

Is the Polluter Paying?

Assessing the Application of the “Polluter Pays” Principle to Ship-Source Pollution in Hong Kong



THE HONG KONG
POLYTECHNIC UNIVERSITY
香港理工大學

Ling Zhu PhD LLM LLB

Associate Professor

Department of Logistics and Maritime Studies

The Hong Kong Polytechnic University

Outline:

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- ❖ Ship-Source Pollution Concerns in Hong Kong
- ❖ Polluter-Pays Principle
- ❖ Main Legal Framework

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Ship-source Pollution Concerns in HK

- ❖ HK's narrow waters are faced with an ever-increasing growth in shipping traffic (local, regional and ocean-going vessels);
- ❖ HK suffers from the typical marine pollution problems associated with shipping activities;
- ❖ The high volume of vessel traffic creates a significant challenge in regard to the control of ship-source pollution and has a significant impact on the marine environment of HK.



Polluter-Pays Principle (PPP)



- ❖ The Organisation for Economic Co-operation and Development (OECD) receives credit for the first formal articulation of the PPP in 1972:
 - ❖ **1972, “Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies”:**
 - ❖ “The principle to be used for allocating costs of pollution prevention and control measures ... is the so-called “Polluter-Pays Principle”.
 - ❖ **1989, “The Application of the Polluter-Pays Principle to Accidental Pollution”:**
 - ❖ “The operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation” and “the cost of reasonable measures to control accidental pollution after an accident”.
 - ❖ **2002, “The Polluter-Pays Principle as It Relates to International Trade”:**
 - ❖ PPP is now evolving in certain instruments towards encompassing all pollution-related expenditure

- ❖ In the following decades after its creation, the principle has been well developed in national laws of OECD Member Countries, especially the ones in European Union.

PPP: Meaning

- ❖ The precise meaning of the PPP remains open to interpretation, as it can vary according to different situations.
- ❖ However, it is generally accepted that the **PPP implies that the polluter should bear the cost of any pollution.**

PPP in Hong Kong

❖ **Introduced** in 1989:

- ❖ “White Paper: Pollution in Hong Kong: A Time to Act” and its subsequent reviews;

❖ **Stressed** by several policy papers, e.g.

- ❖ The 2013 “Policy Address” of The Chief Executive of HK
- ❖ Hong Kong Blueprint for Sustainable Use of Resources 2013 – 2022 by Hong Kong Environment Bureau

❖ **Implemented** in pieces of HK Legislations, e.g.:

- ❖ Sewage services charging scheme, under the Sewage Services Ordinance (Cap. 463, Laws of Hong Kong)
- ❖ Waste disposal charging scheme, under the Waste Disposal Ordinance (Cap.354, Laws of Hong Kong)



Is the polluter paying for ship-source pollution?



Ship-source pollution & PPP

There is a need to have a legal and policy system under which:

- a) *The potential polluter is well aware of his possible liability if any pollution accident occurs;*
- b) *He is motivated to take pollution abatement action; and*
- c) *Once any pollution damage occurs, he does pay for the costs.*





Does Hong Kong have such a legal and policy system for combating ship-source pollution ?



