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Polluter pays principle; A jus cogen or customary international law

Christopher M Inwang
LLB, BL, LLM, PhD (Adjunct Lecturer, Faculty of Law, University of Uyo, Nigeria

Abstract
As norm of customary international law, any breach of international law gives rise to obligation to make reparation. Polluter-pays principle (PPP), in environmental law, refers to the principle that if pollution occurs, the person or organization that caused the pollution should pay for the consequences of the pollution and for avoiding it in future. The principle insists that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment, the principle is also known as extended polluter responsibility (EPR). It is one of the precautionary principles for prevention of environmental damage. The polluter pays principle performs dual functions of preventing, or remediation, if pollution occurs. The principle started out as an economic principle adopted by Organisation for Economic Cooperation and Development (OECD). Internationally, the principle was first incorporated into 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. PPP has been incorporated into domestic environmental legislation of most states. PPP and the general policy of internalising environment costs cannot be treated as a rigid rule of universal application, nor are the means used to implement it the same in all cases, therefore non-binding. The work appraises the Polluter Pays Principle (PPP) as a feature of customary international law.

Keywords: customary international law, polluter pays principle (PPP)

Introduction

Principles of international environmental law are 'reflected in treaties, binding acts of international organizations, state practice, and soft law commitments, opinions of international law writers, writings of internationallaw publicists, pronouncements of courts of international jurisdiction, etc; these are potentially applicable to all members of the international community.'[1] Some of them are universally accepted and frequently endorsed in state practice. Article 38[2] of the Statute of International Court of Justice recognises 'general principles of law recognized by civilized nations' as a source of law. General principles fill the gapsnot already covered by treaty or custom under international law. Courts, therefore, rely on general principles in the absence of treaty or customary law. After World War II, the geographical, industrial and scientific scenario of the world dramatically changed. The emergence of modern industrial society resulted in urbanisation with resultant tremendously negative effect on the global environment [3]. The international community became concerned and therefore recognised certain legal principles so as to contain the damage, and also ensure environment protection. The principles include; sustainable development, intergenerational equity, intra-generational equity, prevention of harm, common but differentiated responsibility, precautionary principles, polluter pays principle, the right to a healthy environment and access to information and public participation in environmental decision-making. Each of these principles must be interpreted in terms and the significance of their legal status should be considered taking into account the textual content, the transparency of the language and the circumstances of their creation. In the overall context of environmental governance, many of these general principles are of less importance, but some play a veryimportant role in protecting the environment and many states have already declared their allegiance to them [4].

The fact that atmospheric pollution as a negative externality resulting from human activities into the global commons is accepted universally, without any contestis indisputable. Additionally, the fact that the sink capacity of the atmosphere is limited and the limited capacity tends to be overwhelmed is also accepted overwhelmingly by the global community of scientists and policy-makers. However, there is no consensus about the fundamentalsolution to this intractable problem. The UNFCCC Article 3.1 did not directly include the PPP as its provision, the fundamental principle of 'equity and common but differentiated responsibility based on respective capabilities (CBDR + RC)' implicitly recognises this principle [5].

Polluter Pays Principle (PPP) is one of the precautionary principles of international environmental law for the control and protection of the human environment. A variety of principles are used in environmental management. The principle helps to provide guide and shape the way persons/ corporations interact with the environment as nations develop. Other principles include; User pays principle (UPP) (or resource pricing principle-RPP); Precautionary principle (PP); Subsidiary principle (SP); Intergenerational equity principle (IEP) and Cradle to the grave principle.

Some authors view PPP as an economic, ethical and legal instrument which has the potential of effecting global responsibility for adaptation and mitigation [6]. The principle operates either as 'soft law' where they act as strategic principles in environmental policies, or as 'hard law' where they are legislated into the municipal legislation and hence enforceable or both. It is also an anchor of sustainable development and ensures that the environment is not

sacrificed on the altar of economic development, developers must pay for any untoward damage which the development occasions. The Principle calls for anyone who disturbs or spoils the environment in any way to take the necessary corrective measures to rectify the environment or pay for the cost of remediation, and is based on the moral basis of responsibility bearing in mind that the environment has so many uses to different people and the capacity to do so must not be compromised by other people's activities.

