines the Polluter Pays Principle as an instrument for '...allocating costs of pollution prevention and control measures.' From the OECD definition, four key issues emerge: identifying the polluter;⁸ ascertaining the extent of damage done to the environment; and establishing the extent of the polluter's liability so that precise monetary value can be attached to the degradation; above all, there must be a damage that must be compensated.⁹

These issues when properly articulated would help ensure that the polluter is made liable for the cost of his polluting activities. The principle envisages that, the parties who generate pollution, and not the victims, the society or the government, should bear the cost of abatement. It therefore allows the party responsible for polluting the environment to take responsibility for his actions. It also allows the polluter to be '...charged with the cost of whatever pollution prevention and control measures are determined by the public authorities, whether preventive measures, restoration, or a combination of both.'¹⁰ The principle gained international momentum in 1992, at the United Nations Convention on Environment and Development (the Earth Summit) the Rio Declaration and got incorporated into Principle 16 of the Rio Declaration.

Cost internalisation of negative externality allows for efficient allocation of resources. Externality relates to any uncompensated cost that is imposed on a third party by a polluter.¹¹ An external cost exists when two conditions prevail: where activity of one person causes loss of welfare to another; and secondly, where the loss of welfare is uncompensated. Thus an external benefit would be an unappropriated benefit accruing to third parties. The idea is that once polluters are bound to internalise the costs, they will try to

⁴ National authorities should endeavour to promote the internalization of ...

⁵ S Wolf and N Stanley, Wolf and Stanley on Environmental Law (5th edn Routledge 2011) 14.

⁶ Ibid.

⁷ A group of 24 Industrialised Countries plus the European Union and Yugoslavia which has special status.

⁸ J Thorton and S Beckwith, Environmental Law (2nd ed Sweet & Maxwell 2004) 14.

⁹ Ibid.

¹⁰ OECD, 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies' C (72) 6

¹¹ Ibid

reduce the cost by reducing pollution, either through using better technology or through emissions trading.¹²

The judicial/legal interpretation of the polluter pays principle holds that states and local governments are jointly and severally liable for environmental damage caused by parties, either private or public, allowing the public regulatory agencies to act in subrogation against industrial polluters. Pedagogically, the principle instills in the producers and consumers a sense of responsibility about the pollution they generate either through production or consumption of goods and services.¹³

The principle can also be described using a fairness argument, as it is only fair that the polluter pays the costs for the pollution which he has caused or contributed to. Making polluters

bear the costs of their polluting activities not only appeals directly to our sense of justice, but also enhances economic efficiency. The principle essentially means that the producer of goods or other items should be responsible for the cost of preventing or remediating any pollution which the process causes. Both environmental cost and those involving people or property are subsumed in the principle.¹⁴ While it could be argued that the costs of these activities should be covered by government budgets, the fairness aspect of the principle suggests that the polluter should bear these costs due to his responsibility for the pollution. Philippe Sands argues that from the wording of the polluter pays principle it seems clear that it would be used to make the polluter pay for the costs incurred by public authorities for pollution prevention and control.¹⁵ It explains why the principle has come to resonate so strongly with both policy makers and the public.

What is Pollution and who is a polluter?

Pollution is any by-product of a production or consumption process that harms or otherwise violates the property rights of others while the polluter is the person, company, or other organisation whose activities generate that by-product. Thus a polluter is literally the person that causes the pollution, which damage or imposes costs on the environment.

Sometimes, the question, determining who a polluter is may not be very simple, thus some statutes expressly allocate responsibility for pollution. The 1992 International Convention on Civil Liability for Oil Pollution Damage¹⁶ makes the ship owner at the time of the incident, liable for pollution damage caused on the territory or territorial sea of a contracting party, as a result of discharge from ships,¹⁷ subject to three exceptions:¹⁸ that the ship owner must prove that the damage from the pollution did result from an act of war or natural phenomenon;¹⁹ that the damage was caused by the act or omission of a third party done with intent to cause damage;²⁰ and that the damage occurred as a result of negligence or other wrongful act of any government or other authority.²¹

However, in the absence of express statutory provisions, it is sometimes difficult to determine the appropriate person(s) to be regarded as the polluter. For instance, in waste management cases, the polluter could be the producer of the product, but it could also be the seller of the product, or the consumer, among many other persons.