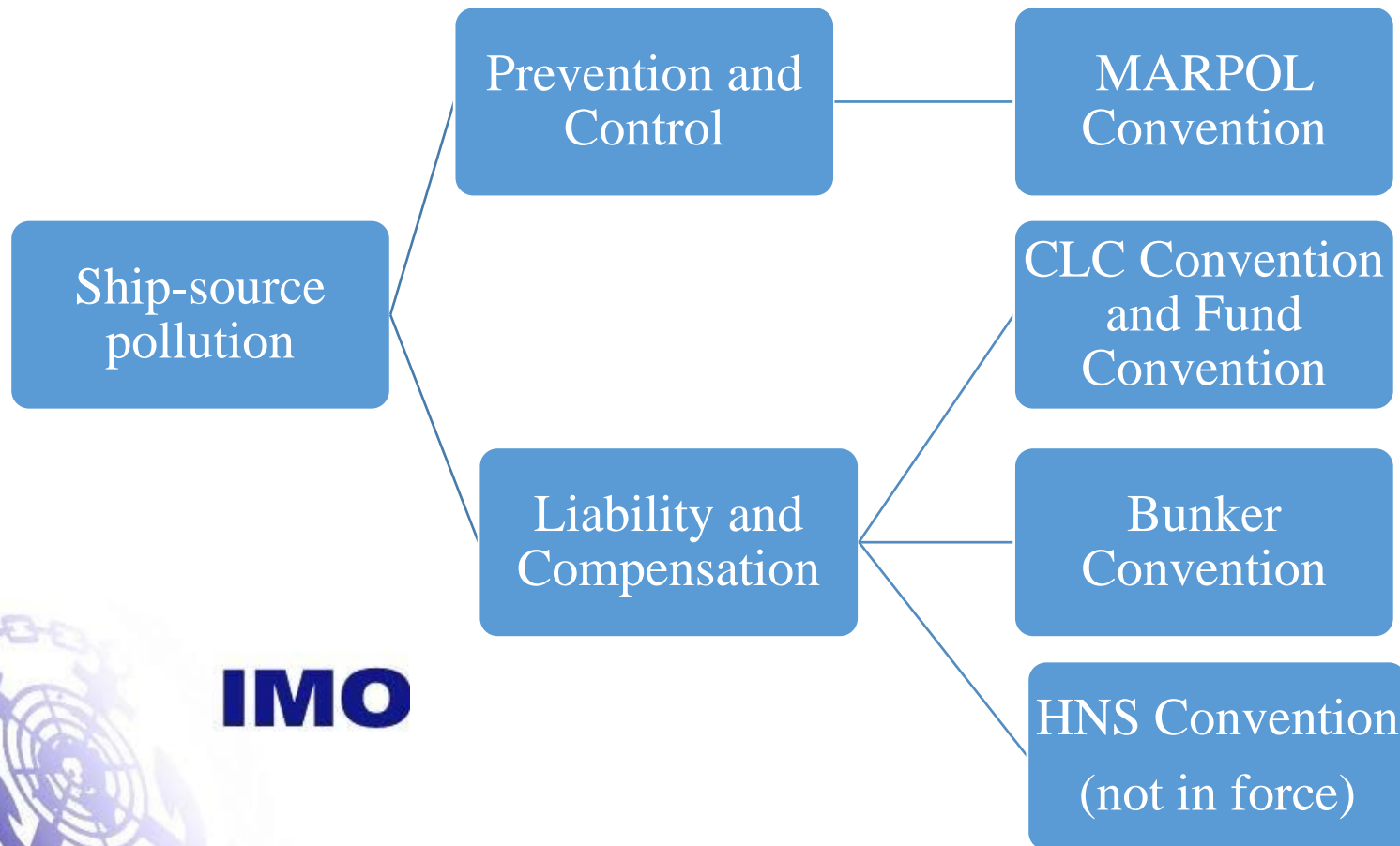
PPP in ship-source pollution law

- ❖ PPP is now reflected in ship-sourced pollution law;
- ❖ The implementation of the PPP has evolved:

“...first, as an economic principle for allocating to potential polluters and polluters **the costs of pollution control** by governments; second, to requiring polluters **pay for emergency response and clean-up costs**, and third, to having polluters **pay compensation to victims** of pollution.”
(MacInnis, 2012).

Reference: MacInnis, K. A. ‘The Polluter Pays Principle: Preventing Ship-Source Pollution in the Arctic’ in Chircop, A., Letalik, N., McDorman, L.T. and Rolsyon, S.J. (eds), *The Regulation of International Shipping: International and Comparative Perspectives: Essays in Honor of Edgar Gold* (Martinus Hijhoff Publishers 2012).

