



POLLUTER PAYS PRINCIPLE AND ENVIRONMENTAL JURISPRUDENCE IN INDIA: AN APPRAISAL

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Abstract

The principles are far more widely in evidence in environmental law than in any other field of law.¹ The 1972 Stockholm Declaration on the Human Environment, World Charter for Nature 1982 and the Rio Declaration on Environment and Development 1992 as well as Agenda 21, intended to clarify scope of the 1992 United Nations Declaration are replete with principles. The principles are set out in disparate legal instruments. The Polluter Pays Principle is one of such important environmental principles. It requires the polluter to bear the expense of preventing, controlling as well as mitigating the damage caused by pollution. It also includes cost, allocation and cost internalization.

Introduction

Rapid and unprecedented industrial development has brought, in its wake myriad environmental and pernicious health problems. Though the industrial and technological advancements have helped to improve food product, raise living standards, solve time and space problems and control some health related problems; yet, they have adversely affected the natural environment and thereby disturbed the balance of nature. The capability of self maintenance and self regulation of our eco system has been disrupted by the continuous discharge of pollutants by the industries and their products. Moreover, improper treatment and discharge of the industrial waste and its unhygienic disposal has created a serious problem for biotic and abiotic components of the environment.

For the last number of years, industries, especially manufacturing industries, nuclear industry and those using hazardous or ultra hazardous material are the major contributors to environmental pollution. Industrialists are by and large thriving on such pollution disseminating units. But, now it has been realized that industries are also social units with rights and duties towards the surrounding community and the consumer. They have a duty not to harm the health of the man and nature. It is recognized that pollution is a form of waste, and a symptom of inefficiency in industrial production. Therefore, it has been thought proper to devise various kinds of measures to curb or minimize industrial pollution. The World Commission on Environment and Development, in its report, has suggested that environment cost of economic activity can be internalized—paid by the enterprises.² It may be in the form of investment to prevent the damages, or to restore unavoidable damages e.g. afforestation, restocking fish, rehabilitation of man and land, etc, or compensating the victims of health and property damage. Thus, enterprises may be encouraged to invest in preventive, restorative or compensative measures. But it was the Organization of Economic Cooperation and Development (OECD), who for the first time, agreed to base their environmental policies on a polluter pays principle (PPP)³ and it was recommended by the World Commission on Environment and Development in 1972 as an essentially economic efficiency measure to internalize environmental costs. Polluter pays principle which was initially recognized as one of the economic and administrative measures to restrain and contain the pollution problem, has recently been adopted as a strong legal measure to minimize environmental pollution. In the present paper the emphasis is to know whether the polluter pays principle is adopted in Indian legal system as a means to abate the environmental pollution.

Concept-Meaning

Generally, the polluter pays principle means that the producer should be responsible for the costs of preventing or dealing with any pollution which the process causes.⁴ In other words the person responsible for causing the pollution should bear the expenses of measures carried out by the public authorities with respect to potential and actual environmental damage. The polluter pays principle is essentially a principle of economic policy for allocating the cost of pollution, rather than a legal principle. But it has certain implications for the development of international environmental law.

The Organization for Economic Cooperation and Development for the first time used the term polluter pays principle which means that the polluter should bear the expenses of carrying out the measures which resulted in the damage. Such measures

¹ Nicholas De. Sadeleer, *Environmental Principles from Political Slogans to Legal Rules*, 1 (2002).

² *Our Common Future* 220-221 (1987).

³ Guiding principles concerning international economic aspects of environmental policies, Council Recommendations C (72) 128 (1972).

⁴ Simon Ball and Stuart Bell, *Environmental Law*, 97 (1994).



must not be accompanied by subsidies causing significant distortions in international trade and investment.⁵ We can reflect it in this way also, i.e. the harm caused to the environment not only extends to compensate the victims of pollution but also the cost to restore the damaged environment. Now the basic question arises who is the polluter and the other corresponding aspect what should the polluter pay for? Regarding the first part it is not clear from the meaning assigned to the polluter pays principle who the polluter is. A strict reading of the meaning conveys that the principle involves not about the polluter and nor about how to control the pollution, but speaks only the cost to be borne by the polluter. So to know who the polluter is we have to depend on the existing situation and prevailing market conditions. As regards the other question it involves two aspects, one is that the cost to compensate the victims of pollution and other one is that the cost of restoring the environment damaged to its previous state.

