

EVOLVING PRINCIPLE OF POLLUTER- PAYS IN ENVIRONMENTAL JURISPRUDENCE

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I. INTRODUCTION

The emerging environmental crisis has necessitated the evolution and implementation of principles which transcends the national boundaries. The polluter pays is one such principle which is playing a significant role in strengthening of national and international environmental jurisprudence. This principle is a driving force behind the process of shaping environmental policy and confronting ecological crisis. It has gained recognition as guiding norm of environmental policy at international level especially in developed economies.¹ The Indian Supreme Court has also specifically addressed and applied this principle in a number of its decisions in last one decade.²

Polluter Pays Principle is one of the economic and administrative measures to restrain and contain the pollution problem. The basic idea underlying polluter pays principle is that those who cause damage or harm to man and environment should pay for it. This basic proposition appeals directly to our common sense of justice.

However putting this seemingly innocuous idea into practice demands answer to certain questions – how to apply this principle to various types of environmental harms; identifying polluters; how much the polluters should

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¹ Article 1.2.1, § 2, Flemish Act, 1995 contains general provisions concerning environmental policy: 'Environment policy shall seek to achieve a high level of protection.... It shall based on *inter alia* - the polluter pays principle'. Article 4 of Federal Act, 1999 concerning protection of marine environment in marine areas under Belgian jurisdiction defines the principle as implying that 'the cost of preventing, reducing and controlling pollution, as well as the cost of reparation of damages are to be borne by polluter'. Also see Article L 100-1 of the French Environmental Code.

² *Indian Council for Enviro-legal Action v. Union of India*, AIR 1996 SC 1466; *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715; *M. C. Mehta v. Union of India*, AIR 1997 SC 714 (*Taj Trapezium case*); *S. Jagannath v. Union of India*, AIR 1997 SC 811; *M. C. Mehta v. Kamal Nath* (1997) 1 SCC 388; *M. C. Mehta v. Kamal Nath* (2000) 6 SCC 213; *M.C. Mehta v. Kamal Nath* (2002) 3 SCC 653; *Research Foundation for Science Technology and Resources Policy v. Union of India and Another*, 2005 (1) SCALE 87.

pay; and to whom they should pay. The answer to these questions is not free from complexity.

These complexities in finding precise meaning and scope of polluter pays can be broadly categorized as follows:

- (i) Types of environmental harms – It is comparatively easy to make reparation when the victims of polluting activity are human beings or goods. But can one calculate harm caused to water and air? When the harm is exclusively to nature i.e. to flora and fauna, the application of polluter pays principle becomes difficult. There are no specific guidelines for making anyone liable for loss of a certain plant or animal species.
- (ii) Who is polluter? – in cases of accumulated pollution there is no method to find out the polluter or how to fix responsibility. For example, the Yamuna River in Delhi is polluted from diverse sources such as domestic waste to industrial effluents. Also there is question of equity involved in dealing with such pollution. This becomes especially relevant when this principle is sought to be applied between developed and developing world. The developed countries are already enjoying the fruits of economic progress and now they want developing countries to accommodate environmental concerns in their quest for economic development. Also it may be noted that many of multinational corporation locate their polluting processes in developing countries in order to avoid more strict liability regimes of their own countries.
- (iii) How much to pay? – Usually the capacity of an enterprise is limited. As such it may not always be easy to recover full environmental costs. There is a need to create funds for this purpose. Various techniques ranging from environmental taxation to insurance could be explored for this purpose.
- (iv) Relationship with traditional liability principles – The traditional legal liability is based on fault³. But in case of polluter pays principle the strict liability works much better. In India the absolute liability principle has been upheld by Supreme Court for deciding the obligations of a polluter under polluter pays principle.

³ Liability based on fault can only be imposed if intention or knowledge on the part of polluter is proved. This liability has proved ineffective in controlling environmentally damaging activities.

