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Due diligence in global value chains: Conceptualizing 'adverse environmental impact'

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Abstract

Due diligence norms often require enterprises to address 'adverse environmental impacts' in their value chains. It is, however, rare for that phrase to be defined. Thus, it is not known precisely what effects are to be prevented or remedied or, where relevant, when sanctions and/or liability can be imposed. This article seeks to determine how 'adverse environmental impact' should be conceptualized in these norms, a question largely unexplored in the literature. It is argued that the polluter-pays principle, and theory of cost internalization that it is built upon, offers a stable normative base from which to sculpt a robust definition. With specificity garnered from exemplar legal frameworks, it is demonstrated that 'traditional damage' (e.g. damage to property or human health) and damage to the environment itself ought to be covered by the phrase. This will ensure that incentives for prevention can be harnessed and that the costs of an enterprise's goods and services will reflect their true social cost more closely.

1 | INTRODUCTION

Corporate due diligence is primarily a preventative mechanism that requires enterprises to identify potential or actual adverse impacts in their value chains[1] and deploy measures to address them.[2] An array of adverse impacts may fall within its scope, including to workers, human rights, consumers and the environment.[3] This article is concerned solely with the latter. When an enterprise identifies that it has caused or contributed to an adverse environmental impact then it should provide for its remediation (i.e. 'make good' the impact).[4] This could comprise, for example, providing financial or non-financial compensation to affected individuals.[5] Although not strictly a component of due diligence, the provision of a remedy is perceived to be a 'separate, critical process' to be enabled and supported by it.[6]

Due diligence recommendations are found in 'voluntary' standards, with the United Nations' Guiding Principles on

[1]In this article, 'value chain' will be used to mean all activities, direct and indirect business relationships and investment relations of an enterprise, including entities that supply goods or services to it, or which receive goods or services from it.

[2]European Parliament, 'Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2020/2129(INL)) para 2.

[3]See, e.g., OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD 2018) <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> 3.

[4]ibid 15, 72 and 88.

[5]See, e.g., 'Recommendations for Drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability' (Draft CDDCA Directive), annexed to European Parliament (n 2) art 10(3) ('The remedy shall be determined in consultation with the affected stakeholders and may consist of: financial or non-financial compensation, reinstatement, public apologies, restitution, rehabilitation or a contribution to an investigation.')

[6]OECD (n 3) 88.

Business and Human Rights (UNGPs)[7] and the Organisation for Economic Co-operation and Development's (OECD) Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance)[8] being two high-profile examples. However, in recent years, there has been an intensification in the political appetite to 'harden' due diligence standards within the European Union (EU), specifically for human rights abuses and environmental impacts. That the European Parliament has recently passed a resolution setting out recommended text for a Directive on Corporate Due Diligence and Corporate Accountability (draft CDDCA Directive), imposing a mandatory cross-sectoral (i.e. not sector specific) due diligence duty in global value chains is evidence of this.[9] And Law No 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies (Vigilance Law)[10] provides a prominent example from French domestic law. This shift towards binding measures reflects the fact that whilst venerable in their goals, voluntary standards have failed to deliver sufficient progress in preventing harms to human rights and the environment.[11] The take-up by enterprises has also been low.[12]

However, when attempting to operationalize these and other due diligence norms,[13] invariably, we find ourselves in somewhat of an interpretative lacuna. Terms crucial to their efficacy are often unclear, if not entirely undefined, hindering their regulatory potential. It is, for instance, often not apparent what factors are (and are not) covered by the phrase 'adverse environmental impact' in these norms, or what threshold must be met before an 'impact' (or harm) is deemed to occur. Even where a threshold is provided (e.g. 'significant' or 'severe'), it is often not clearly articulated.