The history of the polluter pays principle reveals that since its articulation in the OECD and the European Community (EC), there has been gradual shift in its meaning as it assumed various additional functions. Initially, it was referred to as a means of preventing the distortion of competition; latter it formed the basis both for internalizing chronic pollution and preventing it; finally it served to guarantee the integrated reparation of damage.⁶ The polluter pays principle has numerous functions that are times complimentary and at other times mutually exclusive.⁷ Accordingly, under the function of economic integration, the principle was to be used to avoid distortion in international trade and investment. Since, their early recommendations, the OECD and the EC have justified recourse to the polluter pays principle to prohibit state aids from being used to finance anti pollution investments. Under the redistribution function, the polluter pays principle is to internalize the social costs borne by the public authorities for pollution prevention and control.⁸ The principle also serves as an economic rule according to which a portion of the profits accruing to polluters as the result of their activities must be returned to the public authorities responsible for inspecting, monitoring and controlling the pollution, these activities produce.⁹ The preventive function of the polluter pays principle is to abate pollution by encouraging polluters to reduce their emissions instead of being content to pay charges.¹⁰ Finally, the curative function holds polluters responsible for the damage to the environment that occurs despite compliance with regulatory requirements. It also ensures compensation to victims from such polluters. By this way, it provides incentives to avoid harmful pollution and environmental degradation.¹¹ Thus, the polluter pays principle, in addition to the cost of pollution prevention and control measures, also covers ecological damage in its entirety.¹²

Concept-Origin and Evolution

In 1972, OECD articulated certain guiding principles concerning international economic aspects of environmental policies. These principles include the polluter pays principle. The document included the following recommendation that the principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so called polluter pays principle. This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state.¹³ Under the principle, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and consumption. In other words, the price of goods in the market place should include the costs of pollution prevention and control. Such measures should not be accompanied by subsidies to polluters that would create significant distortions in international trade and investment.¹⁴ The guiding principles refer to an acceptable state for environment and present the polluter pays principle as an efficiency principle, aimed at encouraging the rational use of resource.

In 1973, a note on the implementation of the polluter pays principle was drafted by the committee of the OECD. In the note emphasis has been laid on the identification of the acceptable state of the environment by the public authorities in each

⁵ OECD, Recommendations C (72) 128 (1972).

⁶ Supra note 1 at 33-34.

⁷ Id, at 34-37.

⁸ Id, at 35.

⁹ Ibid.

¹⁰ Id, at 36.

¹¹ Id, at 37.

¹² Id, at 43.

¹³ Supra note 5.

¹⁴ Ibid.



state.¹⁵ Means of implementation of the principle must be decided by the public authorities, which may include process and product standards, individual regulations and prohibitions, or pollution charges.¹⁶ A recommendation on the implementation of the polluter pays principle was adopted by the OECD in 1974. This document reaffirmed that the polluter pays principle constitutes a fundamental principle for member countries for allocating costs of pollution prevention and control measures introduced by the public authorities.¹⁷ In 1989, the OECD Council extended the principle to accidental pollution from hazardous substances in its document. Council Recommendation on the Application of the Polluter Pays Principle to Accidental Pollution, that the principle was no longer to be limited to chronic pollution.¹⁸ This was a significant as it obliged potential polluters to cover expense of remedying accidental pollution, which traditionally fell to public authorities.¹⁹ Further the OECD Council in its Recommendation on the Uses of Economic Instruments in Environmental Policy admitted that a sustainable and economically efficient management of environmental resources requires internalization of the costs of pollution prevention and control measures as well as damage costs.²⁰

Thereafter, in 1992, the Polluter Pays Principle: OECD Analysis and Recommendation outlined developments since 1972 and highlighted some of the problems faced in implementing the principle.²¹ The interpretation of the principle moved from application only to pollution prevention and control towards full internalization of pollution costs. Such costs included prevention and control (for instance treatment plant construction), associated administrative measures taken by government such as monitoring, damage caused by pollution such as clean up costs and most accidental pollution.²² A decade later, in 2001, the OECD document, the polluter pays principle as it relates to international trade traced expansion of the principle, both in the OECD and in international provisions from the strict sense of the principle to the broad sense of the principle. In its strict sense the principle requires polluters to pay costs of pollution prevention and control, in the broader sense the polluter takes responsibility to other costs including charges, taxes, cleanup costs and compensation.²³

