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The Polluter Pays Principle in the Privy Council: Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago) [2017] UKPC 37

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The Polluter Pays Principle in the Privy Council: *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago)* [2017] UKPC 37

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ABSTRACT

This analysis considers the UK Privy Council judgment in the Fishermen and Friends of the Sea *case – an appeal from Trinidad and Tobago. The case is noteworthy both because it provides a relatively rare judicial consideration of one of the core environmental principles – the polluter pays principle — and because it is an unusual example of a successful principles-based challenge brought by an environmental NGO. My analysis locates the Privy Council's consideration of the principle within the separation of powers doctrine. I argue that, largely due to this doctrine, while the case is fascinating for its policy discussion of the polluter pays principle in relation to water pollution permit charging, it is ultimately not particularly useable as a precedent by environmental lawyers in jurisdictions beyond Trinidad and Tobago. Nevertheless, the case potentially offers some instructive lessons for the UK post-Brexit, where former EU environmental principles look set to be 'coming home'.*

KEYWORDS: Polluter pays principle, water pollution, permit charging, Trinidad and Tobago, Brexit, environmental principles

1. INTRODUCTION

The current case involved an appeal to the Judicial Committee of the UK Privy Council from the Court of Appeal of Trinidad and Tobago (T&T). Somewhat appropriately for an environmental case, it was also the first video-link hearing from the court's base in Parliament Square, London. The appeal was brought against the T&T Minister of Planning, Housing and the Environment by the environmental NGO, Fishermen and Friends of the Sea, which was challenging the application of the polluter pays principle in relation to cost-recovery charging for the regulation of water pollution.

Lord Carnwath began the judgment with a general summary of what the polluter pays principle is about:

> The Polluter Pays Principle ('PPP' or 'the Principle') is now firmly established as a basic principle of international and domestic environmental laws. It is designed to achieve the 'internalization of environmental costs', by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large.[1]

* The author thanks the anonymous referee for their helpful comments.

[1] *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago)* [2017] UKPC 37 ('*Fishermen and Friends of the Sea*') [2].

He also drew attention to the inherent uncertainties in the principle, including who should pay, what they should pay for, and how much they should pay.[2] These areas of uncertainty are very much a feature of discussion in the case, which involves how the polluter pays principle might shape the fee payable by a water pollution permit holder. The 'who' here is obvious, but the 'what' and 'how much' far less so. Are permit holders simply paying a contribution towards the water pollution regulator's costs of preventive monitoring and enforcement? If so, should the level of this contribution vary based on the polluting amounts discharged to water, or should it be a flat fee? And should there be an extra sum paid to cover a generic clean-up fund if prevention fails and a pollution incident occurs? These are some of the questions touched on by the case. However, as we shall see, anyone looking for a substantive blueprint from the Privy Council on how such a charging scheme should be drawn up so as to be in accordance with the PPP is likely to be disappointed. The judgment may touch on these questions, but it does not really answer them. What we get instead is a classic, measured judicial review analysis of what the T&T Minister was legally required to do under the terms of T&T law and whether he had acted in accordance with that law.

2. THE FACTUAL AND LEGAL BACKGROUND

Section 31 of the Environmental Management Act 2000 requires the Environmental Management Authority and all other governmental entities to conduct their operations and programmes in accordance with the Trinidad & Tobago National Environmental Policy (NEP).[3] This section clearly applied to the Minister of Planning, Housing and the Environment in the present case.

Paragraph 2.3 of the T&T statutory NEP states:

> Polluter Pays Principle
>
> A key principle of pollution control policy is that the cost of preventing pollution or of minimising environmental damage due to pollution will be borne by those responsible for pollution. The principle seeks to accomplish the optimal allocation of limited resources. Important elements of the principle are:
>
> (a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and
>
> (b) Money collected will be used to correct environmental damage.

As noted by Lord Carnwath, the central issue in the case was whether the Ministerial regulations by which charges for water pollution licences were fixed were consistent with this aspect of the NEP and in particular sub-paragraph 2.3(b).

The T&T Water Pollution Rules 2001 established a permitting system for regulating water pollution. Under rule 8, those who release a water pollutant outside the permissible level that is likely to cause harm to human health or to the environment will be notified of the need to apply for a permit. A person granted a permit is then required to pay 'the prescribed fee'.[4] This fee is the one prescribed

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[2] ibid [4] quoting *Burnett-Hall on Environmental Law* (3rd edn, Sweet & Maxwell 2012) 91.