From the environmentalist point of view, a polluter may not necessarily be someone who is harming others, but may be someone who is simply using his own property and resources in a way that is not approved of by government officials and/or in a way that offends the environmentalists' sense of justice. In such cases, there is no harm to be measured and no real victims to compensate. It suffices therefore to

¹² Ibid.

¹³ Ibid note 5.

¹⁴ Park, D.P. *Energy Law and the Environment*. Taylor and Francis 2002 p.16.

¹⁵ Sands, Phillippe, *Principles of International Environmental Law*, 2nd edition. 2003, Cambridge University Press, p. 285

¹⁶ Originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (the 1969 CLC)

¹⁷ Article 1 (6) (a) of the 1992 Civil Liability Convention.

¹⁸ Articles II and III Convention on Civil Liability for Oil Pollution Damage

¹⁹ Article III (2) (a) Ibid

²⁰ Article III (2) (b) Ibid

²¹ Article III (2) (c).

say that pollution can occasion damage to both the physical and human environment while the polluter is the person or organization that causes the pollution.²²

What must the polluter pay?

There is a close nexus between 'environmental damage' and 'environmental cost'. Thus the amount to be paid is often determined by the extent of the damage, as damage and or compensation are aimed at returning the victim as much as possible to the state he was before the injury occurred. There are nevertheless instances where the amount to be paid is not determined by the extent of any actual damage done. Rather, it is set at a level that curbs the environmentally disfavored activity to the degree desired by its opponents. And the payment in such cases, whether or not there are real victims goes to the government in the form of a tax.

Framework for Internalisation of the Principle

Below is a list of a few declarations and regimes that have internalised PPP: the 1972 Stockholm Declaration Principle 21 provides that: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond their limits of national jurisdiction.'

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

The 1992 Rio Declaration Principle 16 provides;

'national authorities should endeavour to promote 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.'

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

The 1992 Convention for Protection of the Marine Environment of the North-East Atlantic (Paris Convention, 1992). Article 2b: 'contracting parties shall apply...the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter.'

Disincentives such as penalties and civil liability can also be seen as application of the PPP. Madrid Protocol to the Barcelona Convention (Article 27); Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Waste Within Africa 1991 (Article 12); Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1983 (Article 14); The 1996 Protocol to the London Dumping Convention; third party liability under the Convention on Transboundary Movement of Hazardous Waste strengthened the PPP.

Other agreements, such as the North American Free Trade Association (NAFTA); Rio Agenda 21; the 2002 World Summit on Sustainable Development (WSSD) Implementation Plan; the Convention of the Protection of the Alps, and the Protocol on Water and Health also endorsed the PPP.

For the last two decades, PPP has been practiced in many different forms in different cultures and economic systems.²³ It is applied through varied economic instruments, such as taxes and charges, emissions trading, as in cap and trade, deposit refund schemes, liability and insurance, *etc.*

²²Ibid

²³ Stiglitz, Joseph. *The Price of Inequality: How Today's Divided Society Endangers Our Future*. New York: W. W. Norton, 2012.

Conceptually,²⁴ a carbon tax should be set at a level that internalise the true costs of environmental damage, so that prices reflect the real environmental costs of pollution. Sweden is regarded by some as having the most advanced application of the PPP in the world.²⁵

Environmental liability rules are crucial in South Africa. The issue of liability pertaining to pollution of or harm to the environment is a critical area in South African law as environmental liability is not adequately addressed in terms of South African law.²⁶ Liability law is necessary in order to prevent environmental pollution or degradation. The South African Constitution, Section 24 provides for the protection of the environment.²⁷ The National Environmental Management Act (NEMA)²⁸ is designed within the framework of the Constitution²⁹ aimed at the promotion of sustainable development. In addition to sustainable development provision, NEMA also promotes the polluter pays principle as its main objective for preservation and protection of the environment.