The Vigilance Law, the first domestic legislative measure to impose mandatory due diligence for human rights and environmental impacts,[14] evinces such concerns. Companies that fall within its scope must prepare a plan which sets out reasonable vigilance measures that are adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, the health and safety of persons and the environment.[15] These risks and potential impacts may derive from the activities of the company, those of the companies it controls or subcontractors or suppliers with whom there is an established commercial relationship, when those activities are related to that relationship.[16]

However, the Vigilance Law does not define 'risks', 'severe impacts' or the 'environment'.[17] During parliamentary debates, it was decided that there was no need for further clarification of key terms such as these as France had committed to sufficiently precise and comprehensive international obligations.[18] The logic appeared to be that international obligations, such as the UNGPs and the OECD Due Diligence Guidance, were capable of filling interpretative 'gaps' in the Vigilance Law's drafting.[19] The UNGPs and the OECD Due Diligence Guidance can certainly inform our understanding, albeit in abstract terms, of the factors that may determine the 'severity' of an impact.[20] They do, however, have their limitations as interpretative guides. The UNGPs are concerned principally with human rights impacts. Although they acknowledge that these are closely connected to environmental impacts, they contain one brief reference to the term 'environmental', and no attempt is made to define it.[21] The OECD Due Diligence Guidance takes us to a similarly dead end. Its recommendations are intended to support enterprises to implement the OECD Guidelines for Multinational Enterprises,[22] Chapter VI of which comprises provisions relating to the environment.[23] Although the OECD Due Diligence Guidance seeks to 'promote a common understanding among governments and stakeholders on due diligence for responsible business conduct',[24] 'environmental' and 'impacts' are not defined in either document. Moreover, neither the OECD Due Diligence Guidance nor the UNGPs are frameworks of liability. The former states that '[t]he OECD Guidelines for MNEs are not meant to establish legal concepts around liability, including among

[7]United Nations, 'Guiding Principles on Business and Human Rights' (2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (UNGPs).

[8]OECD (n 3).

[9]The Resolution was adopted by the European Parliament on 10 March 2021; see European Parliament (n 2).

[10]Law No 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies (Vigilance Law).

[11]European Parliament (n 2) para 1.

[12]ibid [W] ('only 37% of business respondents currently conduct environmental and human rights due diligence'); ibid [X].

[13]In this article, the phrase 'due diligence norm' will be used to encompass both voluntary (i.e. standards and recommendations) and mandatory (i.e. laws and legal frameworks) due diligence, unless stated otherwise.

[14]L Smit et al, 'Study on Due Diligence Requirements Through the Supply Chain, Final Report' (January 2020) <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> 19.

[15]Commercial Code, art L. 225-102-4.-I., as introduced by the Vigilance Law (n 10). The English translation of the Vigilance Law used in this article is that provided by E Savourey, 'France Country Report' in L Smit et al, 'Study on Due Diligence Requirements Through the Supply Chain, Part III: Country Reports' (January 2020) <https://op.europa.eu/en/publication-detail/-/publication/0268dfcf-4c85-11ea-b8b7-01aa75ed71a1/language-en/format-PDF/source-search> 56–94 (France Country Report).

[16]ibid.

[17]ibid 62.

[18]ibid 62–63.

[19]Savourey notes that the UNGPs and OECD Guidelines for Multinational Enterprises were a 'source of inspiration' for the Vigilance Law and should be used to aid its interpretation; ibid 65.

[20]E Savourey and S Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6 Business and Human Rights Journal 1 141, 145. We shall see in Section 3.1 that the UNGPs and OECD Due Diligence Guidance define 'severity' in identical terms.

[21]Perhaps the only pertinent reference to the environment can be found in the commentary to Principle 18; see UNGPs (n 7) 20 ('While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.')

[22]OECD (n 3) 3 and 15.

[23]OECD, 'OECD Guidelines for Multinational Enterprises' (OECD 2011) <https://www.oecd.org/daf/inv/mne/48004323.pdf> Chapter VI, para 3.

[24]OECD (n 3) 3.

enterprises'.[25] The UNGPs make a similar assertion.[26] Thus, the ability of these standards to inform the Vigilance Law or, indeed, any due diligence law under which liability may be imposed, is limited in this particular regard.