[3] Drawn up by the Authority, after public consultation, and requiring Ministerial approval (under s 18 of the Environmental Management Act 2000).

[4] Rule 8(2).

by the Minister under section 96(2) of the Environmental Management Act 2000,[5] which provides him with the power to make regulations determining 'the amount of charges and fees payable to the Authority for or in relation to applications, licences, permits …'.[6]

Using this power, the Minister made the Water Pollution (Fees) Regulations 2001,[7] which prescribed the fees payable to apply for and maintain a water pollution permit. The principal fee took the form of a fixed annual permit fee of TT$10,000 for the period of the permit.[8] There was no variation in this fee according to the type or amount of pollution permitted.

The Minister settled on this approach from a range of permit fee models which had been explored in collaboration with US expertise. He had effectively chosen 'Model 2', described in the T&T Court of Appeal as follows:[9]

> This model suggests an identification of the total permitting cost on a yearly basis and an estimate of the number of permits that the [Authority] anticipate will be issued. The total permitting cost is divided by the anticipated number of permits and the resulting figure is deemed to be the permitting cost.
>
> This is a simple model that will be quite easy to administer. However, it suffers from several inherent deficiencies such as the failure to distinguish between ability to pay; lack of consideration of pollution profile and load profile; and impact of pollutant on the environment.

Model 2 thus lies at the basic end of the spectrum, with a simple division of the regulatory agency's costs by the number of permit holders. Another potential model that was not adopted by the Minister – 'Model 6' – was based on pollution loads and represented a contrasting and ambitious approach to permitting fees:

> The pollution load model is perhaps the most suitable one for ensuring that the environmental imperatives are satisfied together with the cost recovery requirement of the permitting agency. Basically, this model operates on several levels.
>
> Essentially, the Fees paid are based on those pollutants included in the permit; the environmental harm caused by the pollutants discharged; the quantity of the pollutants discharged and the quality of the water receiving the discharge. This method of setting permit fees is big in Wisconsin and the state has been effective in achieving full recovery of its cost …
>
> This Wisconsin model is quite useful as it provides equity in the sense that the polluter pays according to discharge load … In addition by considering where discharge is taking place,

[5] Rule 2.
[6] Environmental Management Act 2000, s 96(2)(a).
[7] These were subsequently amended by The Water Pollution (Fees) (Amendment) Regulations 2006. However the core basis of the fee structure remained the same.
[8] Rule 8(2).
[9] [6] of the Court of Appeal judgment, quoted in *Fishermen and Friends of the Sea* [21].

> measures can be taken to protect more sensitive water zones. Finally, basing a model on load based pollution ensures full implementation of the polluter pay principle.[10]

Detail on the full range of models is not particularly relevant for the purposes of the current analysis, or indeed for that of the Privy Council, which singled out mainly these two models[11] – the first because it was the one chosen by the T&T authorities, and the other representing the ideal PPP version called for by the appellants.

The appellants' claim queried whether the polluter pays principle (as set out in paragraph 2.3 of the NEP) had been properly used in drawing up the annual permit fees under the regulations. They argued that the flat, fixed fee of TT$10,000 showed that it had not been (because such a structure was in breach of the PPP) and that the regulations were therefore unlawful and should be withdrawn.[12]

3. THE BOARD'S JUDGMENT

The Privy Council Board drew explicit attention to para 2.3 of the NEP, which, as we have seen, states that the PPP requires there to be charges for permits and that the money raised will be used to correct environmental damage. It then asked:[13]

> Is it sufficient that the fees are assessed on the basis of full recovery only of the operating costs of the authority, including the administration of the permit scheme? Or should they also allow for an additional amount to be used by the Authority itself 'to correct environmental damage'?

The appellants argued that, under the chosen flat fee model, no fees collected were being used to correct environmental damage. They effectively claimed that only a Model 6-type approach would enable this, given that the costs associated with rectifying environmental damage vary 'according to the pollution load, pollutant profile, sensitivity of receiving environment and toxicity.'[14]

Counsel for the Minister, in contrast, argued that the act of regulating polluters, requiring them to have a permit and to be subject to its conditions, amounted to the Authority acting 'to correct environmental damage' and that its activity in this regard 'is funded by money collected from fees'.[15] Accordingly, the letter of the Policy was being complied with.

