Slide 1
Session on the oldest environmental principle to start with.
Outline

- Historical background
- Functions of the Polluter Pays Principle (PPP)
- Substance of PPP
- PPP in International Law
- PPP in European Law
- PPP in National Law
- Instruments to implement PPP

Slide 2
Outline of the presentation
Historical background

- PPP first mentioned: Recommendation of the OECD of 26th May 1972
- Reaffirmed in recommendation of 14th November 1974
- Recommendation of 3 March 1975 regarding cost allocation by public authorities on environmental matters
- Since 1987: EC Treaty (today: Article 191(2) TFEU)
- 1992: Rio Declaration, Principle 16

Slide 3

- The polluter pays principle (PPP) was first mentioned in the recommendation of the OECD of 26th May 1972 and reaffirmed in the recommendation of 14th November 1974.

- In the 1972 Declaration of the United Nations Conference on the Human Environment in Stockholm the principles did not feature, but in 1992 in Rio PPP was laid down as Principle 16 of the UN Declaration on Environment and Development.

- The European Community took up the OECD recommendation in its first Environmental Action Program (1973-1976) and then in a Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters. Since 1987 the principle has also been enshrined in the Treaty of the European Communities and in numerous national legislations world-wide.
Slide 4

As a main function of the principle the OECD recommendations specify the allocation “of costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment.” The polluter should bear the expense of carrying out the measures “decided by public authorities to ensure that the environment is in an acceptable state” (OECD 1972).
Functions of PPP

Rio Declaration on Environment and Development

Principle 16
National authorities should endeavour 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.

Slide 5
The principle as laid down in the Rio Declaration.
If environmental costs are not internalized (or if state subsidies are given to polluting industries or if preventive measures are paid by the state) this could lead to distortion of international trade and investment. Thus, due application of the principle also protects economic interests. (but: no excessive application of principle, which may again lead to distortions.)
Functions of PPP

Today, PPP is understood in a broad sense:

- Covering pollution prevention and control measures
- Covering liability → clean up costs of damage to the environment
- Pollution at the source → product impacts, LCA, extended producer responsibility
- PPP can be understood as an overarching principle of environmental responsibility

Slide 6

Since its first appearance in 1972, the PPP is today understood in a much broader sense, not only covering pollution prevention and control measures but also covering liability, e.g. costs for the clean-up of damage to the environment, (OECD 1989 and 1992). Also, the field of application of PPP has been extended in recent years from pollution control at the source towards control of product impacts during their whole life cycle (→ extended producer responsibility).

The preventive function of the PPP is based on the assumption that the polluter will reduce pollution as soon as the costs which he or she has to bear are higher than the benefits anticipated from continuing pollution. As the costs for precautionary measures also have to be paid by the potential polluter, he or she has an incentive to reduce risks and invest in appropriate risk management measures. Finally, the PPP has a curative function, which means that the polluter has to bear the clean-up costs for damage already occurred.

(LCA = Life Cycle Assessment)
Slide 7

PPP as an overarching principle of environmental responsibility.

What types of actions are required.

IPPC: safety measures, monitoring, inspections – integrated approach
Slide 8
As the “polluter” should pay, we have to clarify these three questions.
As civil liability is not connected to the breach of administrative standards in most European legislations, the second concept is more consistent with traditional legal concepts. The weakness of this approach is that PPP cannot provide an answer to the question of whether an impact is harmful or has to be considered as damage; it remains a challenge to natural and environmental sciences to define relevant criteria that then also could be implemented by legal standards. Insofar, both concepts do not necessarily contradict each other.

The polluter pays principle does not only apply if there is a “real” pollution in terms of harm or damage to private property and/or the environment. Most legal orders go beyond this interpretation: In the light of the precautionary principle, environmental legislation may also provide for measures which are taken to minimise risks – even in cases where there is a lack of scientific knowledge and scientific cause–effect relationships cannot fully be established.

Pollution ≠ Damage
The term “polluter” refers to a polluting, harmful activity. But the above-mentioned extension of the polluter pays principle has had the inevitable consequence that legislation today often defines the polluter in a more extensive way. Not only those polluters who, in a strict sense, actually “pollute” have to be considered as such, but also those who are (only) causing risks for the environment and where pollution has not (yet) occurred.

In the Erika oil spill case, the European Court of Justice held in 2008, based on Art. 15 of the EU Waste Framework Directive (2006), that the producer of hydrocarbons which became waste due to an accident at sea, could be held liable for the clean-up costs. In accordance with the polluter pays principle, however, such a producer is not liable unless he or she has contributed through his or her conduct to the risk of pollution stemming from the shipwreck.