II. CONCEPTUALIZATION OF POLLUTER PAYS PRINCIPLE

Liability is founded on the basis that polluters are responsible and accountable to others for their actions. In simple terms one can say that since you have polluted, pay for clean up. This means that the application of the principle is limited to specific circumstances usually involving identifiable damage to others or to property. This restrictive meaning to polluter pays principle can hardly be justified considering the immensity of environmental problems. In its wider sense the polluter pays principle demands complete reparation of environmental damage thereby serving not only curative function but preventive and anticipatory as well.

It has been difficult to agree on a precise and fixed meaning of this principle. However, there can be no denying of the fact that a broad understanding about validity of this principle at national and international level has emerged. This general acceptance of this principle at international and national level cannot be overlooked. This acceptance coupled with increasing utilization of this principle would certainly help in clarifying the meaning and scope of this principle.

The polluter pays principle first articulated in early 1970's, was an economic rule of cost allocation whose genesis lies in the theory of externalities⁴. It requires the polluter to 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 it is shifted to the community as a whole.⁵

Accordingly, the purpose of polluter pays principle is to force polluters to bear the real costs of their pollution, though such costs often are difficult to calculate precisely. In theory, measures based on polluter pays principle encourage producers of pollution to make cleaner products or to use cleaner technologies.

A. Organization For Economic Cooperation and Development

The polluter pays principle first adopted in 1972 by OECD (organization for economic cooperation and development), was prompted by

⁴ Many economists claim that much environmental harm is caused by producers who "externalize" the costs of their activities. For example, factories that emit unfiltered exhaust into the atmosphere or discharge untreated chemicals into a river pay little to dispose of their waste. Instead, the cost of waste disposal in the form of pollution is borne by the entire community.

⁵ Nicolas de Sadeleer, ENVIRONMENTAL PRINCIPLES FROM POLITICAL SLOGANS TO LEGAL RULES (Oxford University Press, 2002) at 21.

a desire to increase free market efficiency rather than to promote environmental protection. The OECD Council's Recommendations on Guiding Principle concerning International Aspects of Environmental Policies clearly state that the polluter should "bear expenses of carrying out (preventive & control) measures decided by public authorities to ensure that environment is in acceptable state"⁶. Thus the purpose of OECD policy and recommendation on the subject was to internalize the economic cost of pollution control, clean-up and protection measures and to assure that the Government did not distort international trade and investment by subsidizing these environmental costs.

OECD Council decided in a 1989 Recommendation on the Application of Polluter Pays Principle to Accidental Pollution that the principle would no longer be applicable to only sustained pollution. The cost of measures to prevent and combat acts of accidental pollution should be charged to all potential agents⁷. However, the accidental polluters were also expected to pay only the cost of reasonable measures taken by authorities.

OECD Council in a 1991 Recommendation on Uses of Economic Instruments in Environmental Policy admitted "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"⁸. It is satisfactory to note that under this recommendation, the polluter has been made liable to pay the cost of damage arising from the pollution apart from the cost of prevention and control measures. This is a progress in right direction as the scope of polluter pays principle is getting expanded.

B. European Community

One of the general principles approved by the European Council in 1973 when adopting the first Environmental Action Programme was that of the "polluter pays". The Council recognized that the costs incurred in preventing and suppressing nuisances fall as a matter of principle to polluter.⁹ The European Community's commitment to the polluter pays principle was reaffirmed by Article 130 R of Single European Act and the Maastricht Treaty.¹⁰

⁶ 1972 Recommendation, Annex A (a) (4); 1974 Recommendation, 1(2).

⁷ C (89) 88 (Final), OECD, 1989.

⁸ C (90) 177 (Final), OECD, 1991.

⁹ Stanley P. Johnson, Guy Corcelle, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* (Kluwer Law International, 1995) at 374.

¹⁰ *Id.* at 376.