The draft CDDCA Directive, which, *inter alia*, aims to prevent and mitigate adverse impacts on the environment in value chains and ensure that undertakings can be held accountable for such impacts,[27] raises similar issues. In Article 3(7), the phrase 'potential or actual adverse impact on the environment' is defined as 'any violation of internationally recognised and Union environmental standards, *as set out in Annex xxx to this Directive*'.[28] That annex was not published, meaning that the scope of the definition cannot be probed. It does, nevertheless, seem that there will only be such an impact where a *listed* standard is violated. The actual standards that come to be included, their applicability to the circumstances and efficacy in protecting the environment will dictate the ultimate utility of the definition. The definition accorded to the phrase is all the more important given that the draft CDDCA Directive provides for a civil liability regime 'for any harm arising out of' any violation of the listed standards.[29] Thus, it will have a direct bearing on whether liability can, in fact, be imposed. The development of appropriate sanctions (e.g. fines) and the details of the liability regime is left to the national laws of the Member States.[30]

This lacuna within due diligence norms is problematic for three reasons. First, where the definition of 'adverse environmental impact' (or its variants) is absent or vague, then enterprises, competent authorities and other stakeholders (e.g. nongovernmental organizations) will not know precisely what impacts are to be identified, prevented and/or mitigated. Second, due diligence is 'risk-based',[31] meaning that when the likelihood and severity of an adverse environmental impact is high, then due diligence should be more extensive. The reverse will also be true. The absence of a clearly articulated conception of impact 'severity' (or other threshold term, such as 'significant') hinders the ability of enterprises and stakeholders to understand in concrete terms the extent of the due diligence required in prospective (i.e. to prevent an adverse impact) and retrospective (i.e. to understand what should have been done by way of diligence but was not) terms.[32] Finally, the phrase informs the retrospective responsibilities of enterprises that cause or contribute to adverse effects on the environment. A lack of certainty surrounding its interpretation will mean that due diligence norms will be unable to specify with precision the impacts to be remedied and, where relevant, when sanctions and/or liability may be imposed on an enterprise. It will be seen that there is an inherent tension between the need for the definition to be broad to ensure that a wide range of impacts are to be prevented and the need for it to be precise to enable the remedial process associated with due diligence to operate fairly.

The aim of this article is to determine how the phrase 'adverse environmental impact' (or its variants) should be defined in due diligence norms. It will be argued that the polluter-pays principle provides a stable normative base from which to sculpt an appropriate definition. The principle, as understood in EU environmental law, requires that a polluting enterprise's environmental and social costs be included in its costs of production (i.e. internalized).[33] The phrase ought to be interpreted to adhere to this logic. It must, with the benefit of specificity garnered from exemplar legal frameworks, be able to reflect the wide array of costs – or negative environmental externalities – that enterprises and their global value chains might create, including damage to the environment itself. This will engender a truer, more efficacious expression of the principle within due diligence norms. The internalization facilitated will ensure that the cost of producing goods and providing services reflects their true cost to society more closely. And through the deterrent effect of liability or obligation to provide a remedy, powerful incentives may be generated to prevent impacts from arising in the first place.

The wider importance of this article's findings is that through bringing essential clarity to the scope of environmental due diligence, elucidation of the meaning of 'adverse environmental impact' will provide a firmer legal footing from which to spur more responsible, sustainable conduct by enterprises and their value chains. Although directed at due diligence norms that deal with environmental impacts, such as the Vigilance Law, the OECD Due Diligence Guidance[34] and the 2020 Draft UN Business and Human Rights Treaty,[35] and not solely at the draft CDDCA Directive, the analysis

[25]ibid 89.

[26]In the commentary to Principle 12 of the UNGPs (n 7), it is stated that '[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions'.

[27]Draft CDDCA Directive (n 5) recital 14. The draft CDDCA Directive also deals with impacts on human rights and good governance.

[28]ibid art 3(7) (emphasis added).