The Board of the Privy Council disagreed with the latter view. It held that sub-paragraph (b) of paragraph 2.3 ('Money collected will be used to correct environmental damage') must be given separate effect. This provision was not directed to the general purpose of the permitting system or to the implementation of permit conditions, but rather to the use by the Authority of the money collected by way of fees in order to correct environmental damage.

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[10] Quoted in *Fishermen and Friends of the Sea* [23].
[11] Model 5, which was volume-based was also briefly discussed: *Fishermen and Friends of the Sea* [22]. While volume is in some senses a proxy for pollution, it is only rather crudely so and thus lacks the refinement of a true pollution load model (as in Model 6).
[12] *Fishermen and Friends of the Sea* [27] and [30].
[13] ibid [37].
[14] ibid [38].
[15] ibid [40].

However, the Board could hardly be said to have endorsed the former view (arguing for a Model 6 approach) either. It left much more room for Ministerial discretion than that. As Lord Carnwath held:[16]

> the NEP does not specify the extent of provision to be made for future correction activities of the Authority, nor its form. Those are matters for the judgement of the Minister. However, sub-paragraph (b) is identified as an important aspect of the NEP, which cannot lawfully be ignored. As far as can be judged from the material available to the Board, it was left wholly out of account in setting the prescribed fee … There is no reference to this aspect of paragraph 2.3 in the evidence filed on behalf of the Minister [being taken into account in setting the fees].

The only reasonable inference therefore was that paragraph 2.3 had been ignored. That meant that the regulations failed to comply with the NEP and were thus in breach of the Minister's duty under section 31 of the Environmental Management Act 2000.

4. ANALYSIS

Environmental principles, in terms of judicial application, have never quite lived up to their promise from an environmental point of view. They are Janus-faced tools that have as often been used by industry as by the environmental movement. That is particularly true in an EU law context, where judicial review challenges based on various EU environmental principles, including polluter pays,[17] are very much the province of industry.[18] Furthermore, some of them are less commonly aired in court than others. The precautionary principle, for example, is relatively frequently litigated, whereas an appearance by the polluter pays principle is much rarer. *Fishermen and Friends of the Sea* is therefore notable in at least two respects: it is a case brought by an environmental NGO and it is based on the polluter pays principle. The fact that it was decided by an apex court provides the icing on an already unusual cake.

In some respects, one of the most interesting elements of the case turns out to be juridically of little relevance – its discussion of the policy context to Trinidad and Tobago's choices on cost-recovery charging for water pollution permits. Although they got the law wrong in the end and lost the appeal, one nevertheless comes away impressed with how rigorously the T&T government engaged in research on the various models for permit fees and their compatibility with the PPP. One can only hope that the UK government treats environmental principles as assiduously post-Brexit (British exit from the European Union)[19]– an issue that is considered further below.

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[16] ibid [43].

[17] Eg Case C-293/97 *R v Secretary of State for the Environment, ex p Standley* [1999] ECR I-2603. The precautionary principle is the environmental principle most commonly employed by industry in EU law.

[18] In *Standley*, the 'industry' was farming. This industry dominance in the EU reflects strict standing rules before the Court of Justice which particularly prejudice environmental NGOs.

[19] See UK Human Rights Blog, David Hart QC, 'Polluter Pays Principle: in Tobago, in the EU/UK, and in UK post-Brexit' <https://ukhumanrightsblog.com/2017/12/01/polluter-pays-principle-in-tobago-in-the-eu-uk-and-in-uk-post-brexit/> (accessed 15 June 2018). On Brexit and environmental principles, see further Brexit & Environment Blog, Eloise Scotford, 'Environmental Principles as Legal Foundations of UK Environmental Policy: Bedrocks or Minefields?' <https://www.brexitenvironment.co.uk/2018/07/30/environmental-principles-legal-foundations-uk-environmental-policy-bedrocks-minefields/> (accessed 7 August 2018).