The draft recommendations regarding “cost allocation and action by public authorities on environment matters” sent by European Commission were adopted by European Council on 3rd March 1975. Some of the important rules provided in these recommendations regarding application of polluter pays principle are—

- (i) All natural or legal persons governed by public or private law who are responsible for pollution must pay the cost of such measures as are necessary to eliminate that pollution or to reduce it.
- (ii) A polluter is someone who directly or indirectly damages the environment or who creates conditions leading to such damages.
- (iii) The purpose of charges shall be to encourage the polluter to take the necessary measures to reduce the pollution he is causing as cheaply as possible and or make him pay his share of the costs of collective measures, for example purification costs. Charges should however be fixed so that primarily they fulfill their incentive function.
- (iv) Income from charges may be used either to finance measures taken by public authorities or to help finance installations set up by an individual polluter, provided that the later, at specific request of the public authorities, is seen to render a particular service to the community, by reducing his pollution level to below that set by the competent authorities.
- (v) Polluters will be obliged to pay the charges and expenditure on pollution control measures (investment in anti-pollution installations and equipment, introduction of new processes, cost of running anti-pollution installations, etc.), even when these go beyond the standards laid down by public authorities. The costs to be borne by the polluter under polluter pays principle should include all the expenditure necessary to achieve an environmental quality objective including administrative costs directly linked to the implementation of anti-pollution measures.

C. Conferences

It was only at Rio in 1992¹¹ that for the first time polluter pays principle received recognition as a basis of harmonization of environmental policy at national and international level. Principle 16 of Rio Declaration incorporates polluter pays principle.

¹¹ United Nations Conference on Environment and Development held at Rio de Janeiro from June 3-14, 1992.

Principle 16 of Rio Declaration states that “National authorities should endeavor to promote the internalization of environmental cost and use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with regard to the public interest and without distorting international trade and investment”¹². Seeing the wordings ‘endeavor’ it can be said that Principal 16 of Rio Declaration is more of a guiding principle as it does not impose a strict obligation on States. The polluter pays principle as enunciated in Principle 16 of Rio Declaration is mainly concerned with pollution within the boundary of a State. Whether a State could be considered as a polluter to another State under polluter pays principle is far from being clear. However, it may be noted that polluter pays principle has been enumerated in some of treaties after Rio¹³.

The polluter pays principle is critical in harmonizing environmental standards across countries, and is endorsed in Agenda 21 by urging governments to use “free market mechanisms in which the prices of goods and services ... increasingly reflect the environmental costs.”¹⁴

“Plan of implementation” adopted at Johannesburg, 2002¹⁵, points out polluter pays principle as one of measures which have to be adopted to promote sustainable patterns of production and consumption¹⁶.

III. USER PAYS PRINCIPLE

The basic idea underlying this new principle is that unrestrained consumption of natural resources is also responsible for environmental damage. Not only the polluters but the users also are responsible of environmental crisis. The central difference between polluter pays and user pays principles is that user pays applies to use of resources i.e. users, whereas

¹² S. Shanthakumar, INTRODUCTION TO ENVIRONMENTAL LAW (Nagpur: Wadhwa and Company, 2005) at 383.

¹³ Preamble, Convention on Trans boundary Effects of Industrial Accidents, 1992; Paris Convention for the Protection of Marine Environment of NE Atlantic, 1992; Article 2(2)(b) and Preamble, London Protocol on Preparedness, Response, and Cooperation to Pollution Incidents by Hazardous & Noxious Substances, 2000.

¹⁴ U.N. Doc A/Conf. 151/26, para 30.3 (1992).

¹⁵ World Summit on Sustainable Development held in Johannesburg from August 26 – July 4, 2002.

¹⁶ Article 15 (b), *Plan of Implementation*, adopted at World Summit on Sustainable Development, 2002, http://w.w.w.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.pdf visited on 28th march, 2006.

polluter pays applies to release of pollutants i.e. to polluters. It may be noted that by putting a price on consumption of natural resources can be a more prudent approach as it can lead to more judicious utilization of limited natural resources. The official position of OECD also indicates a growing awareness of the need for prices to reflect the true costs of natural resources use¹⁷.

