I. INTRODUCTION

"The 'polluter pays principle' states that whoever is responsible for damage to the environment should bear the costs associated with it."

"If anyone intentionally spoils the water of another ... let him not only pay damages, but purify the stream or cistern which contains the water..." - Plato

Polluter Pays Principle has become a popular catchphrase in recent times. 'If you make a mess, it's your duty to clean it up'- this is the main basis of this slogan. It should be mentioned that in environmental law, the 'polluter pays principle' does not refer to "fault." Instead, it favors a curative approach which is concerned with repairing ecological damage.

Few people could disagree with what seems at first glance to be such a straightforward proposition. Indeed, properly construed, this is not only a sound principle for dealing with those who pollute but is an extension of one of the most basic principles of fairness and justice: people should be held responsible for their actions. Those who cause damage or harm to other people should "pay" for that damage. This appeal to our sense of justice is why the "polluter pays principle" (PPP) has come to resonate so strongly with both policy makers and the public. The polluter pays principle is an economic rule of cost allocation. The source of the principle is in the economic theory of externalities.

II. HISTORICAL PERSPECTIVE OF POLLUTER PAYS PRINCIPLE

The first mention of the Principle at the international level is to be found in the 1972 Recommendation by the OECD Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, where it stated 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”

The OECD emphasizes the necessity for removal of subsidies which would prevent polluters to bear the costs of pollution which they caused, urging then those costs be internalized into the prices of goods and services: the PPP should "... not be accompanied by subsidies that would create significant distortions in international trade and investment." This is normally referred to as weak or standard PPP.

However, the PPP evolved into what is called extended or strong PPP**. In 1989 OECD included in the PPP** costs related to accidental pollution; the Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution states that: "In matters of accidental pollution risks, the Polluter-Pays Principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation [...]".

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The PPP has also **been reaffirmed in the 1992 Rio Declaration, at Principle 16:** and is mentioned, recalled or otherwise referred to in both **Agenda 21 and the World Summit on Sustainable Development (WSSD) Johannesburg Plan of Implementation.**

The PPP is today one of the **fundamental principles of the environmental policy of European Community. The Treaty Establishing the European Community, under Title XIX Environment, provides at article 174.2** that: "Community policy on the environment [...] shall be based on the precautionary principle and 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."

The PPP is widely acknowledged as a general principle of International Environmental Law, and it is explicitly mentioned or implicitly referred to in a number of Multilateral Environmental Agreements.

III. CONCEPT OF POLLUTER PAYS PRINCIPLE

The polluter pays principle is essentially a principle directed to the internalization of environmental costs. This involves the internalization of environmental costs into decision making for economic and other development plans, programs and projects that are likely to effect the environment. The principle requires accounting for both the short term and the long term external environmental costs.

This can be undertaken in a number of ways including:

1. environmental factors being included in the valuation of assets and services;

2. adopting the polluter pays (or user pays) principle, that is to say, those who generate pollution and waste should bear the cost of containment, avoidance or abatement;

3. the users of goods and services paying prices based on the full life cycle of the cost of providing goods and services, including the use of natural resources and assets and the ultimately disposal of any waste; and

4. environmental goals, having been established, being pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable the best placed to maximize benefits or minimize costs to develop their own solutions and responses to the environmental problems.

The polluter pays principle is an important basis of international law.

1. **In 1972, the OECD** wrote Guiding Principles concerning International Economic Aspects of Environmental Policies, stating:

"… 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."

2. The polluter pays principle was incorporated into **the Rio Declaration on Environment and Development**, which states:

    Principle 16: "National authorities should endeavor 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." (earth.org) https://www.economicshelp.org/blog/6955/economics/polluter-pays-principle-ppp/

3. **De Sadeleer, *Environmental Principles, From Political Slogans to Legal Rules*, Oxford University Press, 2002, explains, the polluter pays principle:**

    "Requires the polluter take responsibility for the external costs arising from his pollution. Internalization is complete when the polluter takes responsibility for all the costs arising from pollution; it is incomplete when part of the cost is shifted to the community as a whole."

4. **J Moffet and F Bregha, "The Role of Law in the Promotion of Sustainable Development" (1996) 6 *Journal of Environmental Law and Practice*** explain the philosophical foundation of the "polluter pays" principle in the following way:

    "The polluter pays principle reflects an important philosophical position…Under the polluter pays principle, the community effectively 'owns' the environment, and forces users to pay for the damage they impose. By contrast, if the community must pay the polluter, the implicit message is that the polluter owns the environment and can use and pollute it with impunity.

    This message is inconsistent with the principles of sustainable development and is not widely reflected in contemporary policy pronouncements, although it remains the effective basis for decision-making in the many areas in which public policy has not yet compelled polluters to internalize their external costs."