The T&T NEP's instantiation of the PPP required the cost of preventing pollution or of minimising environmental damage to be borne by those responsible. It also emphasised the need for permit charging and spending of money collected on correcting environmental damage. Of course, as adverted to in the case,[20] a permit system with conditions in itself reflects the PPP in that polluters are obliged to pay for the cost of pollution control equipment in order to meet their permit conditions. In relation to the permit *charging* element, as we saw earlier, the appellants read this as requiring something like Model 6, with permit fees based directly on pollution loads; the T&T government read it as requiring only a permit-based system with charging to recover the overall system costs (as the permit-based system itself 'corrects environmental damage'); and the Privy Council interpreted it as needing a separate spend (beyond the permit system itself) on correcting environmental damage. In truth, however, the Board's view is much closer to the T&T government approach than to the appellants' one. It would presumably have been fine for the government to keep their cost-recovery charging system more or less as it stood, but to add a small additional fee to everyone's permit to cater for clean-up or remediation after pollution incidents. The latter would fulfil the NEP's requirement for spending the money on correcting environmental damage, assuming that 'spending the money' means spending *some* rather than *all* of the collected permit fees on this. One also assumes that 'correcting' would be interpreted broadly. What, for example, if the Authority deployed a boom after an oil spill to contain the oil and to stop it from polluting (or further polluting) a watercourse? Would this be 'correcting' environmental damage that has occurred or 'preventing' it from happening in the first place? It should of course be included in permissible spending, with 'correcting' interpreted expansively so as to enable this.

The case provides a useful illustration of the separation of powers at work. In her book on environmental principles,[21] Eloise Scotford usefully sets out the various ways in which environmental principles, including the PPP, operate. They have a policy use in that they guide governments in implementing policy.[22] They also have a legal use where they are applied in courts. In the latter context, they can be used to interpret legislation, particularly where that legislation is vague or has gaps;[23] they can also be used to challenge the exercise of government discretionary action (or inaction) in relation to the environment.[24] The two are of course then related. For constitutional separation of powers reasons, courts are often wary of interfering with government policy, the choice of which is seen as one for elected representatives and their accountable agents (regulators) and not for the courts.[25]

This constitutional backdrop is important when considering some key legal issues concerning environmental law principles. One such issue is whether principles like the PPP are justiciable in a freestanding way when challenging the exercise of government discretion. Thus, can I independently challenge any government policy on the basis of the environmental principles?[26] What, for example,

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[20] *Fishermen and Friends of the Sea* [31] and [39].
[21] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017).
[22] ibid 34.
[23] ibid 147.
[24] ibid 166. The current case obviously involves this latter one.
[25] ibid 132-133.
[26] ibid 117, 261, 264, noting this as a particular issue within EU law. See also Richard Macrory, 'Principles into Practice', in Richard Macrory (ed), *Principles of European Environmental Law* (Europa Law Publishing 2004) 3, 6.

if I felt that government inaction on tackling air pollution from wood-burning stoves was in breach of the PPP? Or can I rely on them only where the government has acted with the relevant principle in mind and hence is explicitly intending to implement it?[27] The role of the court is then to encourage the government to stick to what it has intended. The current appeal does not answer this question because it does not need to – it is a clear example of the latter, which is the uncontroversial option for the justiciability of environmental principles. The former, freestanding option opens up much more room for challenging government policy, which the EU courts in particular have tended to shy away from. If the recent *Mott* ruling is anything to go by, the UK Supreme Court is also wary.[28] However, one might want to distinguish less determinate principles such as the PPP and sustainable development from other, more determinate principles, which arguably lend themselves much more to being used on a freestanding basis. Principles such as the non-deterioration principle[29] and perhaps also the precautionary principle could be placed into the latter category. This inevitably begs the question of why some principles are more determinate than others. It is to this that we now turn.

On the legal determinacy of environmental principles, the critical issue is whether the courts can and will set out their own version of a particular principle. In other words, can and will they provide what are typically vague principles with substantive content, or will they allow the executive to follow its own interpretation of the relevant principle? In EU law, the Court of Justice (especially the General Court)[30] — has set out much more detail for the precautionary principle than for the other environmental law principles. Despite de Sadeleer's hope,[31] it seems unlikely that the courts will spell out the parameters of the polluter pays principle in the same way. That is in part because its application is so area-specific – what the PPP means in the context of water pollution permit charging is very different to how it might apply in relation to, for example, contaminated land.[32] It is no surprise therefore that, in the current *Fishermen and Friends of the Sea* case, Lord Carnwath provided only a relatively modest and uncontroversial definition of the polluter pays principle at the start of the judgment. Recognising it as a rather indeterminate principle, he did not lay down a detailed account of how it should apply in the specific context of water pollution permit charging; that was very much left to the T&T executive.

In other words, not all environmental law principles operate similarly in terms of how a court might fill out their content. With the precautionary principle, detail has been provided by the Court of Justice and this is important in the context of the various EU risk regulation regimes. However, one reason that the Court has been bold on this principle is that it has taken many of its cues from the

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[27] Most EU case law on environmental principles can be understood as constitutionally limited in this way: Scotford (n 21) 117-118. On distinguishing between inaction and action, see Gerd Winter, 'The Legal Nature of Environmental Principles in International, EC and German Law', in Macrory (n 26) 11, 22-23.