IV. SUSTAINABLE DEVELOPMENT

The basic premise underlining sustainable development is that economic development by ignoring the social and environmental concerns could not solve the problems faced by mankind. This basic premise leads to the inevitable conclusion that all development activities should incorporate environmental concerns (minimizing and preventing environmental harms) in order to sustain their benefits.

The salient principles of “sustainable development” as held by the Indian Supreme Court are – Intergenerational equity, use and conservation of natural resources, environmental protection, precautionary principle, polluter pays principle, obligation to assist and co-operate, eradication of poverty, and financial assistance to developing countries.¹⁸

The relation between economic development and environmental protection justifies the use of economic instruments in environmental protection law and policy. The polluter pays principle which seeks to impose economic obligations on environment detrimental activities can be an effective measure to achieve sustainable development. The central role assigned to the polluter pays principle in the overall context of sustainable development extends its scope to even preventive measures as polluter could be held liable for preventive measure.

V. POLLUTER PAYS AND INDIAN JUDICIARY

Indian judiciary has declared this principle as well established and a part of Indian environment jurisprudence. It may be noted that the polluter pays principle evolved out of “absolute liability principle” as laid down by the Supreme Court in *Shriram Gas Leak* case.¹⁹ The significance of this

¹⁷ OECD Council Recommendation of 31 March, 1989 Concerning the Management of Aquatic Resources: Integration, Demand, Management and Protection of Ground Waters C (89) 12 (final); The OECD Council Recommendation of 23 July 1992 on the Integrated Management of Coastal Zones C (92) 114 (final).

¹⁸ *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715.

¹⁹ AIR 1987 SC 1086.

judgment lies in the court's formulation of the principle of the measure of liability viz. relating such measure to the magnitude and capacity of the enterprise, directing the industry either to shift from present location or evolve a green belt around it as a condition precedent to restart the industry. This innovative remedy evolved by the Supreme Court was an indirect recognition and application of the "Polluter Pays Principle".

This principle was for the first time, applied and defined in the case of *Indian Council for Enviro-Legal Action v. Union of India*.²⁰ The Supreme Court nicely weighed and balanced the conspectus of absolute liability and polluter pays principle. It was declared by the Court that the redemption of damaged environment is a part of the process of sustainable development and as such polluter is liable to pay the cost of individual sufferers as well as the cost of reversing the damaged ecology. Sincerity of the court came to the fore when it was pronounced that Ministry of Environment and forest must recover the money from the units (Polluters) and recovered money be used to repair the damage caused to the land and water in the area. As a result of which the plants and factories have been sold by State Government.²¹

The Court observed that sections 3 and 5 of the Environment (Protection) Act, 1986, empowered the Central Government to give directions and take measures for giving effect to this principle.²²

In *Vellore Citizen Welfare Forum v. Union of India*²³, Supreme Court reiterated and declared in unequivocal terms that 'the precautionary principle' and the 'polluter pay principle' are part of environmental jurisprudence of this country.²⁴ The Court also observed that these principles have also been accepted as part of the customary international law, therefore, it automatically become a part of the basic jurisprudence of the land. In this case more than 550 tannery units were discharging untreated effluent, thereby causing water

²⁰ AIR 1996 SC 1446 (in this case five chemical factories producing H-acid were discharging an azo dye and untreated toxic sludge into the open compound. This untreated waste percolated deep into the earth and caused water pollution of river water and underground water up to 70 feet below the ground within a radius of 7 miles of the Village Bichhari).

²¹ Satish C. Shastri, *The Polluter Pays Principle and the Supreme Court of India*, 42(1) JOURNAL OF INDIAN LAW INSTITUTE, 2000 at 110.

²² *Supra* n. 20.

²³ *Supra* n.18.