[29]See, e.g., ibid, arts 2(3) and 19(2). Article 19(2) states that 'Member States shall ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on … the environment'. The fact that this provision is contained in a section titled 'Civil Liability' indicates that the 'harm' foreseen *requires a human victim* and may not be concerned directly with harm to the environment itself. That Article 19(2) refers to remediation 'for any harm' and harm 'arising out of' a violation of a listed standard reinforces this.

[30]In relation to sanctions, see ibid art 17. In relation to civil liability, see ibid art 19(2). Recital 53 states that '[w]hen introducing a liability regime, Member States should ensure a *rebuttable presumption* requiring a certain level of evidence' (emphasis added).

[31]OECD (n 3) 17; Draft CDDCA Directive (n 5) recital 29 and art 4(7).

[32]The importance of understanding the extent of the due diligence required is particularly pertinent in the context of the draft CDDCA Directive (n 5) art 19(3), which states that 'Member States shall ensure that their [civil] liability regime … is such that undertakings that prove that they took *all due care* in line with this Directive to avoid the harm in question, or that the harm would have occurred *even if all due care had been taken*, are not held liable for that harm' (emphasis added).

[33]See, e.g., Case C-379/08, *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo Economico*, ECLI:EU:C:2009:650 (*Raffinerie*), Opinion of AG Kokott, para 85.

[34]This article could also inform the construction of environmental impacts in other frameworks, such as Chapter VI (Environment) of the OECD Guidelines for Multinational Enterprises (n 23).

[35]See Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', Second Revised Draft (2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> arts 6(2)-(3).

may aid interpretation of the latter and assist Member States to construct their domestic frameworks of liability.

The literature does note the importance of, and difficulties in establishing, the material scope of adverse environmental impacts.[36] In addition, wider uncertainties surrounding civil liability for human rights and environmental due diligence have been exposed.[37] However, the more basic, preliminary questions regarding how 'adverse environmental impact' ought to be defined and *why* have not received sustained attention by scholars and policymakers. This is the article's primary contribution to the literature. It is hoped that this may engender focused debate and discussion among stakeholders, legislators and policymakers as to how this term – one central to fulfilling the regulatory potential of due diligence norms – should be conceptualized.

Section 2 shows that the polluter-pays principle of EU law can help us to understand the range of environmental and social costs that could be covered by the phrase 'adverse environmental impact'. The wider regulatory significance of the definition accorded to it will also be demonstrated. Section 3 critiques techniques used in existing regulatory frameworks to define the phrase (or terms equivalent to it). The legislative example from Ontario, Canada, was selected as its definition of 'adverse effect', used interchangeably with 'adverse environmental impact' by the Supreme Court of Canada,[38] is not only highly pertinent and informative, but it has also not been examined in previous studies of environmental due diligence.[39] Section 4 puts forward a series of recommendations. Section 5 draws conclusions.

2 | THE POLLUTER-PAYS PRINCIPLE AS A NORMATIVE GUIDE

This section will contend that the polluter-pays principle, a 'backbone' of environmental policy,[40] provides a stable normative base from which to sculpt an appropriate definition of 'adverse environmental impact'. It enables us to understand the array of costs – environmental and social – that could be covered by that phrase and can help to contextualize that phrase's wider regulatory significance. However, it is to be observed from the outset that similarly named principles do not 'indicate equivalent legal developments across jurisdictions',[41] meaning that the way the principle is understood and implemented in one jurisdiction (e.g. Canada) may differ to how it is in another (e.g. the EU). Its implementation within EU law is the focus of this article. A particularly sophisticated construction of its scope and function can be derived from both EU legislation and the caselaw of the Court of Justice of the European Union (CJEU), which can inspire development of due diligence norms.