The Polluter Pays Principleis at the core of sustainable development and promotes economic efficiency in the implementation of environmental control policies and also encourages businesses to control pollution in their activities. The principle creates the burden of proof in demonstrating the fact that given that a particular technology, practice or product is safe should lie with the developer, not the general public [7]. The principle is both preventive and compensatory in nature and may entail fixing criminal responsibility on polluter, to make him make good the harm or pay eco-tax or carbon tax or at least participate in preserving the environment in some way.

Historical Analysis of PPP

The polluter pays principle was first referred to at the international level explicitly 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).

The modern day principle of polluter pays was first incorporated in Principles 21[8] and 22[9] of the Stockholm Declaration, 1973[10]. Thereafter, the European Charter on the Environment and Health, 1989[11] and the Single European Act, 1986[12] made provisions for applying the polluter pays principle. The United Nations Conference on Environment and Development, 1992[13] in Principle 15 explicitly incorporates the polluter pays principle. This laid the historic and monumental foundation for the adoption and acceptability of the principle as state practice and subsequently accorded international municipal judicial notice.

The long held tradition of law must be remembered, that 'every breach of international law gives rise to an obligation to make reparations' [14]. This may have inspired the drafters and proponents of the principle to adopt, modify and expand this principle as an instrument for environmental control. Although traditional norms of state responsibility concerns the treatment of aliens and their property, the *Trail Smelter* [15] arbitration recognised that the principle of state responsibility is applicable in a field of transfrontier pollution and consequently argues that states may be held liable to private parties or other states for pollution that causes demonstrable damage to persons or property.

Application of PPP in Specific Disasters

The polluter pays principle was not applied in most of the notable environmental disaster which claimed innumerable lives in some part of the world. An environmental disaster occurred in the Union Carbide India Ltd.'s (UCIL)Sevin (pesticide) production factory in 1976. The factory used methyl isocyanate as an intermediate for production. A few years later, a worker died due to accidental inhalation of a large amount of toxic phosgene gas from the factory.Unfortunately, regulators failed to make thecompany liable to restore the environment by applying the 'polluter pays' principle even when the gas caused further environmental problems.

Exxon Valdez Disaster is thankfully an example of the application of PPP in the US. In 1989, the oil tanker ran aground and over 300,000 barrels of crude oil poured into Alaskan waters. Exxon was required to pay 125 millionUSD in fines to the US Federal Government and the state of Alaska, as well as 900 millionUSD for a fund to be doled out by government officials for environmental projects, among other things. In addition, Exxon was put under tremendous political pressure to restore the shoreline. It thus engaged in an extensive and costly clean-up operation, though with controversial results.

Chernobyl Disaster is probably the first set of fatalities that occurred after Hiroshima and Nagasaki. ThoughChernobyl forced the world to pay attention to the dangers of nuclear power, sadly its lessons are being forgotten today. However, application of the principle in the Chernobyl disaster is doubtful.

It must be emphasised that though the polluter pays principle was not applied adequately in every notable case of environmental disaster, it does not defeat the acceptance and universal acknowledgement of the principle as an important approach to achieve environmental protection.

The Legal Status of the Polluter Pays Principle

The question is; whether the mere presence of a principle in a few international instruments can have the effect of giving the principle a status of customary international law? The question is however not capable of a precise answer without a voyage on the processes of according recognition to international law, what constitutes international law or the recognisable sources of international law, the law of nations.