²⁴ Supreme Court referred to Articles 21, 48A and 51A (g) of Indian Constitution and other statutory provisions to justify the inclusion of these principles as part of Indian environmental law.

pollution. Considering the serious state of affair the court ordered for closure of industries involved in the tannery business. Supreme Court also directed the Central Government to constitute separate authorities under section 3(3) of Environment Act and directed the authorities to assess the loss to the ecology/ environment and recover the amount from the polluters.

The Court also ordered for imposing a fine of Rs.10, 000/- on each tannery of the area. The Court proposed 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.'²⁵

To monitor the implementation of comprehensive directions by the Authority the Court suggested the constituting of a special bench "Green Bench" which in future would deal with environmental issues.

In *M.C. Mehta v. Union of India*²⁶, the Supreme Court reiterated the polluter pays principle. In this case, the Supreme Court ordered the polluting industries to shift away from the Taj Trapezium or to switch over to gas as fuel. Justice 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/sites, would have to give 'compensatory benefit' to their workers.²⁷ Thus, the Court treated the workers of these polluting industries as victim and ensured that they should not suffer on account of an action against polluting industry. Thus, the Supreme Court has given a new dimension to environmental jurisprudence.

The Supreme Court applying the 'polluter pays principle' ordered compensation under the head for reversing the ecology/environment of affected area around Chilika Lake affected by aquaculture and Shrimp Culture industry.²⁸

Supreme Court directed 'Span Motel' to pay compensation for restitution of environment/ecology in *M.C. Mehta v. Kamal Nath*²⁹. The construction of motel has caused interference with natural flow of the river Beas and thereby causing extensive damage to environment and ecology in the area. In pursuance of court orders show cause notice was issued to

²⁵ *Supra* n. 18 at 2726.

²⁶ AIR 1997 SC 734 (*Taj Trapezium case*).

²⁷ *Id.* at 763.

²⁸ *S. Jagannath v. Union of India*, AIR 1997 SC 811.

²⁹ (1997) 1 SCC 388.

‘Motel’ (“Why pollution fine and damages be not imposed?”) However, the ‘Motel’ argued that pollution fine could be imposed only after proper trial and conviction under relevant statutes. The Court accepted this argument of the ‘Motel’.³⁰ However, the Court observed: “The powers of this court under Article 32 are not restricted and it can award damages in a PIL or writ petition as has been held in a number of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner.”³¹ In pursuance of this observation fresh notice, was directed to be issued to Span Motel.

Thus, the Court has extended the scope of ‘polluter pays principle’. The polluter has to pay:

- (i) damages for restoration of environment/ecology;
- (ii) damages to those who have suffered loss on account of the act of offender; and
- (iii) exemplary damages so that it act as a deterrent for others not to cause pollution in any manner.

Significantly, on March 15, 2002, the Supreme Court imposed a Rs.10 lac fine on ‘Span Motel’, for damaging environment and ecology in Kullu, Himachal Pradesh.³² This fine is quite separate and apart from the cost of ecological/environment restoration.³³

In *Research Foundation for Science Technology and Natural Resources Policy v. Union of India*³⁴, Supreme Court referred to polluter pays principle and held that illegal importers of hazardous waste oil were liable to pay the cost of destroying the said oil in proper manner as per the recommendation of Monitoring Committee.³⁵ The Court observed:

³⁰ *M.C. Mehta v. Kamal Nath* (2000) 6 SCC 213.

³¹ *Id.* at 224.

³² *M.C. Mehta v. Kamal Nath* (2002) 3 SCC 653.

³³ *Ibid.*

³⁴ *Research Foundation for Science Technology and Natural Resources Policy v. Union of India*, 2005 (1) SCALE 87.

³⁵ The main task of this committee is to oversee that direction of the Court are implemented in timely manner. It would also oversee that the aspects to which Ministry of Environment and Forest has agreed are implemented in letter & spirit & without any laxity or delay in matter. See *Research Foundation for Science Technology Natural Resource Policy v. Union of India*, 2003 (9) SCALE 303 at 323.