[28] *R (Mott) v Environment Agency* [2018] UKSC 10. Counsel for the Agency, James Maurici QC, argued that to provide compensation to a salmon fisherman deprived of his (damaging) livelihood due to habitats protection would be contrary to the PPP: [29]. However in his judgment in that court, Lord Carnwath did not take up discussion of the principle at all.

[29] See eg Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland v Germany* (2015) EU:C:2015:433.

[30] Scotford (n 21) 184.

[31] Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 60: 'it is up to legal doctrine progressively to add the finishing touches that will clarify the definition and scope of the [polluter pays] principle'.

[32] Scotford (n 21) 150-151.

Commission's own policy work on it.[33] In separation of powers terms, the Court is therefore not stepping out too far on its own. Another is that, despite applying across a number of risk regimes, the precautionary principle tends to hold to a core meaning: it does not vary much in its application to particular contexts.[34] The PPP and the principle of sustainable development are, in contrast, more 'postmodern' principles in de Sadeleer's sense.[35] They apply across many more settings (not being confined to a risk context) and their application does not hold to a core meaning across those settings.[36] The current *Fishermen and Friends of the Sea* case clearly illustrates this: how the PPP applies in the water pollution permit charging context is rather specific and open to many legitimate interpretations (with government reasonably able to choose between either Model 2 or Model 6 for example, so long as the core aspects of the NEP's version of the PPP are respected).

The approach to environmental law principles may thus be interventionist (with the courts spelling them out in depth) or non-interventionist (with the courts leaving interpretation largely to the executive). Even a non-interventionist approach may have a backstop however. Thus a court may be prepared to intervene if a government's interpretation of a principle is so unreasonable that no reasonable decision-maker could have come to it (in a *Wednesbury* unreasonable or manifest error sense). The Board in the current case was non-interventionist. It did not set out more than a bare definition of the principle and it did not intervene with the T&T government's interpretation of the principle as applied to permit charging – either when set out in paragraph 2.3 of the NEP or in its choice of the more basic PPP-respecting Model 2. If T&T wanted a less advanced charging model, better suited to its capacity as a developing country, then that was fine. The Privy Council was not going to make them adopt the more technically demanding Model 6 on the basis that only that one model or definition truly accorded with the PPP.

After interpretation of the principle (including an interpretive application to a context such as permit charging), there is then the matter of legally reviewing its *implementation* in practice. Again, the question here is whether the courts will adopt an intensive approach to judicial review, holding the executive to its own promises on the principle, or if they will take a more hands-off stance, allowing it room to treat its promises rather loosely. On this element in the current case, the Privy Council Board adopted a relatively hands-on, illegality approach: in applying its own interpretation of the PPP, the T&T executive had committed an error of law by neglecting to provide for a sum to correct environmental damage which they themselves had said that the PPP required in the charging context. The Board could, conceivably, have treated paragraph 2.3 as mere *guidance* (set out in a policy document, albeit on a statutory footing),[37] but rejected this less interventionist approach.[38]

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[33] Commission of the European Communities, 'Communication from the Commission on the Precautionary Principle' COM (2000) 1 final. See Elizabeth C Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2010) ch 6.

[34] Cf Scotford (n 21) 184. Cf also Case C‑111/16 *Fidenato* (2017) EU:C:2017:676. In the latter, while the core content of the principle remained that of allowing risk management measures to be taken despite scientific uncertainty, the case involved variation in the *application* of the precautionary principle to GMOS insofar as particular legislative procedural rules had been established for Member States wishing to impose emergency measures in that policy area.

[35] de Sadeleer (n 31) 273.

[36] de Sadeleer for example, characterises the PPP as 'elusive' (n 31) 60, and Scotford describes sustainable development as 'more amorphous' (n 21) 192.

[37] See the T&T government's argument: *Fishermen and Friends of the Sea* [40].

[38] ibid [41].

Many of the above issues – including variation among environmental law principles; differences between interpretation, application and implementation; and the degree of court intervention and intensity of review – will be of particular interest to a UK audience in the context of Brexit. Section 16(1) of the European Union (Withdrawal) Act 2018 sets out that:

> The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of—
>
> (a) a set of environmental principles,
>
> (b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,
>
> (c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b).