International Scenario

In 1973, the European Community (EC) adopted a program of action on the environment which for the first time endorsed the polluter pays principle. The 1975 EC Council Recommendation regarding cost allocation and action by public authorities on environmental matters provides that the European Communities at community level and the member states in their national environmental legislation must apply the polluter pays principle, under which natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as our necessary to eliminate that pollution or to reduce so as to meet the standards or equivalent measures laid down by the public authorities.²⁴ This recommendation of the EC is not legally binding like the OECD recommendation regarding the costs of environmental damage. The 1986 Single European Act provides that action by the Community regarding the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.²⁵ It is noted that act is legally enforceable.

The 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources also embodies polluter pays principle. The agreement recommends parties to make the originator of the activity which may lead to environmental degradation responsible for its prevention, reduction and control and also for rehabilitation and remedial measures.²⁶ In 1990, the preamble of International Convention o Oil Pollution Preparedness, Response and Cooperation considered polluter pays principle as a general principle of international environmental law. The polluter pays principle has also been acknowledged by Rio Declaration on Environment and Development in 1992. The Declaration explicitly adopted the polluter pays principle in its principle 16 which states that national authorities endeavor to promote the internalization of environmental cost and the use of economic instruments, taking into account the approach that the polluter should in principle bear the cost of pollution,

¹⁵ Note on the Implementation of the Polluter Pays Principle, OECD Doc. Env. (73) 32 (1974) 238.

¹⁶ Id, at 239-40.

¹⁷ Id, at 234.

¹⁸ OECD Doc. C (89) 88 Final (1989), 28 ILM 1320 (1989).

¹⁹ Supra note 1 at 27.

²⁰ Ibid.

²¹ OECD Doc. OCDE/GD (92) 81 (1992) 9.

²² Supra note 1.

²³ Margaret Rosso Grossman, 'Agricultural and the Polluter Pays Principle: An Introduction', 59 Oklahoma, L.R. 1 (2006).

²⁴ Para 2, Council Recommendation 75/436/EURATUM

²⁵ Article 25, Single European Act, 1986.

²⁶ Article 10 (d), ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985.



with due regard to the public interest and without distorting international trade and investment. Further, principle 13 indicates that states should develop national law regarding liability and compensation for the victims of pollution and other environmental damage. Thus, in Rio Declaration the polluter pays principle mentions full internalization of damage costs as well as expenses for pollution control and prevention.²⁷ Though the declaration was not the first embodiment of the principle which called for the internalization of damage costs, this is still a relatively recent phenomenon. Agenda 21 on program of action for sustainable development, a document of Rio Declaration, implicitly has recognized the polluter pays principle in several provisions.

As regards the legal status of polluter pays principle, Sands said that it has not received the broad geographic and subject matter support over the long period. He continued that it is doubtful whether the principle has achieved the status of a generally applicable rule of customary international law.²⁸ Burnie and Boyle expressed the view that as a policy, the polluter pay principle has obtained significant endorsement, and it represents an important strategy for controlling environmentally harmful activities by emphasizing responsibility for their true economic costs and complementing the more obvious regulatory measures adopted under global and regional treaties.²⁹ Since a number of international and regional instruments expressly recognized the polluter pays principle which means that the polluter should pay and international community accepted the principle with a view to protect the environment, it can be said that the principle has emerged a customary rule of international law.