The rationale for the principle's invocation in the context of this article will first be sketched. As the Court of Justice held in *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo Economico*, in accordance with the polluter-pays principle, 'the obligation to take remedial measures is imposed on operators only because of their *contribution* to the creation of pollution or the risk of pollution'.[42] The idea of contribution is key. Although 'pollution' is the term of reference here, we find environmental damage[43] and the creation of waste[44] in other judicial expressions of the principle. And in *Commune de Mesquer v Total France SA and Total International Ltd*, the Grand Chamber held that a company will have contributed to the risk that pollution would occur, 'in particular if [it] failed to take measures to *prevent* such an incident'.[45] Indeed, this aligns with the position that, as a general rule, 'polluters are the parties who are able to take the most effective [preventive] measures'.[46]

We have seen that due diligence is focused primarily on the prevention of adverse environmental impacts.[47] Thus, where the requirements of a due diligence norm were not met, and an impact occurred that could have been prevented if due care had been exercised by the enterprise, then it may be deemed to have contributed to its materialization in the *Commune de Mesquer* sense. On this basis, attributing legal responsibility for the impact to the enterprise is, therefore, justifiable given its failure to prevent it. This logic does fit with the broader picture of EU environmental law. Under Council Recommendation 75/436/Euratom, a polluter was someone 'who directly or *indirectly* damages the environment or who *creates conditions* leading to such damage'.[48] An enterprise ought, therefore, to be deemed capable of being classified as a 'polluter' in both a direct and indirect sense.

When a polluter is not required to bear the environmental (e.g. pollution, environmental damage, creation of waste) and social (e.g. compensation of victims) costs generated by their activities then those costs need not be reflected in its costs of production.[49] Not only can it 'ignore' them in deciding how much to produce and at what price to sell,[50] the unpriced costs – negative externalities –

[36]Smit et al (n 14) 277–278.

[37]See, e.g., N Bueno and C Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International and Comparative Law Quarterly 789.

[38]*Castonguay Blasting Ltd. v Ontario (Environment)*, [2013] SCC 52 (*Castonguay*) para 1.

[39]It was not, for example, mentioned in the extensive report by Smit et al (n 14).

[40]D Heine, MG Faure and G Dominioni, 'The Polluter-Pays Principle in Climate Change Law: An Economic Appraisal' (2020) 10 Climate Law 94, 95.

[41]E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017) 4.

[42]Case C-379/08, *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo Economico*, ECLI:EU:C:2010:127, para 57 (emphasis added).

[43]*Raffinerie*, Opinion of AG Kokott (n 33) para 94.

[44]Case C-254/08, *Futura Immobiliare Srl Hotel Futura v Comune di Casoria*, ECLI:EU:C:2009:264, Opinion of AG Kokott, para 33.

[45]Case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd*, ECLI:EU:C:2008:359, para 78 (emphasis added).

[46]Case C-534/13, *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl*, ECLI:EU:C:2014:2393, Opinion of AG Kokott, para 55.

[47]See, e.g., OECD (n 3) 18.

[48]Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters [1975] OJ L194/1, para 3 (emphasis added).

[49]A Ogus, *Regulation: Legal Form and Economic Theory* (Hart 2004) 35.

[50]Case C-126/01, *Ministre de L'économie, Des Finances et de L'industrie v GEMO SA*, ECLI:EU:C:2002:273 (*Gemo*), Opinion of AG Jacobs, para 66.

may be transferred to local communities, the environment and wider society.[51] This is a form of market failure. The principle seeks to make the polluter 'internalize' these external costs, ensuring that they are made 'part of the economic process rather than a forgotten after-effect of it'.[52]

While polluter cost internalization is 'nearly unassailable as a guiding principle for environmental regulation',[53] there is uncertainty surrounding what it means in strict legal terms.[54] An array of language is used in the literature to describe it – costs being taken into account in the polluter's decision-making process,[55] or absorbed by the causer,[56] or accounted for in the cost of the transaction.[57] However, Ogus captures the tone of the literature when he asserts that internalization is concerned with requiring a company to 'cover' the costs which its activities impose on others in the 'pricing' of its goods or services.[58] This connects to the logic of the principle's originator, the OECD: that pollution prevention and control costs should be reflected in the polluter's costs of production.[59] In addition, as understood under EU law, the costs of environmental protection, remediating pollution and providing compensation are to be included in the production costs of the polluting enterprise.[60] This is how cost internalization will be used in this article.