The principle is a measure aimed at prevention of pollution and environmental degradation as referred to in section 24(b) (ii) of the Constitution.³⁰ The Section directs the government to take measures to ensure that remediation of environmental damage takes place.³¹

The state of New South Wales in Australia has included the polluter pays principle with the other principles of ecologically sustainable development in the objectives of the Environment Protection Authority.³²

The polluter pays principle is set out in the Treaty on the Functioning of the European Union³³ and Directive 2004/35/EC 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 is based on this principle. The directive entered into force on 30 April 2004 allowed member states three years to transpose the directive into domestic law and by July 2010 all member states had completed this.³⁴

In France, the Charter for the Environment contains a formulation of the polluter pays principle (article 4): ‘Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment’.³⁵

Accordingly, the Organisation for Economic Co-operation and Development defines the principle as: a concept where manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products is based on the polluter pays principle. Bin bags (for municipal solid waste) are taxed with pay-per-bag fees in three quarters of the communes (and the recycling rate doubled in twenty years).³⁶

The Environmental Damage (Prevention and Remediation) Regulations 2009 (for England) and the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (for Wales) established the operation of the polluter pays principle.³⁷ The principle is employed in all of the major US pollution

²⁴ Førsund, Finn R. “The polluter-pays principle and transitional period measures in a dynamic setting.” *The Swedish Journal of Economics* 77 (1975): <http://www.jstor.org/>(accessed on 30 January 2021).

²⁵ Faure, Michael. “Environmental Liability.” In *Tort Law and Economics*. Cheltenham: Edward Elgar Publishing, 2009, pp. 247–86.

²⁶ Soltau 1999 *SAJELP* 48-50. See Oosthuizen 1998 *SAJELP* 360-361.

²⁷ Section 24 (a) (b) (i) (ii) and (iii).

²⁸ *Constitution of the Republic of South Africa*, 1996. See Scholtz 2005 *TSAR* 69.

²⁹ Section 2 of NEMA Principle 22 of the *Stockholm Declaration* ‘States shall cooperate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damage.’

³⁰ Oosthuizen 1998 *SAJELP* 358.

³¹ Anon <http://lwww2-win4.pUk.ac.za/nxtigateway>. 31.01.2021.

³² Protection of the Environment Administration Act 1991, section 6(2)(d)(i)[1].

³³ Article 191(2) TFEU

³⁴ European Commission, *Environmental Liability*, 3 . 01. 2018.

³⁵ *Charter for the Environment*, Constitutional Council, 03.01.2018.

³⁶ Organisation for Economic Cooperation and Development (OECD). Environment Directorate, Paris, France (2006). “Extended Producer Responsibility.” Project Fact Sheet.

³⁷ The Environmental Damage Regulations: Preventing and Remedying Environmental Damage, 03.01.2018

control laws: Clean Air Act,³⁸ Clean Water Act,³⁹ Resource Conservation and Recovery Act (solid waste and hazardous waste management),⁴⁰ and Superfund (cleanup of abandoned waste sites).⁴¹

The Zimbabwe Environmental Management Act of 2002⁴² prohibits the discharge of pollutants into the environment. In line with the 'Polluter Pays' principle, the Act requires a polluter to meet the cost of decontaminating the polluted environment.⁴³

Canada has also adopted the principle in its municipal environmental legislation. Many Canadian laws that protect air, water and land incorporate the polluter pays principle. As just one of many possible examples, Section 2 of the Alberta Environmental Protection and Enhancement Act contends that one of the purposes of the Act is to recognize 'the responsibility of polluters to pay for the costs of their actions'. It puts that purpose into action in sections 108 and 109 by stating that that no one is allowed to release substances into the environment at a rate greater than what they have permission to do or at a rate that causes 'significant adverse effect'. If they do, then section 112 says they have a duty to repair, remedy and confine the effects of the substance, remediate, manage, remove or otherwise dispose of the substance to prevent an adverse effect, and then to restore the environment.

