# APPLICATION OF POLLUTER PAYS PRINCIPLE THROUGH ENVIRONMETNAL TORT IN MYANMAR

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## Abstract

Polluter pays principle (PPP) is a widely accepted and applied concept both in the context of developed and developing countries to address the environmental problems. In the simplest term, the principal means that the polluter should bear the costs of the pollution prevention and control to maintain the environment in an acceptable state. Later, it has been extended to use as an instrument to implement the civil liability regime to compensate the environmental damage. PPP can be implemented through various instruments such as economic instruments, standards-based regulations, or liability rules. Myanmar's legislation specifically provides the any person who pollute or caused damage to the environment to pay compensation for such damage. However, these provisions apply only to public environment and not cover environmental related private injury or property damage. Since Myanmar practices common law based legal system, private party can recourse to tort litigation to seek remedy for environment related private property damage. This paper critically analyzes the application of PPP through environmental tort litigation in Myanmar based on the available reported case. It is found out that the decisions of the courts do not support application of PPP as proclaimed in the environmental legislation. Moreover, some procedural rules should be amended specifically for the civil suit involving environmental related damage since they do not correspond/reflect to the nature of environmental related injury. The paper also suggests the use of strict liability in cases involving activities inherently dangerous to the environment to enable the effective application of PPP in Myanmar.

**Keywords:** Polluter Pays Principle; Environmental tort litigation; Environmental Liability

## Materials and Method

This research uses a combination of doctrinal analysis and case analysis. Doctrinal analysis is used to analyze primary documents as well as secondary documents. Primary documents include international environmental conventions, policy documents, legislations and reported cases. Secondary sources include books, bibliography and academic on the related topics. First, it studies the origin, development, and concepts of the PPP in international documents and national legislations. Secondly, it studies a related reported case to understand and analyze the position of the courts in deciding environmental tort cases in Myanmar. And finally, it discuss whether the aims of the environmental legislations in Myanmar to apply PPP is achieved through the tort litigation.

## Introduction

Polluter pays principle (PPP) first appeared in "Guiding Principles concerning the International Economic Aspects of Environmental Policies" on 26th May 1972. It was adopted by Organization of Economic Cooperation and Development (OECD). The policy was aimed to be used for the allocation of costs related to pollution prevention and control, to encourage rational use of scarce environmental resources, and to avoid distortions in international trade and investment. PPP means that polluter should bear the expenses of pollution prevention and

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control decided by public authorities to maintain the environment in an acceptable state. Afterwards, PPP gains acceptance as an international and national environmental principle and implemented through standard-based instrument and economic instruments and liability regime, etc. In Myanmar, Environmental Conservation Law, 2012 also proclaimed to implement PPP.

## Development of Concept of Polluter Pays Principle

In Guiding Principles Concerning the International Economic Aspects of Environmental Policies of 26th May 1972 adopted by Organization for Economic Cooperation and Development states that -

"(t)he 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 principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment."[1]

PPP has been recognized as a basic principle and repeatedly prescribed in several international environmental documents.

Principle 16 of the Rio Declaration provides –

"(n)ational 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[2]."

Principle 16 has become known as "polluter pays principle" or "PPP". According to this principle, governments should strive to encourage the internalization of environmental costs into the costs of economic activities by considering the use of polluter pays principle. In doing so, the governments should ensure that the use of the policy do not cause distortion in international trade and investment. Since the Rio declaration, both developed and developing countries alike have increasingly accepted the principle. The scope applicable to the principle has also expanded and applied to all costs relating to pollution.[3]

PPP was enunciated in many international instruments, especially those adopted after 1992. Despite the enunciation of the principle in many international instruments the principle has not been followed when deciding who should bear the cost of polluting activities. For example, the Rhine Convention on Chlorides was adopted in 1976 and entered into force on 1st November 1994 expressly provides the Kingdom of Netherlands to pay for some costs of

[1] OECD, Guiding Principle Concerning the International Economic Aspects of Environmental Policies, 26th may 1972

[2] Principle 16, Rio Declaration.