Main Legal Framework for Ship-source Pollution: International Regime



Main Legal Framework for Ship-source Pollution in Hong Kong

HK has implemented most of international conventions:

MARPOL
Convention

Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap 413, Laws of Hong Kong)

CLC Convention
and Fund
Convention

Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414, Laws of Hong Kong)

Bunker
Convention

Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap 605, Laws of Hong Kong)

Main Legal Framework in HK

- ❖ It seems that HK already has adequate laws in place to combat the challenges of ship-source pollution and require the polluter to pay; **however, this general perception is flawed.**

For example:

- ❖ Some new legal issues are not fully addressed;
- ❖ Some certain kinds of pollution may not fall within the realm of existing legal and policy system;
- ❖ It happens that some small and non-serious pollution incidents are not well addressed; and these accumulation of pollution damage from those small and non-serious pollution incidents, **if they are not appropriately addressed**, may eventually be of serious consequence to HK marine waters;
- ❖ ...

Is the Polluter Paying? – Problems

For **prevention and control** of ship-source pollution, the issue of reception facilities is very outstanding:

- 1) Under the MARPOL Convention, the setting-up and operation of port reception facilities (PRFs) takes up a large proportion of the prevention investment. It is the Contracting States that should ensure adequate reception facilities at their ports or terminals.
- 2) It is usual that the government is the funding source for the establishment of port reception facilities. The government will charge both users and polluters with fees for the service rendered, which is called a cost recovery mechanism.
- 3) Although the recovery rate of variable operating cost (VOC) for MARPOL waste handled by the Chemical Waste Treatment Centre (CWTC) has been increasing, it remains unsatisfactory – **which means the operating costs of the CWTC for MARPOL waste are not fully internalized to polluters.**

Recovery rate of VOC for MARPOL waste handled by CWTC in HK

VOC recovery %	20	25	31	54	66
Effective date	1.8.1995	20.12.1996	16.1.1998	31.3.2006	1.7.2008

(Sources: HK Environmental Protection Department)

Is the Polluter Paying? – Problems

For **liability and compensation** for ship-source pollution, there are three main problems:

Who is the
polluter?

- With the exception of bunker oil pollution incidents, the liability for pollution damage is narrowly channeled through a long list to the registered owner of the ship.

What
should the
polluter
pay?

- The shipowner's liability is subject to the application of the rule of limitation of liability based on CLC/Fund Convention or Limitation Liability Convention.