5. **In 1986, Article 25 of the** ***Single European Act*** provided that:

    "Action by the Community relating to the environment shall be based on the principles that preventative action should be taken, that environmental damage should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay".

    As quoted in P W Birnie and E Boyle, *International Law and the Environment*, Clarendon Press, Oxford, 1992, p. 110.

IV. FLAWS IN THE CONCEPT OF POLLUTER PAYS PRINCIPLE

It is true that polluter pays principle has a positive effect to reduce pollution. The principle seems quite relevant for pollution that occurs during industrial activity, although it remains inefficient in the case of historical pollution. Most developing countries, however, have not yet subscribed to the PPP as a main environmental policy guideline. As Rege (1994) points out, this is due to adverse economic conditions. Legal theorists discovered few loopholes of this rule. The flaws are as follows:

1. Firstly, ambiguity still exists in determining 'who is a polluter'. In legal terminology, a 'polluter' is someone who directly or indirectly damages the environment or who creates conditions relating to such damage. Clearly, this definition is so broad as to be unsupportive in many situations. For example, Mr.Aryaan owns a BMW .If his BMW emits harmful gas in the atmosphere, he will be directly liable for the emission .Furthermore, the manufacturer of the vehicle will be indirectly liable for committing ecological damage too and so the retailer of the vehicle and the fuel supplier, and the government who created 'conditions relating to the damage' by building roads and neglecting public transport regulations.

2. Second, a large number of poor households, informal sector firms, and subsistence farmers cannot bear any additional charges for energy or for waste disposal.

3. Third, small and medium-size firms from the formal sector, which mainly serve the home market, find it difficult to pass on higher costs to the domestic end-users of their products.

4. Fourth, exporters in developing countries usually cannot shift the burden of cost internalisation to foreign customers due to elastic demand.

5. Lastly, many environmental problems in developing countries are caused by an overexploitation of common pool resources. Access to these common pool resources (in line with the PPP) could be limited in some cases through assigning private property rights, however, this solution could lead to severe distributional conflicts.

All of these problems make it difficult to implement the PPP as a guideline for environmental policy in developing countries. Despite the fact that Polluter Pay Principle was publicized by early conservationists as a means to reduce ecological pollution, still many consider it as a 'vague idea'. Some put forward their argument that under this principle a polluter fulfils his obligations when he pays at least some of administrative expenses of the agencies who regulate pollution activities .'Exxon Valdez' case is the best example of this criterion of Polluter Pays Principle. Others argue that it can only be satisfied by polluters when they will pay the total depollution cost. And the rest support the view that tax (like 'Carbon Taxes') should be legitimised on the users of the natural resources that cause atmospheric hazards.

V. POLLUTER PAYS PRINCIPLE: AN ECONOMIC TERM

As a general rule, sound economic analysis of pollution and environmental problems must also be based on the principle of responsibility. Forcing polluters to bear the costs of their activities is good economics too; it not only advances fairness and justice, but also enhances economic efficiency. In other words, with appropriate policies based on a PPP, we should not have to give up the economic efficiency of a free market system based on private property in order to obtain environmental protection, nor vice versa. But as with most such general principles, the devil is in the details. In this case, the details relate to three basic questions that any application of the PPP must answer. First, how do we define pollution and therefore a polluter? Second, how much should the polluter pay, once he is identified? Third, to whom should the payment be made? The answers to these questions are at the heart of whether any application of the PPP will be either just or economically efficient.

A correctly construed polluter pays principle would penalize those who injure other people by harming their persons, or by degrading their property.

Too often, however, the PPP is misdefined and misused to suppress private economic activity that benefits the parties directly involved and does no specific damage to other people, but which offends those who oppose human impact on the environment and prefer to leave resources undeveloped. The objective is to restrain the resource use at the expense of the property owners and consumers without cost to those who wish to see the resources remain idle.

Under such a misapplication of the PPP, very often "a polluter" is not someone who is harming others, but is someone who is simply using his own property and resources in a way that is not approved of by government officials or environmentalists. In such cases there is no harm to be measured and no real victims to compensate. Consequently, 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 politically disfavored activity to the degree desired by its opponents. And finally, the payment (whether there are real victims or not) typically goes to the government in the form of a tax. In other words, in most cases, the PPP is used as cover to promote a political or ideological agenda rather than to ensure that real polluters pay compensation to real victims of their activities.

VI. POLLUTER PAYS PRINCIPLE: AN ENVIRONMENTAL POLICY

The Polluter Pays Principle (PPP) is an environmental policy principle which requires that the costs of pollution be borne by those who cause it. In its original emergence the Polluter Pays Principle aims at determining how the costs of pollution prevention and control must be allocated: the polluter must pay.