[3] UNEP, 2006, Training Manual on Environmental Law: Principles and concepts of international environmental law, p-34.

pollution prevention although Netherlands is the recipient of pollution.[1] In the Chernobyl disaster, many countries were affected by the radioactive fallout. However, no country demanded compensation for damages they suffered from Soviet Union. And the Soviet Union claimed that measures undertaken by the affected countries were overcautious and denied any responsibility.[2]

Without the use of PPP and internalization of environmental cost in the economic activities, the public must shoulder the burden of the pollution by paying the costs for elimination and mitigation of the pollution. Thus, the purpose of PPP is to avoid the pollution costs, or economic externalities, which otherwise be incurred by the public, by mandating this obligation to the polluters. Usually, the polluters will incorporate the costs into the total costs of their products, and this again will be incurred by the users or consumers of the product.

An important issue of the use of PPP is the difficulty of identifying the polluter and sometimes victim of such pollution sources. It is because air pollution can be caused by various pollutants which come from different sources and different locations beyond one country's jurisdiction.[3] Moreover, the consumers may also be the polluters because they are benefited from the polluters products and services such as foods, clothes and transport, etc.[4] Moreover, according to the nature of environmental pollution, certain sources of pollution are difficulty to identify (eg., the use of pesticide in agriculture).

## Implementation of PPP at National Level

PPP can be implemented through various instruments such as economic instruments, standards-based regulations, and liability rules.[5] In this research, for the simplicity, economic instruments and other standards and rules-based instrument are not considered. Instead, the use of civil liability to remedy private environmental damage focusing on the current judicial practice in Myanmar is considered and discussed.

PPP has developed to internalize the cost of pollution control as well as an instrument to implement the civil liability regime of environmental damage relating both to private and public property.[6]

The application PPP through civil liability regimes depends on the following circumstances;(i) there should be identifiable polluters, (ii) the damage is concrete and quantifiable, and (iii) the possibility of proving a causal link between the damage and the actions of the polluters.[7]

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[1] Elli Louka, 2006, International Environmental Law: Fariness, Effectiveness, and World Order, Cambridge University Press, p-51

[2] Ibid, pp 51-52

[3] Does the polluter Pays, European Environment Agency,https://www.eea.europa.eu/signals/signals-2020/articles/interview-does-the-polluter-pay

[4] Ibid.

[5] Michael Faure & Nicole Niessen(Editors), "Environmental Law in Development; Lessons from the Indonesian Experience", 2006, Edward Elgar Publishing, p-28.

[6] UNEP, 2006, Training Manual on Environmental Law: Principles and concepts of international environmental law, p-51.

[7] Ibid, p-57.

Application of the liability rules can revoke to satisfy the problem of externality in environmental pollution control.[1] Thus, it is the direct implementation of PPP. In common law systems, liability can be invoked through tort litigation.[2] A tort is "an act or omission which constitutes a breach of duty fixed by law."[3] Tort is related to "loss allocation". In any society losses may occur under any circumstances arising either from a failure to exercise due care or willful conduct of some description.[4] Traditionally, tort action is used to settle private dispute. In this sense, tort is not related to any objectives of environmental protection. However, in case an owner of a house has been disturbed by some noxious fumes, then the tort has become concerned with environmental aspect.[5] Moreover, many hazardous substances can be a trespass to land and cause property damage and personal injury.[6] Thus, tort related with environmental damage or environmental tort can specifically be instituted under the two forms of legal action, namely, trespass and nuisance. "Trespass" is used when there are direct incursions of tangible matters. On the other hand, "nuisance" is used when there are indirect incursions by intangible phenomena, such as noise or fumes, exists.[7]

In application of the tortious liability there are more than one method of categorization of liability. For environmental tort, there are generally three types of liability available, namely, fault liability, strict liability, and absolute liability.[8]

In fault liability, the plaintiff is required to prove that the wrong doer acted the injurious act with intent or negligently or without due care. Therefore, in environmental cases it would be difficult to prove that there is fault on the part of the wrong doer especially when the environmental legislations are ambiguous.[9]

In the case of strict liability, it is not necessary to establish fault. It is not necessary to test if there is violation of a duty of care or a norm or any negligence exist. The fact that the damage is caused by the defendant's conduct is material. There are certain exemptions to the strict liability if the damage is caused by an act of God, an act of war and by the interference of a third party.[10] The underlying reason of using strict liability in environmental tort is that an actor who benefits from inherently harmful activities should incur for the damage arising out of such activity. Thus, it serves the purpose of PPP.[11]