A thoughtful point to begin the journey is the grundnorm of the sources of international law. Article 38(1) of the Statute of the International Court of Justice, ICJ, divides the sources of international law into two; the primary sources and secondary sources. The primary source, conventions (or treaties), customary law, and general principles recognized by civilized nations.

On the other hand, judicial decisions and the teachings of highly qualified publicists are listed as merely secondary sources. Treaties are the most prominent sources of international law and are the only source available to two or more States that want to formally enter into legal relations. Customs are the general practices of States, which are accepted as law. International customary law comes into play when a specific way of behaving is, firstly, followed as a general practice among States; and, secondly, accepted by those States as legally binding. Naturally, the absence of an international 'law maker' has made customs a particularly important source of international law. Unless a State persistently objects, customary law binds all States. Similarly, 'general principles of law recognised by civilised nations' are useful sources for courts to rely on when there is no sufficiently articulated law available. These were inserted into article 38 as 'gap fillers' by drafters of the PCIJ Statute to compensate for situations where treaties and customs were insufficient to provide the legal answers [16].

On the other hand, judicial decisions and scholarly articles are subsidiary rules that are reflected in article 38(1) (d). On the former, and article 59 of the Statute notwithstanding (which states that stare decisis is not part of international

law), it is averred that judicial decisions actually play an essential role in ICJ's decisions. The ICJ has also relied upon international law commission reports. Since judicial decisions and scholarly articles are secondary obligations, judges will only turn to them in situations where they do not succeed in finding authority in one of the other sources [17].

The International Court of Justice in the *North Sea Continental Shelf Case* [18] 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 which are not signatories to the treaty. 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 [19].

The argument is that the fact that 153 states were signatories of the Rio Declaration which introduced the principle does not make the principle in the declaration one of international customary law and that 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 [20]. It is further argued that in the absence of any clear intent among nations, incorporating the principle, one wonders how the principle of polluter pays has been incorporated into municipal law, the argument concluded that the principle of polluter pays, therefore, stands on a weak legal foundation, mainly because its salient features have yet to be finalised by international law jurists. This argument, however loses sight of the objective of the principle in the light of the overwhelming need for environmental protection and by extension protect life. The argument has not taken into consideration the uncountable number of countries that have incorporated the principle into the municipal laws to comply with the sustainable development requirement of state policies.

Jus cogens norms: A source of Article 38(1) or external obligations?

The first external source of law applied by courts is *jus cogens* norms, also known as peremptory norms. *Jus cogens* operate as a form of public order in that they protect the legal system from incompatible laws, acts, and transactions. Some of the significant *jus cogens* norms include; the prohibition of genocide, torture, a ban on slavery; the prohibition of aggression, the right to self-determination, a ban on piracy, and devastating cases of environmental harm. *Jus cogens* hold an authoritative status as an external source outside of article 38. In fact, academics such as Alexander devotes a great deal of energy to the idea that the power of states to make treaties runs out when it confronts a superior customary norm of *jus cogens*. This is also affirmed by article 53 of Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331) which states that: 'a treaty is void if it, at the time of its conclusion…conflicts with a peremptory norm of general international law, a norm from which no derogation is permitted.' Similarly, according to article 64: 'if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.Thus, it the opinion of this article that The polluter pays principle hasenjoyed goodwill of the states in their practice overtly and covertly and has therefore assumed the jus cogens rule.

The initiative to promote the polluter pays principle, taken by the OECD during the 1970s, has subsequently been widely endorsed in relation to the protection of the global environment. In essence, it could be said to be based on three elements: the need for preventive action; the need for environmental damage to be rectified at the source; andthat the polluter should pay.