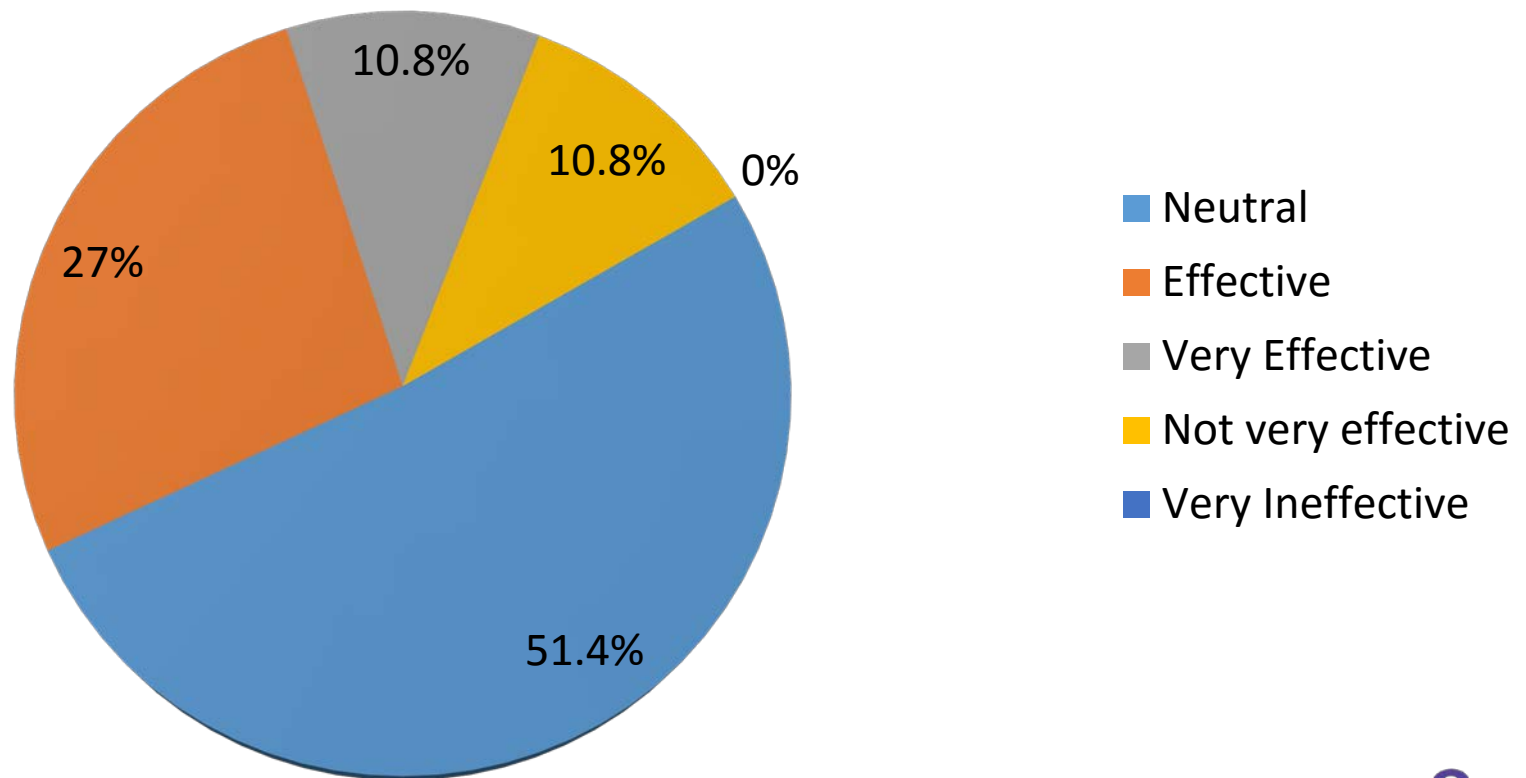
What is
pollution?

- The defining scope of pollution damage is limited; and ecological damage of the marine environment is not covered fully in the conventions.