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[1] Michael Faure & Nicole Niessen (Editors), "Environmental Law in Development; Lessons from the Indonesian Experience", 2006, Edward Elgar Publishing, p-28.
[2] Mark Wilde, 2013, "Civil Liability for Environmental Damage; Comparative Analysis of Law and Policy in Europe and the US", 2nd Edition, Wolters Kluwer, p-22.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid, p-22.
[8] UNEP, "Liability and Compensation Regimes Related to Environmental Damage" in "Training Manual on International Environmental Law", p-57.
[9] Ibid.
[10] UNEP, "Liability and Compensation Regimes Related to Environmental Damage" in "Training Manual on International Environmental Law", p-57
[11] Ibid.

Absolute liability basically differs from strict liability in that it allows only the defense of an act of God. In environmental case, this kind of liability is imposed only on ultra-hazardous activities such as nuclear facility.[1]

Nowadays, many countries in the world has introduced and practiced strict liability for environmental damage, for example – countries in European Union, China and India, etc.

## PPP in Myanmar's Environmental Legislations

The benefits of providing environmental principle in national environmental legislation is that they can complement the legislation in case there is any gaps in the provisions. Thus, an effective method of implementing PPP is that it should have a legal basis in national environmental legislation. Myanmar's commitment to environmental conservation is already embodied in Myanmar Agenda 21 in which it proclaimed its specific aim "to facilitate the incorporation of environmental and sustainable development policy considerations into the decision-making and policy formulation processes of the government in the economic and social sectors."[2] The Constitution of the Republic of the Union of Myanmar (2008) says in its Section 45 "The Union shall protect and conserve natural environment".[3] And, also under Section 390 (b), the Constitution provides that every citizen has the duty to assist the Union in carrying out the environmental conservation.[4]

In Myanmar, Environmental Conservation Law was provided in 2012 and The Environmental Conservation Rules in 2015 respectively. Myanmar's environmental legislation does not explicitly say that PPP is to use in addressing environmental pollution and damages. But many provisions in the Law includes prohibitions and designation which requires to use the principle without wording "PPP". For example, under Section 7(o) of the Environmental Conservation Law provides the duties and powers of the Ministry to include "managing to cause the polluter to compensate for environmental impact, cause to contribute fund by the organizations which obtain benefit from the natural environmental service system, cause to contribute a part of the benefit from the business which explore, trade and use the natural resources in environmental conservation works;".

And, under Section (33) of the Law provides; whoever shall:

"(a) if convicted under section 32, be passed an order to compensate for damage due to such act or omission.

(b) if ordered under sub-section (a), and fails to pay the compensation to be paid, be recovered in accord with the existing revenue laws."

Rules (30) of the Environmental Conservation Rules reaffirmed the provisions of the Environmental Conservation Law, which says: -

"(t) he Ministry:

[1] Ibid, p-58.
[2] Para 0.0.7, Myanmar Agenda 21, National Commission for Environmental Affairs, 1997.
[3] Section 45, Constitution of the Republic of the Union of Myanmar.
[4] Section 390(b), Ibid.

(a) May determine with the approval of the committee the necessary facts including the amount of money which would be compensated and to cause compensate by the polluter to environment in environmental damage;
(b) May determine, with the approval of the Committee, to contribute fund by the organizations which obtain benefit from the natural environmental service system and other necessary facts including the amount of money to be contributed for contributing in environmental conservation works from a part of benefits from the businesses which extract, trade and use the natural resources."

Thus, it is obvious from the above provisions that the environmental legislation in Myanmar is intended to use the polluter pays principle as a basic tool to remedy the environmental damage. However, the laws do not lay down any plan or scheme of calculation of the damages. Moreover, the environmental damage mentioned in the above sections are referred to damage to the public environment and not applicable to environmental damage to private property. Thus, any private individual can seek remedy through tort litigation available under traditional common law for any injury they suffered arise out of environmental consequences of a business activity.