The definition accorded to the phrase 'adverse environmental impact' will have a direct bearing on the degree of cost internalization that is possible under a due diligence norm and associated liability regime. Sensitive to Bergkamp's observation that as the principle 'does not have any built-in conceptual limits' it could be 'invoked to justify virtually any measure that imposes costs on polluters',[61] it is, as we shall see, now widely accepted that the principle encompasses two 'senses': strict and broad. Both ought to be captured under a definition of 'adverse environmental impact' informed by the principle. The first category, the 'strict sense', requires enterprises to bear the costs of pollution prevention and control measures implemented by public authorities to ensure the environment is in an acceptable state.[62] Due diligence may be viewed as such a pollution prevention and control measure, the costs of which ought, according to the original conceptualization of the principle by the OECD in 1972,[63] and its subsequent development under EU law,[64] to be borne by polluters. Viewed in this light, the 'strict sense' would cover the costs to enterprises of preventing impacts in their global value chains.

This sense would also cover the costs of measures 'necessary to eliminate … pollution or to reduce it so as to comply with the standards or equivalent measures',[65] including restoration of the environment.[66] This could comprise costs arising from administrative law requirements to remediate harm caused to the environment itself (e.g. cleaning up land contamination). The EU Environmental Liability Directive (ELD)[67] sets out such requirements and is perceived to be an 'expression' of the principle.[68] Such laws prove useful where there is no human victim, or at least not one able and willing to bring (and fund) a civil action against the polluter with a view to remedying the damage done.

The second category, the 'broad sense' of the principle, is concerned with internalization of '*all* social costs – including the environmental costs – of the pollution [caused]'.[69] It would extend to, for example, compensation payable to victims of the pollution.[70] In the context of due diligence, this compensation may take two forms. The first is the provision of extra-judicial remedies where the enterprise is deemed to have caused or contributed to an adverse impact. As regards remedies, the OECD Due Diligence Guidance, for example, recommends that the enterprise should '[s]eek to *restore* the affected person or persons to the situation they would be in had the adverse impact not occurred (where possible)'.[71] Although this may not necessarily result in remediation of the damage done to the environment, it may mean that persons harmed by it are compensated, financially or otherwise.[72]

The second form of compensation covered by this 'broad sense' encompasses costs associated with civil liability for harm caused, including that arising from breach of a due diligence law. This could

[51]Ogus (n 49) 21 and 35.

[52]M Humphreys, 'The Polluter Pays Principle in Transport Policy' (2001) 26 European Law Review 5 451, 456.

[53]J Boyd, 'Financial Responsibility for Environmental Obligations: Are Bonding and Assurance Rules Fulfilling Their Promise?' (Resources for the Future 2001) 2.

[54]C Mackie and L Besco, 'Rethinking the Function of Financial Assurance for End-of-Life Obligations' (2020) 50 Environmental Law Reporter: News and Analysis 7 10573, 10590.

[55]M Faure, 'Economic Aspects of Environmental Liability: An Introduction' (1996) 4 European Review of Private Law 85, 87.

[56]J Alder and D Wilkinson, *Environmental Law and Ethics* (Palgrave Law Masters 1999) 30.

[57]R Perkins, 'Electricity Deregulation, Environmental Externalities, and the Limitations of Price' (1998) 39 Boston College Law Review 993, 994.

[58]Ogus (n 49) 19 and 35.

[59]OECD, 'Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies' C(72)128 (1972) (OECD, 1972 Recommendation).

[60]See, e.g., *Raffinerie*, Opinion of AG Kokott (n 33) para 85; *GEMO*, Opinion of AG Jacobs (n 50), para 66; Case C-277/02, *EU-Wood-Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, ECLI:EU:C:2004:547, Opinion of AG Léger, para 6.

[61]L Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Kluwer Law International 2001) 16 and 19.

[62]M Grossman, 'Agriculture and the Polluter Pays Principle: An Introduction' (2006) 59 Oklahoma Law Review 1, 10; HC Bugge, 'The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts' in J Ebbesson and P Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009) 411, 416; OECD, 1972 Recommendation (n 59) para 4.