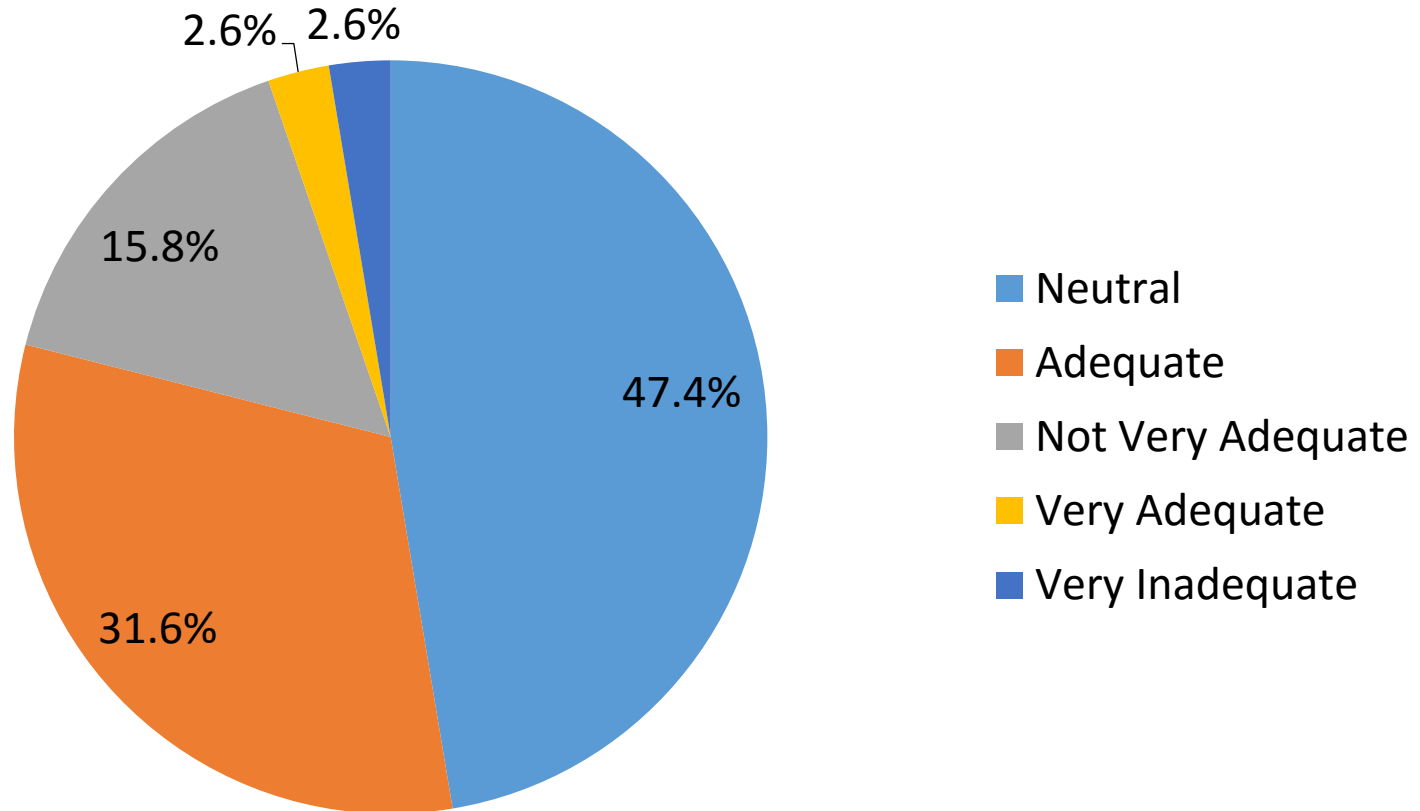
Is the Polluter Paying? – The Survey

- ❖ A questionnaire survey was also conducted in order to have a full understanding of the industry's concern about ship-source pollution and the PPP.
- ❖ In total, 127 participants were invited, including: 98 shipowners, ship managers or ship operators, based upon the membership directory of the Hong Kong Shipowner Association; 10 cargo owners/charterers; and 19 general marine insurance underwriters or P&I clubs, especially those most likely involved in the business of shipowner's pollution liability. In total, 39 companies participated in the survey.