## Application of PPP and Environmental Tort in Myanmar

Environmental liability under Myanmar's environmental legislations is based on the fault-liability. Section 32 of the Environmental Conservation Law provides: - "whoever violates any prohibition contained in the rules, notification, orders, directives and procedures issued under this Law shall, on conviction, be punished with imprisonment for a term not exceeding one year, or with fine, or with both." And then, Section 33(a) of the Environmental Conservation Law provides that "if convicted under section 32, be passed an order to compensate for damage due to such act or omission." According to Section 32 and 33(a), the compensation for environmental damage will be incurred only in case the requirements of the laws are violated. Thus, it implies that Myanmar applies fault liability rules. The Law does not say anything on private environmental damage. On the other hand, Section (128) of the Environmental Impact Assessment Procedure confirms that the project proponents shall not be relieved from any liability for the claims against the project by any third parties in relating to any damage incurred or any injury suffered because of the failure of the project proponents or any breach or defects in the performance of the projects.[1] According to this Section, it can confirm that environmental laws of Myanmar also recognize individual rights to seek remedy for environmental damage or loss suffered arising out of business activity. Therefore, any person or individual who suffers any loss or damage to them or their property by environmental consequences of any business activity can recourse to civil liability for redress.

In Myanmar, there are only a few cases relating to environmental tort and most of which did not reached to the Supreme Court. So far, there has been only one reported case decided relating to environmental tort litigation, ie., U Soe Naing and eight others Vs Myanmar Pongpipat Mining Co., Ltd and one (Special Civil Appeal, 2018, MLR, No. 26, p-30).[2] The case can offer a good discussion how PPP is applied in the environmental tort case in Myanmar.

[1] Section 127, The Environmental Impact Assessment Procedure, 2015.
[2] U Soe Naing and eight others Vs Myanmar Pongpipat Mining Col, Ltd and one (Special Civil Appeal, 2018, MLR, No. 26, p-30

The facts of the case are as follows. The defendant Myanmar Pongpipat Mining Co., Ltd is operator of Heinda tin mines in Tenasserim Division. The plaintiffs are residents of the nearby villages of Heinda tin mine. The Pongpipat Co., Ltd signed a production-sharing contract with Mining Enterprise II in 1999. It is reportedly said that Pongpipat Co., Ltd holds 65% of the production. The villagers have been suffered the environmental consequences of the tin mine since it started operating in 1999. Then, due to the heavy rain in 2012, the mine tailing ponds overflew and flooded the village. It also contaminated the water sources and villagers were not able to use or drink.[1] Therefore, a group of villagers filed a civil suit to seek compensation for damage to their property. The case was filed by U Soe Naing and eight against the Myanmar Pongpipat Co., Ltd and Ministry of Mine II originally at the Dawei District Court and accepted as Civil Suit No.19/2014. The court decided upon three preliminary issues in favor of the plaintiffs; that there was ground to institute the case; it did not exceed period of limitation; and the notice has been duly served. Then the defendants applied for the civil revision cases separately (Civil Revision No.10/2015 and 11/2015) at High Court of Tenasserim Division. The Court decided that the case did not exceed the period of limitation, but it remove the Ministry of Mine II from the proceeding. Thus, both parties applied for Civil Revision case at Supreme Court. The Supreme Court dismissed the plaintiffs' application (Civil Revision Case 508/2015) but accepted the defendant's application (Civil Revision Case 607/2015) and reversed the decision of the lower courts (Dawei District Court and High Court of Tenasserim Division). Thus, finally the plaintiffs (U Soe Naing and eight) filed for the Special Civil Appeal Case No. 392/2016 and the Supreme Court accepted the case and continued the proceeding.

The Supreme Court finally decided that the loss suffered by the plaintiffs started in 2008 and continued until 2012. Thus, the plaintiff's rights to sue against the defendant appeared in 2008 where the loss began and as well as in 2012 where the loss last appeared. However, the plaintiffs instituted the suit only on 14/5/2014, which was more than one year after the loss finally appeared in 2012. Therefore, the plaintiffs' rights to institute the suit exceeded the period of limitation (Limitation Act, First Schedule, Clause 22).

## Discussion

In the case mentioned above, Supreme Court finally dismissed the case on the ground of procedural defect that the time to institute the case is beyond the limitation provided for the suit. Thus, the plaintiffs did not receive any remedy for their loss.