[63]OECD, 1972 Recommendation (n 59) para 4.

[64]See, e.g., Council Recommendation 75/436/Euratom (n 48) para 1.

[65]ibid para 2.

[66]OECD, 'The Polluter Pays Principle: Definition, Analysis and Implementation' (OECD 1975) 6.

[67]Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56 (ELD).

[68]Commission Notice, Guidelines providing a common understanding of the term 'environmental damage' as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage [2021] C118/1, para 8.

[69]Grossman (n 62) 10; Bugge (n 62) 416 (emphasis added).

[70]Grossman (n 62) 10.

[71]OECD Due Diligence Guidance (n 3) 34 (emphasis added).

[72]ibid.

relate to various forms of harm, such as damage to property, harm to human health and business interference. Civil liability in tort, in which the court may be viewed as 'fixing retrospectively a price for the pollution', is one important means of dealing with externalities created by enterprises.[73] That a person should 'rectify the damage that he causes' through civil liability was, according to the European Commission, one means of evoking the principle.[74] More specifically, ascribing civil liability to an enterprise for the cost of cleaning up environmental contamination that it had caused would be a 'concrete application' of the principle.[75] Thus, although provision of compensation to victims for damage caused by pollution was not originally considered part of the principle by the OECD,[76] an established relationship between the principle and civil liability is now acknowledged.[77] The French Vigilance Law provides an illustration of that connection. It provides that civil liability in tort may be imposed upon a company that breaches its 'vigilance obligations'. The company may be required to remedy the damage that the execution of those obligations 'could have prevented'.[78] To be clear, the liability relates to the fault of the company in breach of the vigilance obligations, not the fault of others in the supply/value chain,[79] such as the company whose activities physically caused the impact.

Using the principle to frame the analysis also engenders a deeper understanding of the wider regulatory significance of the definition accorded to 'adverse environmental impact'. First, it will determine the degree of deterrence that a due diligence norm exhibits. Where the definition is able to allocate to enterprises the costs associated with a more complete range of impacts that they may have caused or contributed to, then it can create stronger incentives to avoid their creation in the first place, compared with a definition that is narrower and less inclusive.[80] This aligns with the principle that preventive action should be taken,[81] a priority in both EU environmental law and due diligence norms.[82] The decision will, however, be left up to the enterprise as to the optimal means of prevention.[83]

This 'upstream' benefit of cost internalization gives the definition accorded to 'adverse environmental impact' an important role in environmental protection. The incentivizing potential associated with being able to require that an appropriate extra-judicial remedy be provided and/or impose liability in respect of an 'adverse environmental impact', or phrased negatively, its deterrent effect,[84] derives from the fact that 'potential polluters who know they will be liable for the costs of remedying the damage they cause have a strong incentive to avoid causing such damage'.[85] In light of the costs associated with remedying those impacts, it is economically rational for enterprises to increase the level of care that is exercised in undertaking the activity and/or decrease the volume of activity.[86] However, if (i) 'adverse environmental impact' is construed narrowly; (ii) extra-judicial remedies are not genuinely restorative and/or (iii) the associated liability regime is weak, then the incentive function will be diluted. This would result in a weak expression of the principle.

Second, the interpretation accorded to 'adverse environmental impact' will impact on an enterprise's costs of production. The capacity of that phrase to facilitate internalization of the array of environmental and social costs that an enterprise may create will mean that the costs of their goods or services will more closely reflect the true cost to society of their production or provision.[87] A narrow construction of the phrase would allow the enterprise to externalize costs traceable to their activities, creating false price signals for consumers.[88] Where consumers benefit from market prices that do not reflect the true cost to society of producing the goods or providing the services then there will be greater demand for those produced or provided by enterprises whose activities have been subsidized by society.[89] More will be produced than socially efficient.[90] The phrase's definition will help to correct this market failure.