However, the precise scope of the principle, and its implications for those involved in potentially polluting activities, has never been satisfactorily agreed. Furthermore, it is not yet unquestionably accepted as a principle of international law. For example, according to Sands, the polluter pays principle is yet to receive broad geographic and subject-matter support over the long term. He has serious doubts whether the principle has achieved the status of a generally applicable rule of customary international law. On the other hand, there is strong support among academics, who have expressed the view that the polluter pays principle has obtained significant endorsement from a large number of states and international organisations. For example, Birnie and Boyle are of the view that as a policy the polluter pays principle represents an important strategy for controlling environmentally harmful activities by emphasising responsibility for their true economic costs and complementing the more obvious regulatory measures adopted under global and regional treaties [21]. Grossman has stated that the polluter pays principle has developed legal status and is now considered as a general principle of international environmental law [22].

Application of the Polluter Pays Principle

Example of some countries that have adopted the principle will be attempted to show the widespread goodwill that the principle enjoys;

Australia

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 [23].

The polluter pays principle is set out in the Treaty on the Functioning of the European Union [24] 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; member states were allowed three years to transpose the directive into their domestic law and by July 2010 all member states had completed this [24].

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.' [25]

In Ghana, the polluter pays principle was adopted in 2011 [26]; in Sweden, the polluter pays principle is also known as extended producer responsibility (EPR). This is a concept that was probably first described by Thomas Lindhqvist for the Swedish government in 1990 [27]. EPR seeks to shift the responsibility of dealing with waste from governments (and thus, taxpayers and society at large) to the entities producing it. In effect, it internalised the cost of waste disposal into the cost of the product, theoretically meaning that the producers

will improve the waste profile of their products, thus decreasing waste and increasing possibilities for reuse and recycling.

Based on the polluter pays principle [28] binbags (for municipal solid waste) are taxed with pay-per-bag fees in three quarters of the communities) and the recycling rate doubled in twenty years).

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 [29].

The principle is employed in all of the major US pollution control laws: Clean Air Act [30], Clean Water Act [31], Resource Conservation and Recovery Act (solid waste and hazardous waste management), and Superfund (cleanup of abandoned waste sites).Some eco-taxes underpinned by the polluter pays principle include:the Gas Guzzler Tax for motor vehicles; Corporate Average Fuel Economy (CAFE), a "polluter pays" fine; and the Superfund law requires polluters to pay for cleanup of hazardous waste sites, when the polluters can be identified [32].

The Zimbabwe Environmental Management Act of 2002 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.

Nigeria's National Policy on the Environment recognises the polluter pays principle. It provides that: 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 must be built on the following sustainable development principles: …. The polluter pays principle which suggests that the polluter should bear the cost of preventing and controlling pollution [33].

Conclusion

It can be concluded that the international community has accepted the polluter pays principle as a strategic tool for the environment protection and the principle has emerged as a customary rule of international law. However, it is also safe to extend the frontiers of this argument to make it logical and convincing. The principle has been recognised as a general principle of international environmental law in notable international environmental agreements since 1989 with the OECD Council Recommendation to protect human health and the environment. The principle has been applied since its inception to require the producer and/or resource user to meet the costs of implementing an environmental standard. Where it is required, the resource user should also meet the necessary expenses for implementation of technical regulations. The 'polluter pays' principle has been the commonly accepted practice that require those who produce pollution to bear the costs of managing it to prevent damage to human health or the environment and underpins most of the regulation of pollution affecting land, water and air. The Principle has now assumed the status of a custom and has received strong support in most OECD and EU countries, a fundamental principle in the US environmental Clime. Several countries have adopted and incorporated the principle into their municipal law particularly the environmental legislation thereby ensuring that market forces take the cost of environmental control into account and that resources would be allocated accordingly in production and consumption of goods.Courts have also accorded judicial notice to the principle. The Supreme Court of India, for example, first time applied and defined the polluter pays principle in the 1996 case of *Indian Council for Enviro-Legal Action &Ors v Union of India &Ors.* In the case filed by an environmental organisation to bring to light the suffering of people living in the vicinity of chemical industrial plant in India, the presiding judge, Justice Dalveer Bhandari pronounced that reversing the imbalance caused to the ecology is part and parcel of the industrial process. The above position is to buttress the fact the polluter paid principle has assumed the status of state practice and custom practised by a widespread of civilised states within the international community. The article concludes that the principle has assumed the status of customary international law, *juscogens*for the protection of the human environment.