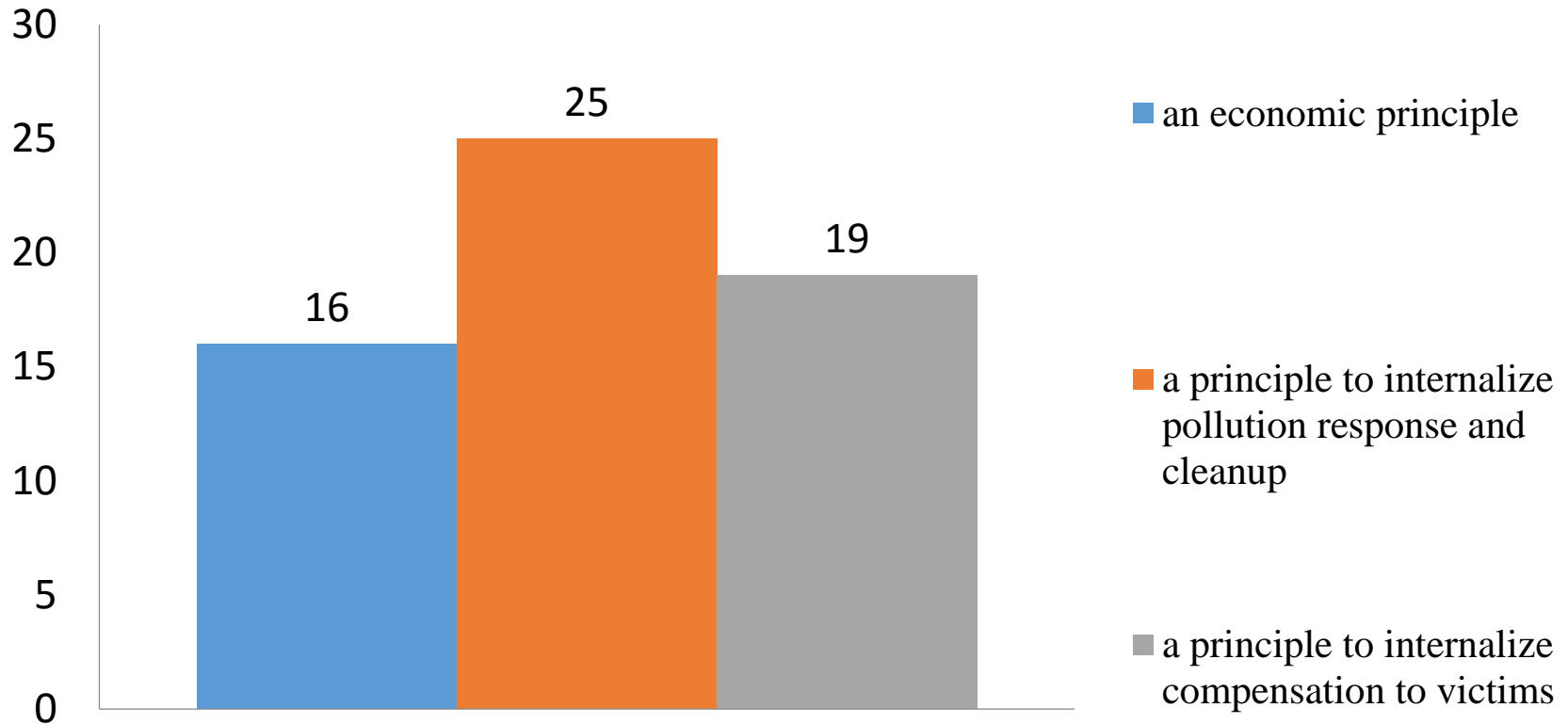
The result of participants' views on the effectiveness of pollution prevention and control



The result of participants' views on the adequacy of pollution liability and compensation