A consultation document on this draft Bill was issued in May 2018, with consultation closing on 2 August and the Bill due to be published in autumn 2018.[39] The draft Environmental Principles and Governance Bill will be accompanied by a new statutory policy statement on environmental principles to be drawn up under it.

What then is the key lesson from the *Fishermen and Friends of the Sea* case for the duties in paragraphs (b) and (c) above, to which the new Bill will give effect? Given that there is little to separate the UK Supreme Court from the Privy Council compositionally, one can conclude for now that our courts are unlikely to flesh out the principles much themselves in terms of application to particular environmental policy areas. On that count, they can generally be expected to defer to government. However, the courts are likely to insist that legislative wording is followed. In that respect, the new Environmental Principles and Governance Bill and its associated statutory policy statement on environmental principles provide a good starting point. However (depending on the wording of the new Bill), the levels of ambition and specificity in all future substantive environmental legislation and policy in their reference to principles also seems crucial. Without a connected and coherent legislative basis for incorporating environmental principles into UK environmental legislation generally, the promise of a post-Brexit replacement of EU accountability mechanisms with home-grown British ones may turn out to be a hollow one. *Existing* legislation and policy will also need revisiting. A brief look at just English environmental permitting charging reveals that there is much work to be done on that front. Unlike Trinidad and Tobago, England's charging scheme and guidance make no mention of the polluter pays principle.[40] The 2017 consultation paper that preceded the current scheme mentioned the principle only once in relation to EU emissions trading system (ETS) charging and that was to propose abandoning a distinction between the largest and smaller emitters that the principle previously supported.[41] Absent a mention of the PPP in

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[39] Defra, *Environmental Principles and Governance after the United Kingdom leaves the European Union Consultation on environmental principles and accountability for the environment* (May 2018).
[40] The Environment Agency (Environmental Permitting) (England) Charging Scheme 2018 and 'Environmental permitting charges guidance' https://www.gov.uk/government/publications/environmental-permitting-charges-guidance/environmental-permitting-charges-guidance> (accessed 7 August 2018).
[41] Environment Agency, *Environment Agency Charge proposals from 2018* (2017) 52.

relevant substantive legislation and policy, it seems unlikely that we will see litigants able to mobilise the principle in court in the way seen in the current T&T case and in other jurisdictions.[42]

5. CONCLUSION

Ultimately, the *Fishermen and Friends of the Sea* case tells us everything and yet nothing about the polluter pays principle. This is not meant as a disrespectful comment on the judgment, which is as elegant and tightly reasoned as one has come to expect from Lord Carnwath. It is more a statement of the inevitable limitations of examining the PPP in a particular jurisdictional context – here Trinidad and Tobago. As Scotford rightly observes, case law on the environmental principles tends to be very much legislation and policy wording, and thus jurisdictionally, -specific.[43] Hence, we learn *everything* about the PPP in an interesting policy-application sense because we see the background to T&T's choices concerning the principle in relation to permit charging. But that is ultimately not justiciable material. Much as they might like to be able to, environmental lawyers elsewhere cannot argue, in future cases, that the PPP requires something akin to Model 6-based fees.

However, at the same time we learn *nothing*, because the whole of the *Fishermen and Friends of the Sea* case really just turns on the T&T government ignoring specific wording (spending collected fees on correcting environmental damage), which is extremely unlikely to be found elsewhere in another jurisdiction. In the end, as Scotford elegantly puts it: 'The transnational turn related to environmental principles is one of normative inspiration rather than cascading legalisation.'[44] The case, in other words, serves principally as an encouragement, but not as a readily transplantable blueprint on the polluter pays principle. That said, in a UK Brexit context, the case does provide some tantalising food for thought as to how, in general terms, our courts might approach the proposed new legislative duties on environmental principles. Trinidad and Tobago's authorities were, in many ways, a thoughtful watchdog in applying T&T's version of the polluter pays principle, so the Privy Council perhaps felt able to adopt more of a poodle approach in its review. If the UK government lives up to its promises on post-Brexit principles and accountability, then we can probably expect a similarly non-aggressive stance by our own courts. If, on the other hand, the government comes up with a poodle in the way in which the proposed environmental principles framework operates in practice, then one might expect the UK Supreme Court to adopt a more interventionist, watchdog role.

[42] eg Belgium (including in relation to discharge charging), see Luc Lavrysen, 'European Environmental Law Principles in Belgian Jurisprudence' in Macrory (n 26) 75.
[43] Scotford (n 21) 263-264.
[44] ibid 264.