“The polluter pays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes. This includes environmental cost as well as direct cost to the people or property; it also covers cost incurred in avoiding pollution and not just those related to remedying any damage. It will include full environmental cost and not just those which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it. The nature and extent of cost and the circumstances in which the principle will apply may differ from case to case.”³⁶

The significant words to note in above are “full environmental cost”. The Supreme Court has emphatically urged a wide scope for polluter pays principle within environmental jurisprudence. The court also was justified in pointing out the flexible nature of the principle.

The Court also pointed out – “It is however, to be borne in mind that in India the liability to pay compensation to affected persons is strict and absolute and the rule laid down in *Ryland v. Fletcher* has been held to be not applicable”³⁷.

Thus, the Supreme Court through its landmark judgments has made ‘polluter pays principle’ a part of Indian environmental jurisprudence without any statutory requirement, thereby coming to rescue of those who have suffered due to pollution – be it man or nature.

VI. PUBLIC LIABILITY INSURANCE ACT

The ‘no-fault’ liability envisioned by Indian Judiciary has received legislative recognition through enactment of Public Liability Insurance Act of 1991 and National Environment Tribunal Act of 1995. The persistent effort made by judiciary towards tribunalization/environment courts thereby strengthening environment justice has met partial success. The tribunal envisioned under NETA of 1995 and National Environment Appellate Authority established under National Environment Authority Act of 1997 are the steps taken by legislature in this direction.

Public Liability Insurance Act has been enacted by the Government to provide quick relief to victims of any accidents arising out of hazardous substances. The source of the legislation has apparently been, to cover-up

³⁶ *Supra* n. 34 at 98.

³⁷ *Id.* at 99.

the area, as suggested by the Supreme Court.³⁸

The Act has been amended in 1992. By this amendment, the liability of the insurer has been limited to amount of premium. The insurance policy shall not be for less than the paid up capital amount of the hazardous unit and shall not exceed 50 crores.³⁹ In addition all the owners of hazardous units are to pay yearly an amount equal to the premium to environment relief fund. It may be noted, that the liability of the owner of hazardous unit is not limited.

The Act seeks to fulfill the aim of providing immediate relief to victims besides enabling the industry to discharge the liability to settle large claims arising out of major accidents through 'mandatory insurance'. Under section 4, every owner is under an obligation to take out insurance policies, before he starts handling any hazardous substance. Such policies are required to be renewed from time to time so long as such handling is continued.

Section 3 of the Act provides for no-fault liability and claimant shall not be required to plead and establish that death, injury etc. was due to any wrongful act, neglect or default of any person. However, the claims can be made within 5 years of the occurrence of the accident.⁴⁰ The time for disposal of claims is fixed at 3 months and insurer is obliged to deposit the amount of award within a period of 30 days of the announcement of award.⁴¹ Where owner is likely to dispose of the property to avoid responsibility, the collector may issue temporary injunction to restrain such act.⁴² Collector may make an award from the "Environment Relief Fund" established under section 7A. It may be noted that right to claim relief under Act is in addition to any other right to claim compensation in respect of death/injury/damage under any other law. However, the amount of relief paid under any other law shall be reduced by an amount of relief paid under this Act.⁴³ It may also be noted that the idea behind the Act is only to confer immediate relief according to the fixed scale provided in the schedule attached to the Act. Claims for full and final compensation are outside the purview of the Act.

³⁸ See AIR 1990 SC 1480, wherein Justice Ranganathan suggested a fresh legislation to constitute a special forum with special procedure, conducive to expeditious determination and power, to grant interim relief by way of no-fault liability. Further it was suggested, by statute to provide compulsory insurance by such industries engaged in hazardous activities, against third party risk. Also, it was suggested to constitute Industrial Disaster Fund.

³⁹ Sec. 4 (2A), Public Liability Insurance Act, 1991.