Its immediate goal is that of internalizing the environmental externalities of economic activities, so that the prices of goods and services fully reflect the costs of production. Bugge (1996) has identified four versions of the PPP: economically, it promotes efficiency; legally, it promotes justice; it promotes harmonization of international environmental policies; it defines how to allocate costs within a State.

The normative scope of the PPP has evolved over time to include also accidental pollution prevention, control and clean-up costs, in what is referred to as extended Polluter Pays Principle. Today the Principle is a generally recognized principle of International Environmental Law, and it is a fundamental principle of environmental policy of both the Organization for Economic Co-operation and Development (OECD) and the European Community.

The polluter pays principle is simply the idea that we should pay the total social cost including the environmental costs. This requires some authority or government agency to calculate our external costs and make sure that we pay the full social cost. A simple example, is a tax on petrol. When consuming petrol, we create pollution. The tax means the price we pay more closely reflects the social cost.

The polluter pays principle is a way of 'internalizing the externality'. It makes the firm / consumer pay the total social cost, rather than just the private cost**. (Social cost = private cost** + **external cost)**.

VII. FUNCTIONS OF THE POLLUTER PAYS PRINCIPLE

There are a number of different functions which the principle can serve:

1. remediation of damage (restorative);

2. compensation for damage (redistributive);

3. prevention of pollution/damage, with market correction through the internalization of the 'external' consequences of polluting activities (preventative); and

4. as a deterrent (punitive).

VIII. APPLICATION OF THE POLLUTER PAYS PRINCIPLE

The PPP is normally implemented through two different policy approaches: command-and-control and market-based. Command-and-control approaches include performance and technology standards. Market-based instruments include pollution taxes, tradable pollution permits and product labeling. The elimination of subsidies is also an important part of the application of the PPP.

At the international level the Kyoto Protocol is an example of application of the PPP: parties that have obligations to reduce their greenhouse gas emissions must bear the costs of reducing (prevention and control) such polluting emissions.

Retrieved from http://www.eoearth.org/view/article/155292

IX. CASE LAWS ON POLLUTER PAYS PRINCIPLE:

A. In Canada

1. Imperial Oil Ltd. v. Quebec (Minister of the Environment), [2003] 2 S.C.R. 624, 2003 SCC 58

In 2003, the Supreme Court of Canada issued a judgment upholding the ability of the Quebec Minister of Environment to issue an order to Imperial Oil requiring it to assess contamination at a site previously owned by Imperial, with a view towards future remediation of the site. The site in question had been used for roughly 50 years as a petroleum products depot by Imperial. The depot had been shut down by Imperial, which sold the site to a purchaser who demolished the industrial buildings and subsequently transferred the property to a real estate developer. Ultimately the site was developed as residential properties, following remediation of the site by the developer in consultation with the Quebec Minister of Environment. Further contamination problems became evident on the site in the mid-1990s, and in 1998 the Minister of Environment issued an order to Imperial, as the former owner and operator of the site, to prepare and submit a report assessing the soil contamination and providing recommendations on future action. Imperial challenged the order, and the matter made its way to the Supreme Court of Canada for consideration on points of administrative law.

The key question addressed by the Supreme Court was whether the Minister of Environment had violated administrative law principles of procedural fairness and impartiality by issuing the order to Imperial. Before the order was issued, several of the residential property owners had initiated civil actions against the Minister for involvement in the site's remediation. Basically, Imperial's main argument was that the order was flawed and should be set aside due to bias on the part of the Minister, suggesting that by issuing the order to Imperial, the Minister avoided potential liability on his own part and was therefore in a conflict of interest.

As part of its determination of the application of the rules of procedural fairness to this case, the Supreme Court reviewed the legislative context in which the Minister issued the order to Imperial. It recognized the incorporation of the polluter pays principle in Quebec's Environment Quality Act and many other pieces of Canadian environmental legislation, indicating "that principle has become firmly entrenched in environmental law in Canada" and went on to examine the regulatory process under the Act for remediation of contamination. Ultimately, the Supreme Court's decision to uphold the order hinged on its finding that the Minister was exercising a primarily political role, rather than an adjudicative one, in choosing "the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation." Due to the nature of the Minister's role under the Act, he was not required to maintain the impartiality that the law would require of

a court, and was held to have met the requirements of procedural fairness in issuing the order to Imperial.

