THE POLLUTER PAYS PRINCIPLE

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INTRODUCTION

Most of the industrial factory owners do not perceive an improvement in environmental conditions to be in their interest. If that interest is to be promoted it is not enough to merely remind them of their social responsibilities. Towards this purpose the Supreme Court in 1996 and 1997 delivered five landmark judgements[1] adopting the polluter pays principle in India as an improvement over the absolute liability principle.

The study focuses on the above mentioned cases together with developments in international treaty law that have contributed towards the evolution of the polluter pays principle. An improvement in environmental quality should be made in the interest of industrialists. The article suggests how this could be achieved economically through Market Based Instruments.

DEFINING POLLUTION

There are legislative definitions of what constitutes a pollutant in the Water (Prevention and Control) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Environmental Protection Act, 1986. The Water Act defines pollution as "such contamination of water...likely to create a nuisance or liable to render such water harmful and injurious to health" and the definitions in the subsequent legislations are similar. It is evident from these definitions that the emphasis is on the fact that pollution must have a tendency to cause harm, or must actually cause harm. Emissions *per se* are not pollution. Properly understood, pollution is the coercive imposition of a harmful waste product or emission onto another person or their property; it is a "trespass" under the principles of common law. If the trespass is so minor that it creates no harm or inconvenience to the property owner, it will normally be tolerated. Today's pollution dilemma is often the result of what is essentially a universal "easement" granted by the State to polluters, even to producers of significant and damaging pollution.[2] 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.

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1 *Indian Council for Enviro-Legal Action and others v. Union of India,* (1996) 3 SCC 212 , *Vellore Citizens' Welfare Forum v. Union of India,* (1996) 5 SCC 647, *M.C. Mehta v. Union of India* (1997) 2 SCC 353, *M.C. Mehta v. Union of India,* (1997) 2 SCC 411 and *M.C. Mehta v. Kamal Nath,* (1997) 1 SCC 388.

2 *Making the Polluter Pay*, http://www.cei.org/ebb/polluter/html.

WHAT IS THE POLLUTER PAYS PRINCIPLE?

The polluter pays principle is an extension of the principle of absolute liability. The principle of absolute liability is 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.[3] The polluter pays principle extends the liability of the polluter to the costs of repairing the damage to the environment. The polluter pays principle broadens the ambit of the principle of absolute liability.The importance of this principle is that the damage to the environment may be remedied and this is extremely essential to sustainable development. "The polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."[4]

THE EVOLUTION OF THIS PRINCIPLE IN INDIA

Despite the potential that the polluter pays principle holds to protect the environment, it was not a part of the law in India till it was invoked in the *Enviro-Legal Action*[5] case as late as 1996. In this case the court affirmed the principle of absolute liability as stated in the *Oleum Gas Leak*[6] case and extended it. The court laid down, "The polluter pays principle demands that the financial costs of preventing or remedying the damage caused by pollution should lie in the undertakings which cause the pollution or produce the goods that cause the pollution." The judgement of the above case on the polluter pays principle and the justification for invoking it was reaffirmed by another Bench in 1996, in the case of *Vellore Citizens Welfare Forum v. Union of India*.[7] In these cases the use of the polluter pays principle has been justified via the constitutional mandate,[8] statutory provisions[9] and international customary law.[10]

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

4 *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212 at 215.

5 *Id.*

6 *Supra* n. 3, hereinafter referred to as the *Oleum Gas Leak Case*.

7 (1996) 5 SCC 647. In this case tanneries and other industries in the state of Tamil Nadu were discharging untreated effluents into the agricultural fields, roadsides, waterways and open lands. The untreated effluents were finally discharged into the River Palar, which was the main source of water supply to the residents of that area.

8 Under Article 21 and Article 47. The most relevant provision invoked was Article 48-A, which states that the State will endeavour to protect and improve the environment, and Article 51-A(g) which ensures the protection of the natural environment.

9 The Water Act, 1974, the Air Act, 1981 and The Environmental Protection Act, 1986.

10 *Infra*.