Position in India

The evolution and application of the polluter pays principle by the Indian judiciary is inexplicitly evident from the case of *M.C. Mehta v. Union of India* in the year 1986.³⁰ It was declared by the court that we have evolved new principles and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialized economy. The significance of this judgment lies in the court's formulation of the principle of the measure of liability of industry engaged in hazardous or inherently dangerous activities. Such measure must be co related to the magnitude and the capacity of the enterprise. Secondly, the court directed the industry either to shift from the present or evolve a green belt around it as a condition precedent to restart the industry. Further, the industry was asked to deposit a sum of rupees 35 lakhs in a bank and a guarantee of rupees 15 lakhs with the court for compensation to be paid to one who can prove before the court of law that he suffered because of the oleum gas leakage from the Sri Ram Food and Fertilizer Corporation. Thus, an innovative remedy was evolved by the Supreme Court of India in this case which was indirect recognition and application of the polluter pays principle.

The polluter pays principle was for the first time applied and defined in the case of *Indian Council for Enviro-Legal Action v. Union of India*.³¹ It was declared by the court that redemption of the damaged environment is a part of the process of sustainable development and as such polluter is liable to pay the cost of the individual sufferers as well as the cost of reversing the damaged ecology. Thus the polluter pays principle means the absolute liability for harm to environment extends not only to compensate the victims of pollution but also to the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development.

The Supreme Court in *Vellore Citizens Welfare Forum v. Union of India*³² retreated and declared in unequivocal terms that the polluter pays principle are part of the environmental jurisprudence of this country. This principle has been accepted as a part of the law of the land as Article 21 of the Constitution of India guarantees protection of life and personal liberty. There is also a constitutional mandate to protect and improve the environment under Articles 48-A and 51-A (g). These are also supported by other statutory provisions³³ the court also observed that this principle has also been accepted as part of the customary international law, therefore, it automatically becomes a part of the basic jurisprudence of the land. In this case it was suggested by the court that the central government should constitute an authority under Section 3 (3) of the EPA, 1986 and such authority, shall, with the help of the expert opinion assess the loss to the ecology in the affected area. After making

²⁷ Henry Smets, *The Polluter Pays Principle in the Early 1990s, in the Environment after Rio: International Law and Economics*, 131, at 40.

²⁸ Philippe Sands, *Principles of International Environmental Law*, 213.

²⁹ Patricia W. Burnie and Allen E. Boyle, *International Law and the Environment*, 111.

³⁰ AIR 1986 SC 1086.

³¹ (1996) 2 JT SC 196.

³² AIR 1996 SC 2715.

³³ Water Act, 1974; the Air Act, 1981; the Environment Protection Act, 1986.



proper assessment such an authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment, after giving the polluter an opportunity of being heard. In the same case the court also ordered for imposing a fine of rupees 10 thousand on each tannery of the area. The fine had to be paid to the collector of the district. The court purposed the fine plus the compensation amount so recovered from the polluters be deposited under the head Environment Protection Fund. This fund could be utilized for compensating the affected persons identified by the authority and also for restoring the damaged environment.³⁴ Thus, it was really a landmark judgment in the history environmental jurisprudence in India.

In *M.C. Mehta v. Union of India*³⁵, the Supreme Court reiterated the polluter pays principle and re emphasized the need to apply it. It was a case of yellowing and decaying of the Taj Mahal. As per reports of NEERI, 1993 and Vardhajan Committee 1995, the foundries, chemicals or hazardous industries and the Mathura Refinery were the major sources of damage to the Taj Mahal, a priceless national monument. The court ordered the industries to shift away from the Taj Trapezium or to switch over to gas as fuel. The industries, which did not switch to gas, were ordered to be closed down unconditionally. J. Kuldeep Singh gave a new dimension to the polluter pays principle. It was ordered by the court that the various kinds of industries numbering 292, if they opted to shift to other states would have to give compensatory benefits to their workers. In this case it is simply clear that the workers of industries were also the victims of the polluting industries and they should not suffer on account of an action against the polluting industries. If the industry is closed or shifted for disseminating pollution or violations of statutory provisions, the workers shall not be thrown out of the industry without any economic security. They are also entitled to certain rights and benefits from the erring industries. Therefore, declaration of gratuity, compensation, additional compensation or shifting allowance by the Supreme Court has given a new dimension to environmental jurisprudence and it is true that this judgment has proved to be a watershed in the history of environmental management in India.