The result of participants' understanding of PPP



The understanding of PPP in Hong Kong Shipping Industry

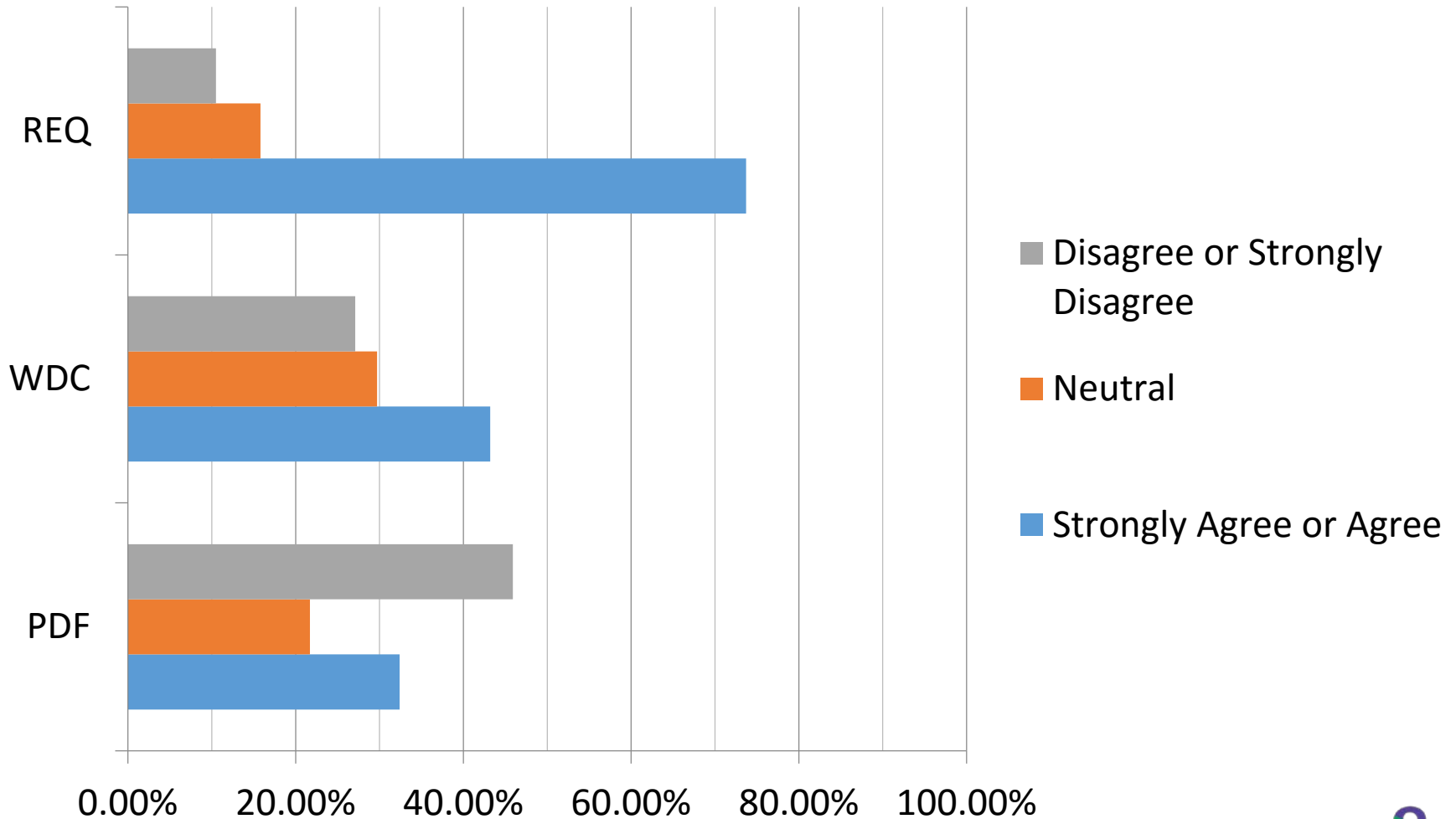
Proposed policies to which PPP may be applied:

❖ In the survey, among other questions, there were **three** proposed policies to which PPP were suggested to be applied to its fullest measure. They are:

- 1) Increasing the waste disposal charge (WDC);
- 2) Increasing the port due and fees (PDF); and
- 3) Raising the requirement for entering vessels (REQ).