References

1. Sands P. Principles of International Environmental Law, 2nd edition, Cambridge: Cambridge University Press, 2003, 231.
2. Article 38 The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
3. Rao AS. 'Enforcement of Environmental Laws', AIR Journal 88. 2001; 222-4: 222
4. Sands P. Principles of International Environmental Law I: Frameworks, Standards and Implementation, Manchester: Manchester University Press, 1995, 183.
5. Mizan R Khan. Department of Environmental Science and Management, North South University, Bashundhara, Dhaka 1229, Bangladesh; E-Mail: mizan.khan@northsouth.edu; Tel.: +88-017-130-383-06
6. Ursula Kettlewell. "The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter-Pays Principle." Colorado Journal of Environmental Law & Policy 3, 1992, 429-78.
7. http://www.sustainable-environment.org.uk/Principles /Objectives.php 30.01.2021.
8. The polluter should bear the expenses of carrying out the. measuresdecided by public authorities to ensure that the environment is in an acceptable state.
9. '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.'
10. Alexander Kiss and Dinnah Shelton, International Environmental Law 66 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, 1991.
11. ILM 1416, 1972. https://www.asil.org/eisil/ declaration-united-nations-conference-human-environment. 30.01.2021.
12. The Rio Declaration on Environment and Development cf. 31 ILM 876, 1992.
13. States shall develop national laws regarding liability and compensation for the victims of pollution and other environmental damage.
14. 31 ILM (1992).http://heinonline.org/HOL/Page?handle =hein.journals/intlm31&div=114&g_sent. 30.01,2021.
15. Chorzow Factory (Indemnity) Case, pcn Ser. A. "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. 1928; 17:29.
16. 1969 ICJ 3.
17. Israr Khan, Article 38 of the Statute of the International Court of Justice: A Complete Reference Point for the Sources of International Law.
18. Ibid (note 16).
19. 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.
20. Geoffrey Palmer, New Ways to Make International Environmental Law, Am J Int'l L 259, 265, 1992.
21. Vellore Citizens Case, 5 SCC 47 at para 10, 1196.
22. Birnie and Boyle, p. 111.
23. Rosso Grossman M. ‘Agriculture and Polluter Pays Principle’, Netherlands Comparative Law Association, p. 2. Online. Available HTTP: < http://www.ejcl.org/ 113/article113–15.pdf > (accessed 21 January 2021).
24. Protection of the Environment Administration Act 1991, section 6(2) (d) (i) [1].
25. Article 191(2) TFEU
26. European Commission, Environmental Liability, accessed 31January 2021
27. Charter for the Environment, Constitutional Council, assessed 31 January 2021.
28. Ghana Business News, Cabinet approves Polluter Pays Principle, 8 December 2011, accessed, 2021.
29. International Institute for Industrial Environmental Economics at Lund University, Sweden (2000)."Extended Producer Responsibility in Cleaner Production" Archived 2014-05-13 at the Wayback Machine Doctoral Dissertation, 2000.
30. In French) AïnaSkjellaug, "L’autre or de la Suisse, sesdéchets", Le temps, Tuesday 6 September 2016 (page visited on, 2021.
31. The Environmental Damage Regulations: Preventing and Remedying Environmental Damage.
32. ‘Air Enforcement’. Washington, D.C.: US Environmental Protection Agency (EPA). 31 January, 2021.
33. ‘Water Enforcement". EPA. 30 January, 2021.
34. The Buck Stops Here: Polluters are paying for Most Hazardous Waste Cleanups. Superfund Today (newsletter) (Report). EPA. June 1996. EPA-540-K-96/004.
35. Paragraph 1 Nigeria’s National Policy on the Environment.