The principle was again applied by the Supreme Court in *Deepak Nitrite Ltd. V. State of Gujarat*³⁶ but with a different view that before fixing the liability it is to be found out whether there was any nexus to the extent of the fault. The court observing that compensation can be avoided under only if damaged has been caused to the environment by the person concerned. Applying the principle again in *Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group*,³⁷ the Supreme Court ordered the Appellants who willfully damaged the mangrove forests in defiance of the orders of the court into their original position in the instant case during the pendency of a suit, the appellants mere ordered to repair the damage but knowingly made such attempts that the mangroves would die natural death and extensive damage was caused to that ecologically sensitive mangroves and vegetation of wetland of CRZ-1 area. Holding the appellants guilty of willful defiance of orders of the Supreme Court, time bound directions were issued to the appellant to restore the original height and width of the bind, dismantle platforms and remove debris to facilitate natural flow of sea water into land at their own cost.³⁸ The authorities were also directed to carry out the said directions of the appellants fail to comply therewith and to recover the cost therefore as arrears of land revenue.

There are certain statutes passed by the Indian Parliament, which directly or indirectly adhere to the polluter pays principle. The Public Liability Insurance Act, 1991, makes it a mandatory duty of all the industries, which have a capital value of rupees 200 thousand to get insured under the Act. The premium of such insurance shall be collected in the Environment Relief Fund which shall be available with the collector of the district. The collector in case of industrial accident or disaster shall pay, by way of relief, immediately to the victims. This relief will not be a bar to file a case to file a case for compensation separately. Similarly, as per the provision of Section 15 (1) of the National Green Tribunal Act, 2010, the Tribunal may order; provide relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule 1 including accident occurring while handling any hazardous substance, for restitution of property damaged and for restitution of the environment for such area or areas, as the Tribunal may think fit. The relief ad compensation and restitution of property and environment as referred above shall be in addition to the relief paid or payable under the Public Liability Insurance Act, 1991.

³⁴ Supra note 32 at 2726.

³⁵ AIR, 1997 SC 734.

³⁶ (2004) 6 SCC 402.

³⁷ (2011) 3 SCC 363.

³⁸ Id, at 407



Concluding Remarks

The polluter pays principle is a normative doctrine of environmental law. Although its precise legal definition remains elusive, the core of this principle stems from the fundamental, logical and fair proposition that those who generate pollution should bear pollution costs and not the government. Reference to the principle is found in an increasing number of international recommendations and treaties. The principle's inclusion in one of the most important and influential international statements of fundamental principles of environmental law demonstrates its significance in environmental liability regimes around the world. The polluter pays principle is being adopted as core component of liability in the environmental regimes of the developed as well as developing nations. It has been accepted by the majority of industrialized as the mechanism for controlling global pollution. Environmental legislation in our country too, assigns liability to compensate for loss caused to persons, property or environment on the principle of polluter pays by imposing liability on those who are responsible for causing underlying pollution or damage while handling any hazardous substance. The application of the principle can be effective to avoid wasting natural resources and to put an end to the cost free use of the environment as a receptacle for the pollution. The true aim of the principle is to institute a policy to abate pollution by encouraging polluters to reduce their emission instead of being content to pay charges.

The above mentioned pronouncements of the Supreme Court of India has declared it in unequivocal terms that the polluter pays principle is well established and has become a part of the Indian environmental jurisprudence. The Apex Court, the Supreme Court of India, in this respect has been very responsive, effective and innovative. The court has always come to the rescue of those who have suffered due to pollution, be it man or nature. The judiciary, by pronouncing landmark judgments and taking polluters to task, is acting under its constitutional obligations. Such a firm stand of the court has taken by surprise all those who used to manipulate the apathetic environmental agencies. It makes amply clear that if a person carries on hazardous or ultra hazardous activity, he has absolute liability under civil law and criminal law. Under civil law, he is liable to pay compensation to individual for their loss of man and material and personal discomfort; and to pay the cost of restoring the damaged environment. He will also be prosecuted and punished under the Section 15 of Environment Protection Act, 1986 and other related criminal laws. Thus, in its judicial pronouncements, the court has addressed the polluter pays principle as not only a sound principle of sustainable development but also as a part of environmental jurisprudence of India. Effective application of the polluter pays principle through the statutes, regulations and courts would certainly help in protecting the environment from all types of pollution and environmental harm in a long way.