⁴⁰ Section 6, *id.*

⁴¹ See section 7, *id.*

⁴² *Ibid.*

⁴³ Section 8. *id.*

Thus, Public Liability Insurance Act gives partial recognition to polluter pays principle. The liability has been imposed on the basis of no-fault, but this Act applies only to cases of hazardous industries. Also, by limiting the liability under the Act a compromise has been made between the need to provide immediate relief to victims and the concerns of polluters. As such the polluter pays principle has been effectuated only in a limited manner.

VII. ENVIRONMENTAL COURTS

The need to have environmental courts could hardly be overemphasized. The polluter pays principle being one important instrument of ensuring sustainable development require speedy decision making in order to protect the interests of victims and also the environment. The Supreme Court has repeatedly pointed the need of the specialized environmental courts having access to a combination of scientific and judicial inputs.

In *Indian Council for Enviro-Legal Action v. Union of India*⁴⁴, the Supreme Court articulated the need for environment courts in following words:

“The experience shows that the prosecutions launched in ordinary courts under the provisions of the Water Act, Air Act and Environment Act, never reach their conclusion either because of the work load in these courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting these cases. Moreover, any order passed by the authorities under Water and Air Acts and Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders. All this points to the need for creating environment courts which alone should be empowered to deal with all matters civil and criminal, relating to environment.”⁴⁵

A. National Environment Tribunal Act, 1995

The Indian judiciary's repeated emphasis on the necessity of alternative forum for settling environmental disputes received legislative endorsement by enactment of National Environment Tribunal Act, 1995.⁴⁶

⁴⁴ *Supra* n. 20.

⁴⁵ *Id.* at 1469.

⁴⁶ It may be noted that Environment Tribunal Bill was introduced in Parliament on 5th August, 1992. After a gap of almost three years the 'Bill' was reintroduced on 24th May, 1995. Ultimately on 17th June, 1995, the Bill received Presidential assent. However this Act has not been notified even after more than decade of its being passed by Parliament.

The Act provides for strict liability for damages arising out of any accidents occurring while handling hazardous substance and for establishment of National Environment Tribunal for expeditious disposal of cases arising from such accidents, with a view to giving relief and compensation for damages to person, property and the environment.⁴⁷

Under section 3, the Act imposes liability on the owner of a hazardous enterprise to pay compensation in case of an industrial disaster on principle of no fault liability. This means that the claimant shall not be required to plead and establish the wrongful act, neglect or default of any person. Also, if the death, injury or damage cannot be attributed to any individual activity but is combined result of several activities, the Tribunal may divide the liability for compensation among those responsible for such activities on an equitable basis.⁴⁸

The scope of the Act has been limited to only the handling of any hazardous substance. While defining accident under section 2(a), it says that accident means an accident involving fortuitous or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to any person or damage to any property or environment. It does not include an accident by reason of only war or radioactivity. Under section 2(f), hazardous substance has been defined as any substance or preparation which is defined as a hazardous substance in Environment (Protection) Act, 1986 and exceeding such quantity as specified by Central Government under Public Liability Insurance Act, 1991. This means that there is an attempt to restrict the definition of hazardous substance. It means that the damage caused by hazardous substances that have not been identified by Ministry of Environment and Forest (MOEF) as such or even if recognized by MOEF as hazardous but handled in quantities below the specified limits, is not covered under the ambit of the Act.

The power to establish National Environment Tribunal has been given to Central Government.⁴⁹ The Tribunal shall consist of a chairperson and such number of Vice-chairpersons, judicial members and technical members as the Central Government may deem fit. Each bench shall consist of one judicial member and one technical member.⁵⁰ However, a single member bench may also be set up.⁵¹ A single member bench shall be devoid of

⁴⁷ See Preamble to National Environment Tribunal Act, 1995.