2. North Fraser Harbour Commission v. Environmental Appeal Board, 2005 SCC 1

In early 2005, the Supreme Court of Canada ruled on an appeal of a remediation order issued under the British Columbia Waste Management Act to B.C. Hydro and Power Authority (BC Hydro), a successor of a party involved in pollution of the site in question.9 The Act provides for retroactive liability for remediation of contaminated property. Industrial operations on the site took place over roughly forty years, until the late 1950s. BC Hydro was created in 1965 by the amalgamation of three corporate entities, including BC Electric Company. Activities of BC Electric Company were admitted by BC Hydro to have contributed to the site's contamination. While the legislation under which the disputed order was issued incorporates the polluter pays principle, the principle was not specifically mentioned in the judgment. The Supreme Court did not issue its own reasons, instead adopting the reasons of Justice Rowles, one of the dissenting justices when the matter was heard by the British Columbia Court of Appeal.10 BC Hydro had conceded that its predecessor would have been a "responsible person" under the Waste Management Act due to its activities at the site. Given that concession, Justice Rowles felt it was unnecessary to deal with the question of retroactive application of the Act and focused on the meaning and effects of corporate amalgamation. BC Hydro had argued that wording in the amalgamation agreement and supporting statute creating it had the effect of protecting it from liability attracted by the company's three predecessor corporations. Justice Rowles disagreed with this argument, indicating that much clearer wording would be required to immunize an amalgamated company from liability for the consequences of acts carried out by its predecessors. As such, the order against BC Hydro requiring remediation was upheld.

http://www.elc.ab.ca/pages/Publications/PreviousIssue.aspx?id=281

B. In India

1. Indian Council for Enviro-Legal Action v. Union of India, (1996) JT (SC) 196

The court recognized the polluter pays principle as a sound principle.

The Court observed, "We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country". In this case the number of private companies operated as chemical companies were creating hazardous wastes in the soil, henceforth, polluting the village area situated nearby, and they were also running without licenses, so an environmental NGO, filed writ petition under article 32 of the COI, which sought from the court to compel SPCB and CPCB to recover costs of the remedial measures from the companies.

The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on."

Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas".

The "**polluter pays**" principle as interpreted by the Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The court further stated that:

> "according to this principle, the responsibility for repairing the damage is that of the offending industry. Sections 3 and 5 empower the Central Government to give directions and take measures for giving effect to this principle. In all the circumstances of the case, we think it appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realisation and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment [Protection] Act, 1986. It is of course, open to the Central Government to take the help and assistance of State Government, R.P.C.B. or such other agency or authority, as they think fit."

2. M.C. Mehta v. Union of India, WP 3727/1985 (19 December, 1996)

The Supreme Court referred the case of Enviro-Legal Action and Vellore Citizens and ordered the Calcutta tanneries to relocate and pay compensation for the loss of ecology/environment of the affected areas and the suffering of the residents.

3. Vellore Citizen's case, AIR 1996 SC 2715

The court held that: The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty. Article 47, 48A and 51A(g) of the Constitutional are as under:

> Article 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular,

> the State shall endeavor to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
>
> Article 48A. Protection and improvement of environment and safeguarding of forests and wild life. - The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
>
> Article 51A(g). To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are : The Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), The Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment Protection Act 1986 (the Environment Act). The Water Act provides for the Constitution of the Central Pollution Control Board by the Central Government and the Constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. Also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the later part of this judgment.

4. Kamalnath's case (1997)1SCC 388

Court by considering the PPP as the law of the land ordered that: "It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts." Court disposed this matter by giving a show cause notice to the span motels, that, why Pollution-fine and damages be not imposed as directed by us. This case subsequently came up in front of the court in the 2000 AIR SCW 1854 and court directed to the span motels that: "The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions."

Henceforth, court directed a fresh notice to be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damage is not awarded for having committed the acts set out and detailed in the main judgment. Finally in **AIR 2002 SC 1515**, while granting exemplary damages court held that:

> Liability to pay damages on the principle of 'polluter pays' in addition to damages, exemplary damages for having committed the acts set out and

> detailed in the main judgment. Considering the object underlying the award of exemplary damages to serve a deterrent punishment for others not to cause pollution in any manner. So the quantum at Rs. 10 lakhs is fixed for the span motels.

http://www.legalserviceindia.com/article/l54-Interpretation-of-Polluter-Pays-Principle.html

C. In Australia:

That approach was also adopted in sentencing an offender who had committed the environmental offence of damaging and destroying a threatened species of plant, contrary to the ***National Parks and Wildlife Act*** **1974 (NSW). In** ***Bentley v Gordon, [2005] NSWLEC 695*** I referred to the decision in *Axer Pty Lt v Environmental Protection Authority* (1993) 113 LGERA 357. And stated:

> In the context of the conservation of threatened species, it is equally true to say that the object of the NPW Act is to prevent damage to threatened species and their habitat. Business must be arranged and precautions taken, to ensure that damage to threatened species does not occur. The cost of taking precautions to avoid damaging threatened species must become accepted as an ordinary cost of doing business. So, too, therefore, in assessing the amount of a fine for an offence involving damage to threatened species, considerations of this kind are to be taken into account. The fine should be such as, will make it worthwhile that the costs of taking precautions to avoid damaging threatened species are undertaken.