The question of whether the “user” could also be regarded as a “polluter” is relevant, particularly in the field of product control law. Users often pay indirectly when pollution control costs are internalised in the prices of the product.
Slide 11

The slide shows what costs should be borne by the polluter. In principle, only the costs for own pollution have to be paid. But there are some exceptions to this rule, e.g. when the law provides for joint and several liability, meaning that in cases of several polluters the injured party can claim for total compensation against one of the polluters of his or her choice (as under the US CERCLA). Under several regimes of strict liability, the maximum amount for which the polluter is liable in the case of damage is limited, whereas under the general law of tort there is no such limit.

The second case: Paragraph 8(1) of the AbfVerbrG establishes a solidarity fund for the return of waste (Solidarfonds Abfallrückführung; the solidarity fund). In order to cover the payments and administrative costs of the solidarity fund, notifiers within the meaning of Regulation [No 259/93] are required to contribute to this fund proportionally to the type and quantity of waste to be shipped. The obligation to contribute to the solidarity fund is in addition to the obligation imposed on the notifier by Paragraph 7(1) of the AbfVerbrG to provide a financial guarantee or proof of equivalent insurance covering costs for shipment, in accordance with Article 27 of Regulation No 259/93.

The Court held, that there is an infringement of (former) Art. 23 and 25 ECT as the individual (legal) exporter has no benefit from the fund, it is in fact responsibility for illegal behaviour of other (ECJ According to the German Constitutional Court this could not be justified by the argument, that there would be a responsibility of the “group” of exporters, although this could be justified in some cases, it is not possible to be hold liable for the illegal behaviour of third person (BVerfG, 6 July 2005, Zeitschrift für Umweltrecht, p. 426.).
PPP in International Law

- Numerous Conventions
  (Helsinki Convention on the Protection of the Baltic Sea, Convention for the Protection of the Mediterranean Sea against Pollution)

- WTO Law

- PPP as a general principle of law or as a rule of customary law as provided for in Article 38 of the Statute of the International Court of Justice?

See also the opinion of the ITLOS (international Tribunal on Law of the Sea).

Slide 12

PPP is recognised in a number of international Conventions (most of which have a regional character) like the Helsinki Convention on the Protection of the Baltic Sea or the Convention for the Protection of the Mediterranean Sea against Pollution.

There is not yet a unanimous opinion as to whether PPP should be considered as a general principle of law or as a rule of customary law as provided for in Art. 38 of the Statute of the International Court of Justice. The fact that most nations have introduced PPP into their national legal orders, there is growing international acceptance for it, and an increasing number of international Conventions refer to it are all strong arguments in favour of the reconnaissance of PPP as a general principle of law.

See also the opinion of the ITLOS (international Tribunal on Law of the Sea).
Slide 13

“General principles of law recognized by civilized nations” (Art. 38 1 (c)
And international custom are both “sources” of international law!
The preventive principle is accepted as such (→ see PP prevention).
PPP is mentioned in Art. 191 (2) of the EU Treaty as a principle of EU environmental law. Though, its substance is not defined there. Secondary legislation to follow in session after case study.
Slide 15
A definition is given by the French legislator in the French Environmental Code.

PPP in National Law

The codification of the principle in the French Environmental Code:

Article L 110-1 para. 2

3° Le principe pollueur-payeur, selon lequel les frais résultant des mesures de prévention, de réduction de la pollution et de lutte contre celle-ci doivent être supportés par le pollueur

3° The polluter pays principle according to which the costs of measures carried out to prevent, reduce and control pollution have to be born by the polluter.
As to implement the polluter pays principle there exists a broad range of instruments that can be classified into three main categories: Command and control law, economic instruments and voluntary approaches, provided by “soft law”.

**Slide 16**

- Command-and-control law: Environmental binding standards, emission limit values, “Best available technique”
- Economic instruments → tradable permits, eco-taxes, liability rules
- Voluntary approaches
Slide 17

This slide show some of the instruments that could be used for implementation. Market based instruments are well suited to improve internalization of environmental costs, but command and control law is still of high relevance in particular to implement the preventive aspects of PPP.

Feed in tariffs = policy mechanism designed to accelerate investment in renewable energy technology (long-term contracts "purchase guarantees" such as German EEG)
More information


Mann, Ian, (2009), A comparative study of the polluter pays principle and its international normative effect on pollutive processes.

Slides 18 and 19

Useful literature on PPP
More information

OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies 26th May 1972. [Cf. C/M(72)15(Final), Item 129(a), (b) and (c) - Doc. No. C(72)128].


OECD. Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution, 7 July 1969 - C(89)88/FINAL.


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**Slide 19**

See slide 18