THE PRINCIPLE AS A FEATURE OF CUSTOMARY INTERNATIONAL LAW

The polluter pays principle was promoted by the Organisation for Economic Cooperation and Development (OECD) during the 1970s[11] when there was a great deal of public interest in environmental issues which resulted in demands on the Governments and other institutions to introduce policies and mechanisms for the protection of the environment.[12]

The modern day principle of polluter pays was first incorporated in Principles 21[13] and 22[14] of the Stockholm Declaration, 1973.[15] Thereafter, the European Charter on the Environmental and Health, 1989[16] and the Single European Act, 1986[17] made provisions for applying the polluter pays principle. The United Nations Conference on Environment and Development, 1992[18] in Principle 15 incorporates the polluter pays principle. More recently the member states of the Council of Europe and the European Economic Community adopted the Convention on Civil Liability For Damage Resulting from Activities Dangerous to the Environment,[19] which specifically deals with transboundary pollution. It must be remembered that every breach of international law gives rise to an

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11 OECD:Principles On The Environment.Ministerial Meeting of the OECD, adopted on May 24-26, 1972. *cf* 11 ILM 1172-73 (1972).

12 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 the activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.

13 States shall cooperate to develop further the international law regarding liability and compensation for victims of pollution and environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.

14 The Charter provides that environmental standards should be constantly revised in light of new knowledge and new economic conditions applying the polluter pays principle whereby any public or private entity causing or likely to cause damage to the environment is financially responsible for restorative or preventive measures. *cf* Alexander Kiss and Dinnah Shelton, *International Environmental Law* 66 (1991).

15 11 ILM 1416 (1972).

16 The Rio Declaration on Environment and Development *c.f.* 31 ILM 876 (1992).

17 States shall develop national laws regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in a more determined manner to develop further international law regarding liability and compensation for adverse affects of environmental; damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

18 31 ILM (1992).

19 Object statement: "considering that emissions released in one country may cause damage in another country and that therefore the problems of adequate compensation for such damage are also of an international nature...having regard to the desirability of providing for strict liability in this field and taking into account the polluter pays principle."

obligation to make reparations.[20] Although traditional norms of state responsibility concern the treatment of aliens and their property, the *Trail Smelter*[21] arbitration recognised that the principle of state responsibility is applicable in a field of transfrontier pollution and consequently states may be held liable to private parties or other states for pollution that causes demonstrable damage to persons or property.

The question that gains importance is whether the mere presence of a principle in a few instruments can have the effect of giving it the status of customary international law?

The International Court of Justice in the *North Sea Continental Shelf Case*[22] delivered a landmark judgement determining whether a particular provision in a treaty had acquired the status of customary international law, thereby making it binding on those nations who are not signatories to the treaty concerned. According to the decision, state practice and *opinio juris* can enable a treaty to acquire the status of customary international law. The former requires that there be widespread acceptance by nations of the new norm and the latter signifies that the practice must have been rendered obligatory by the existence of the rule of law requiring it.[23]

The fact that 153 states were signatories of the Rio Declaration does not make the principle in the declaration one of international customary law. What is required is a demonstrable willingness to adhere to it and the practice of nations must alter according to the prescriptions of the new norm for it to attain the status of international customary law.[24] In the absence of any clear intent among nations, incorporating the above two requirements of customary international law, one wonders how the principle of polluter pays has been incorporated into municipal law.

Therefore the principle of polluter pays stands on a weak legal foundation, mainly because its salient features have yet to be finalised by international law jurists.[25]

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20 *Chorzow Factory (Indemnity) Case, (*1928) PCIJ Ser. A.No.17, p.29. "Reparation must in so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. Restitution in kind or if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."

21 1969 ICJ 3.

22 The *North Sea* Case was followed by subsequent decisions of the World Court. *See* Advisory Opinion on the Legality of the threat of Nuclear Weapons, ICJ Communique No. 96/23 (July 3, 1996).

23 Geoffrey Palmer, *New Ways to Make International Environmental Law*, Am J Int'l L 259, 265 (1992).

24 *Vellore Citizens Case*, (1196) 5 SCC 47 at para 10.

25 Both the relevant judgements fail to lay down a standard by which the damages in the case of environmental restoration are to be estimated.

THE ROLE OF MARKET BASED INSTRUMENTS

The development of the polluter pays principle must also include mechanisms to safeguard against its potentially harmful effects while at the same time reduce uncertainties about its economic impact.