In this case there are two important issues to discuss if consider the case as an environmental civil suit or environmental tort case. Firstly, it can be said that the decision of the court does not reflect the application of PPP as provided in environmental laws of Myanmar. In its decision, the Supreme Court did not reject the decision of the lower courts that there is ground for the plaintiffs to institute the suit against the defendant. In other words, the Supreme Court did not reject the fact that the plaintiff suffers loss and injury to their private property due to the environmental consequences of the tin mine operated by the defendant. Despite no rejection to the injury on the part of the plaintiffs caused by the defendant, the plaintiffs were denied for appropriate remedy. Thus, the decision does not reflect the application of PPP as proclaimed in

[1] "Pongpipat follows Myanmar environmental regulations", Monday, June 28, 2021, The Nation (Thailand), https://www.nationthailand.com/in-focus/30326330

the environmental legislations of Myanmar. Since the case is environmental related civil suit or environmental tort case, it should also reflect the provisions of environmental law and thus the court should make the polluter pays for loss which he has done and the environmental cost incurred by the individuals which he has done.

Secondly, the fact that the case exceeded the limitation of the time should not be a decisive matter to give effect to the merit of the case. While the case is considered and decided in the way that an ordinary tort case might have been done, it should also be taking into consider the very nature of environmental pollution issues and its consequences. In this case, the consequence of environmental impact is physical and visible, and the plaintiffs' claim is based on the ground of property damage only. However, it should well be noted that environmental problems used to trigger serious human health. According to the environmental incidents in many other countries, environmental related health issues can appear long after they have exposed to the environmental pollution or hazardous materials. For this reason, relying on the same rule of limitation of time used in ordinary tort case and deciding the merit of the case may not properly serve justice for the injured party in the environmental tort.

Another important issue is that the liability provided in Myanmar's environmental legislations is based on the fault liability. It means that an operator of a business or an activity will not be liable for the environmental consequences so long as the operator abide by the laws or is done his business or activity in accordance with the requirements of the law. In this context, Myanmar should consider that many business activities, such as mining in this case, are inherently hazardous in nature. On the other hand, in tort liability instituted under common law, the merit of the case is mainly dependent on the ability to prove on the part of the plaintiff a causal link between his injury and the injurious act of the defendant. In many cases, it is difficult to construct the causal link between the health problems and environmental issues since many health problems can occur naturally without the disturbance of environmental factors.

## Conclusion

Therefore, to assure application of PPP in environmental related tort liability, Myanmar should consider introducing strict liability for environmental damage especially those for inherently dangerous and hazardous activities. The rationale to suggest the use of strict liability is that since Myanmar is based on common law tradition, the merits of the suits are largely, if not absolutely, depend on the skills of the lawyers representing the plaintiffs on how to approach the case, the perception of the judges on the nature of the case and their discretion to decide the case. Thus, by introducing strict liability, the injured parties are guaranteed to a certain level that they have access to remedy for their personal injury or property damage.

Moreover, Myanmar also should consider amending related procedural rules, especially those relating to limitation to institute an environmental suit. As it has been discussed above, many environments related diseases take time to surface. And it is also possible that injured party may not have enough knowledge, information, and ability to bring the suit to the court and they might cost them extraordinary duration. This is particularly relevant if consider Myanmar situation since it is a developing country where majority of population do not have a level of legal knowledge. Therefore, this paper would like to suggest Myanmar to introduce strict liability for environmental damage and to make necessary amendment of related procedural rules

to be able to effectively implement polluter pays principle (PPP) and enhance access to environmental justice in Myanmar.

## Acknowledgement

First of all, I am extremely grateful to Professor Dr. Daw Than Nwe (Former Head of Department, Department of Law, Yangon University) for her sincere encouragement and her valuable guidance to write this research paper. And I would like to express my deepest appreciation to Professor Dr. Daw Tin May Htun (Former Head of Department, Yangon University of Distance Education), who presided the conference session for this paper, for her contribution and insightful commentary during the seminars and in writing this publication. Then, I would like to send my heartful gratitude to Professor Dr. Tin Moe Lwin (Head of Department, Department of Law, University of Mandalay), Professor Dr. Nan Thet Mon (Department of Law, University of Mandalay) and Professor Dr. Yin Nu Htun (Department of Law, University of Mandalay) for their support and contributions in the writing of this research paper. Finally, I would like to show my appreciation to my seniors and colleagues of legal professions for their fruitful discussions, insights, contributions in writing this research paper. Last but not least, I would like to pay my respect and greatest gratitude to my parents who always support me in all aspects to the development of my academic career.

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