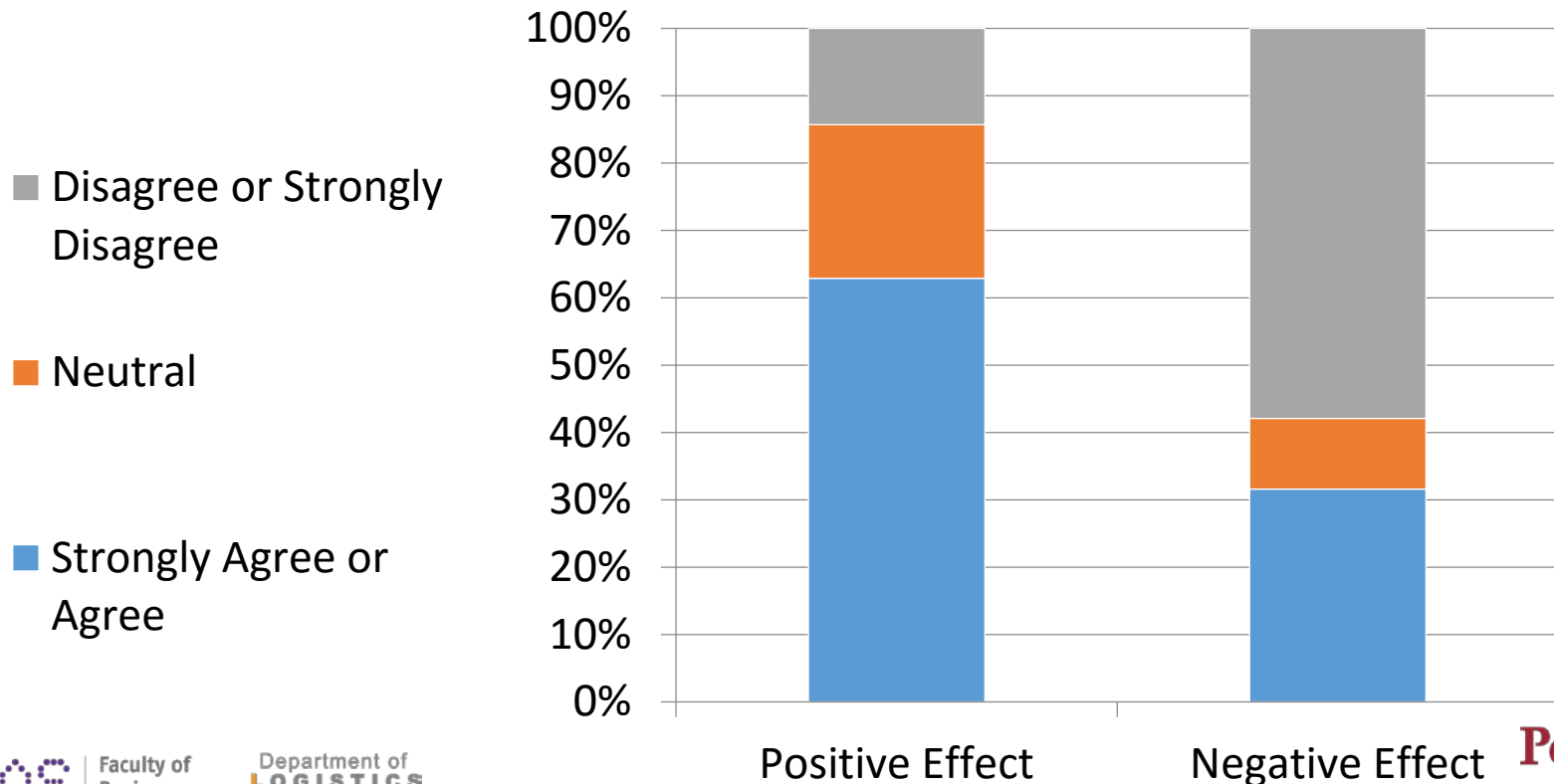
The participants were invited to **evaluate the above suggested policies** and **the possible effects** if they were carried out.

The result of participants' evaluation to the suggested policies:



The potential effects of suggested policies:

There are two proposed answers: For a positive one, the prevention and controlling of ship-source pollution will be strengthened; for a negative one, vessels may be prevented from calling to HK or passing through HK waters in order to avoid the policies.



Policy Recommendations

- ❖ Being a port state, HK has the jurisdiction power to establish and enforce particular rules and standards for vessels' entry and stay in its waters in order to prevent pollution to marine environment;
- ❖ The survey shows the support from the industry to implement PPP further to preventing and controlling ship-source pollution. **Therefore, there is a feasibility to propose to HK government to consider adopting the relevant policy based upon PPP**, e.g., increasing the waste disposal charge to recover all the operating costs for reception facilities, and raising the requirements for vessels entering HK waters.

Acknowledgements

This policy study is financially supported by a research grant from the Public Policy Research project sponsored by the Central Policy Unit of Hong Kong SAR (Project Number: 2013.A6.022.13A). We are very grateful to all participants who generously supported and participated in our questionnaire survey.

Publications

- ❖ ZHU, Ling (2015), “Is the Polluter Paying for Vessel-Source Pollution?” *Journal of Business Law*. Issue 4, pp. 348-360.
- ❖ ZHU, Ling and ZHAO, Yachao (2015), “Polluter-Pays Principle: Policy Implementation”. *Environmental Policy and Law*. 45/1, pp. 34-39.
- ❖ ZHU, Ling and ZHAO, Yachao (2015), “A feasibility assessment of the application of the polluter-pays principle to ship-source pollution in Hong Kong”. *Marine Policy*. 57, pp. 36-44.



Thank you!
ling.zhu@polyu.edu.hk