⁴⁸ Section 3(3), *id.*

⁴⁹ Section 8, *id.*

⁵⁰ Section 9(2), *id.*

⁵¹ Section 9(4), *id.*

judicial or technical input depending upon the fact of presiding member's field. Thus, the order passed by such benches might lack judicial input or scientific expertise, the combination of which has been considered vital for speedy and efficient disposal of environmental litigation.

A person shall not be qualified for appointment as Chairperson unless he is or has been a judge of Supreme Court or a High Court. A Vice-chairperson with two years experience can also be appointed as Chairperson.⁵² Any person who has held the post of Secretary to Government of India for at least two years can be Vice-chairperson.⁵³ This means that an administrator could be appointed as Chairperson. The appointment of an administrator to the post of Chairperson negates the concept of 'impartial tribunal' to adjudicate the dispute and it defeats the very object of this Act.

Section 10(4) lays down qualification for appointment of technical member. The said requirement is "adequate knowledge of or experience in or capacity to deal with administration, scientific and technical aspect relating to environment". This requirement of "adequate knowledge" is quite vague. This qualification leave an absolute unfettered discretion with Government to appoint anyone whom it wants to favor as any amount of knowledge will be adequate.

B. National Environment Appellate Authority Act

The National Environment Appellate Authority Act, 1997 provide for establishment of National Environment Appellate Authority. The Authority established under this Act can hear appeals against orders granting environmental clearance in designated areas where industrial activity is proscribed or restricted by regulations framed under Environment (Protection) Act, 1986. It means that the Authority can take up cases regarding the shifting of industries requiring statutory clearance. Thus, industries or industrial projects not requiring such statutory clearance (even though may generate legitimate environmental concern) are outside the ambit of the Act.

Under section 4, the Authority consists of a Chairperson, a Vice-chairperson and members not exceeding three. A person appointed as Chairperson should have been a judge of Supreme Court or a High Court. However, Vice-chairperson can be an administrator. Such person must have an expertise or experience in administrative, legal, managerial or technical

⁵² Section 10(1)(a)(b), *id.*

⁵³ Section 10(2)(b), *id.*

aspects of problems relating to environment. For appointment as member a person shall have knowledge or practical experience in the relevant areas. The appointment to these posts shall be made by President. It would have been better if prior consultation with Chief Justice of Supreme Court has been ensured.

In *A.P. Pollution Control Board v. M.V. Nayadu*⁵⁴, the Supreme Court regarded the Constitution of National Environment Appellate Authority as approximating an ideal forum with judicial as well as technical expertise to adjudicate on complex environmental issues.⁵⁵

VIII. CONCLUSIONS

There can be no doubt about the necessity of polluter pays principle – as restoration of environment and compensating the victims of environmental harm both depend upon availability of financial resources. This principle may also be a catalyst in modifying the behavior of polluters. But it is too simplistic to assume that this principle by itself can induce socially and environmentally desirable activities. Further, it should not be forgotten especially in context of international environmental jurisprudence that many of environmental problems are result of past activities of developed economies. This pollution, which is a result of diffused activities of developed economies, is certainly posing a challenge - as developed countries are not very enthusiastic about applying this principle beyond their boundaries.

However, it should be remembered that the basic purpose of this principle is to guide and reform. It should be hoped that as this principle is applied more and more in relation to myriad human activities, its definition and scope would become more clear and concretized.

The application of polluter pays principle based on strict and absolute liability should not be seen as penalizing the polluter. Most of polluting activities are the by-product of production of some goods or services required by society. The pollution caused by such activities has to be translated in money terms under polluter pays principle thereby obliging the users of scarce natural resources to pay. Also, in the long run only those producers will succeed in the market who can reduce or minimize their costs under polluter pays principle. This will in turn promote the use of cleaner technologies and environmentally sustainable practices. Seen in this light, the overall impact of rigorous application of polluter pays principle at both local and global level could be to make the development activities as a catalyst even for restoration of environment.

⁵⁴ AIR 1999 SC 812.

⁵⁵ *Id.* at 823.