Economists have expressed reservations about the economic viability of the polluter pays principle. Noted economist Kirit Parikh cites four reasons:

1. 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.

2. 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.

3. Representing a larger objection to the inclusion of Polluter Pays 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.

4. 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.[27] To offset the potential economic harm, the principle must be implemented via Market Based Instruments.[28] The main aim of this is to induce efficiency in environmental management through the use of market mechanisms.

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26 Kirit Parikh, *The Polluter Pays Principle for Developing Countries: Merits, Drawbacks and Feasibility c.f.* Vinod Rege, *GATT Law and Environment Related Issues Affecting the Trade of Developing Countries*, 26 J World Trade 95 at 150 (1994).

27 Gupta, *Opt for Market Based Instruments*, The Economic Times 6 (September 8, 1997), Bangalore.

One of the suggested mechanisms to achieve the above mentioned goal is an environmental assurance bond.[29] This is a bond that would provide a contractual guarantee that the principal would perform in an environmentally benign manner, but would be levied for the current best estimate of the largest potential future environmental damages. Funds in the bond would be invested and would produce interest that would be returned to the principal. The bond would be held till the uncertainty or some part of it was removed.[30] This would provide a strong incentive for the principal to reduce the uncertainty of the environmental impact of their activities as quickly as possible, by changing technology to being more environment friendly. The bonds could be administered by an independent regulatory authority, similar to that of the Pollution Control Board.

A potential argument against such bonds is that it would favour relatively large firms that could afford to handle the financial responsibilities of activities potentially hazardous to the environment. But this will prevent firms that cannot handle the financial imposition from passing on the cost of the environmental damage to the public.[31] This does not however exclude small firms from the ambit of this principle. It is desired that these firms bond together to handle financial responsibility for environmental damage. They may also feel it is more profitable to switch to less risky activities or technology that does not require such high assurance bonds.[32]

CONCLUSION

The judgements of the Supreme Court undoubtedly go a long way in reaffirming the commitment of the judiciary in protecting the environment and remedying the ill-effects of pollution. However, the court has erred in the manner in which it has adopted the polluter pays principle, as one of international customary law without demonstrating how the principle actually fits into the ambit of international law.

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28 Hereinafter referred to as MBIs.

29 Attilio Bissio and Sharon Boots (Ed.),*The Wiley Encyclopedia of Energy and the Environment*, 685 (1997).

30 A similar legislation has been enacted in India, in 1991. The Public Liability Insurance Act, 1991. According to S.4(1) of the Act every owner shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief under S.3(1). Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in the Schedule for such death, injury or damage.

31 Robert Costaza,General Policies To Achieve Sustainability, http://csf.colorado.edu/authors/hanson/ p.8.

32 Environmental costs are referred to as negative externalities because they are external to the decision making process. As per the polluter pays principle a particular standard is issued which must be complied with. The compliance results in costs, which in the case of absolute liability are calculated only when the damage occurs, unlike the polluter pays principle, where the cost is a continuous calculation.

The drawbacks of the polluter pays principle as laid down by the Supreme Court are that there is no gradation system prescribed so that the Polluter Pays Principle can also have a deterrent effect on the industries. It is important for it to be financially unviable to violate environmental protection laws. Thus in addition to evaluating the cost of reparation of the damage, the size of the industry must also be considered so that the penalty can be graded accordingly. This is the only way to ensure that the polluter pays principle will have a deterrent effect on large industries, as often the damage to the environment is irreparable.

Nevertheless, the polluter pays principle has set the stage for efficiency based environmental management, through the use of market mechanisms. The authors have identified three challenges that need to be countered to make the polluter pays principle effective, that the Supreme Court did not address-

1) To develop scientific methods to determine the potential costs of uncertainty vis-à-vis environmental damage.

2) To adjust incentives so that the appropriate parties pay the cost of this uncertainty.

3) To offer appropriate incentives to reduce the detrimental effects of the high risk activity.

As strict liability for environmental damages becomes the norm, clairvoyant firms must take measures to protect themselves. The polluter pays principle is an improvement on strict liability because it explicitly moves the costs to the present where they will have a great deal of impact on decision making.

In lieu of the logic, fairness and efficiency of the polluter pays principle, it promises to be both practical and feasible in helping us ward off the impending environmental crisis.