Nigeria's National Policy on Environment recognises the polluter pays principle. The policy provides: Nigeria is committed to a national environmental policy that will ensure sustainable development based on proper management of the environment. This policy, in order to succeed is founded on the sustainable development principles and the polluter pays principle which suggests that the polluter should bear the cost of preventing and controlling pollution.⁴⁴

The National Environmental Standards and Regulations Enforcement Agency (NESREA) Act⁴⁵ provides:

Where an offence under subsection (1) of this section is committed by a body corporate, it shall on conviction, be liable to a fine, not exceeding ₦1,000,000 and an additional fine of ₦50,000 for every day the offence subsists.⁴⁶

These provisions presuppose that the polluter would bear the costs of removing the polluting substance/s or discontinuing the polluting activity, and to abate and/or clean up the affected area. There are plethora of legislations and Guidelines that acknowledge, adopt and provide for the polluter pays principle within and outside Nigeria which shall not be captured in this write up.

CONCLUSION

Every country of the world is preoccupied with the policy of development. Poorly planned or totally unplanned infrastructural development with daring negative consequences has resulted in dire consequences on the human environment. Without deliberate and conscious steps to address the developmental impacts on the environment, earth, our common home, may stand the risk of imminent collapse. Production and exploration of crude oil emits deleterious bye-products which causes pollution with degradable environmental consequences. In every environmental incident, the environment and humans suffer irremediable consequences and unfortunately, the polluter goes away free without responsibility. The principle is therefore a welcome development that has happened at the right time to make the polluter take responsibility of polluting the environment. Your parents may have told you: 'If you make a mess, you have to clean it up. In a nutshell, that is the basis of the "polluter pays" principle.

³⁸"Air Enforcement". Washington, D.C.: US Environmental Protection Agency (EPA). 2015-12-01.

³⁹"Water Enforcement". EPA. 2015-12-14.

⁴⁰"Waste, Chemical, and Cleanup Enforcement". EPA.

⁴¹*The Buck Stops Here: Polluters are Paying for Most Hazardous Waste Cleanups. Superfund Today (newsletter) (Report)*. EPA. June 1996. EPA-540-K-96/004.

⁴²The Herald (Harare), Polluter pays as environmental management principle, 03.01.2018.

⁴³Ibid.

⁴⁴ Paragraph 1 Nigeria's National Policy on the Environment.

⁴⁵Cap N164 Laws of the Federation of Nigeria 2010

⁴⁶ Section 27 subsection (3) of the NESREA Act.

There is a lot wrapped up inside the simple principle of polluter pays. The roots of the principle come from economics rather than from environmentalism. The idea is that an organization that damages the environment should pay to fix the damage it causes. In some cases the polluting organization might also be required to pay money to people that it has harmed. Since all costs that a commercial organization pays eventually get passed on to its consumers, cleanup costs will raise the prices of the goods they are selling. If the laws of economics hold true, those higher prices will cause rational consumers to seek substitute goods and then the demand for the polluting goods will fall. In theory, the rational profit maximizing organizations that had been causing the harm will respond by finding ways to produce their goods that don't pollute. Their costs will come down, the price of their goods will fall and the organization will become more competitive. If they don't react in this way, they might find themselves out of business. The polluter pays principle helps us recognize the true costs of things. This idea of 'cost internalization' is part of international environmental law. It was recognized in Principle 16 of the 1992 United Nations Rio Declaration which said 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.' Member states need to pass 'enabling legislation' at home before the Declaration has any effect within their borders. This article finds that the polluter pays principle is an awesome principle for the ultimate protection of the human environment. Thankfully the principle has received tremendous goodwill and support from all climes evidenced by the number of countries that have adopted and incorporated the principle into their municipal environmental legislation and enacted same to bind persons, both private and corporate as well as consumers to ensure that their acts does not in any way affect the environment negatively. The principle puts everyone on toes especially the multinational oil corporations exploring and other producers which by-products may be hazardous to the environment.