Third, diverging interpretations between nations creates potential for distortions in trade. The principle, when examined from the perspective of the reason for its origination, engenders an understanding of the importance of harmonizing how 'adverse environmental impact' is defined. Through its introduction of the principle in the early 1970s, the OECD sought to establish a common standard to prevent States from giving domestic businesses a competitive edge in world markets through subsidies.[91] For manufacturers in States that adopted strong environmental protection measures, new costs would be imposed.[92] Thus, any state subsidization relating to those costs could give manufacturers a significant price advantage in the global market. The principle was conceived as an economic rule to avoid this.[93] It did so through allocating the expenses of carrying

[73] Alder and Wilkinson (n 56) 30.

[74] Commission (EU) 'Green Paper on Remedying Environmental Damage' (Communication) COM(93) 47 final, 14 May 1993, 5.

[75] ibid 18.

[76] OECD (n 66) 6.

[77] Bergkamp (n 61) 15; Bugge (n 62) 427.

[78] Commercial Code, art 225-102-5.

[79] Savourey (n 15) 73.

[80] For a discussion of the incentivizing potential of environmental liability more broadly see, e.g., M Faure, 'Regulatory Strategies in Environmental Liability' in F Cafaggi and M Watt (eds), *The Regulatory Function of European Private Law* (Edward Elgar 2009) 129, 132.

[81] *Raffinerie*, Opinion of AG Kokott (n 33) para 86.

[82] See, e.g., OECD Due Diligence Guidance (n 3) 74 ('Prevention is the primary goal of due diligence.')

[83] Faure (n 80) 132.

[84] ibid.

[85] Commission (EU) (n 74) 5.

[86] Bergkamp (n 61) 87.

[87] Bugge (n 62) 413. Whether the *price* increases will depend on price elasticity and other market conditions; ibid.

[88] C Mackie and MM Combe, 'Charges on Land for Environmental Liabilities: A Matter Of 'Priority' For Scotland' (2019) 31 Journal of Environmental Law 1 83, 102.

[89] N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) 21.

[90] G Richardson, A Ogus and P Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press 1982) 4; Ogus (n 49) 19 and 35.

[91] OECD, 1972 Recommendation (n 58); S Gaines, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' (1991) 26 Texas International Law Journal 463, 471.

[92] Gaines (n 91) 466.

[93] OECD, 'Recommendation of the Council on the Implementation of the Polluter-Pays Principle' C(74)223 (1974); OECD, 1972 Recommendation (n 59).

out pollution prevention and control measures decided by public authorities to ensure the environment was in an 'acceptable' state to polluters and preventing subsidies that would create 'significant' distortions in international trade and investment.[94] This economic equity dimension met the pressing trade-harmonization needs of the then-European Community, which incorporated it into its emerging environmental policies.[95]

The principle, and the theory of cost internalization that it is built on, ensures fair competition if applied 'consistently and uniformly' to enterprises.[96] The concern is that a narrow and shallow construction of 'adverse environmental impact' in one country (A), with a robust construction being adopted in another (B) (i.e. which can reflect – and, in turn, facilitate internalization of – the true environmental and social costs associated with the activity) will lead to a differential cost burden which has the potential to distort trade and investment. Enterprises in country A would be permitted to externalize more costs than those in country B and, other things being equal, the former would benefit from a competitive advantage as their costs of production would be lower.[97] Thus, stringent requirements in country B have a detrimental effect on the international competitiveness of enterprises in that country. As Dernbach observes, 'externalized costs provide an indirect subsidy that may give the benefited entity an international trade advantage'.[98] Wirth makes a similar point but connects it explicitly to a country's failure to implement the polluter-pays principle.[99] The effect of these indirect subsidies is to compel communities in host countries to pay part of the cost of a polluter's profit-making activity 'whether or not the affected members of the public consent or themselves realize any substantial benefit'.[100] The environment also bears the burden.

The interpretation given to 'adverse environmental impact' will have a direct bearing on the extent to which we can say that the principle's economic equity dimension – and, indeed, the principle more widely – has been implemented within a jurisdiction. A spectrum of definitions creates a spectrum of cost burdens. A particularly problematic issue with the draft CDDCA Directive is that it requires Member States to use existing, or develop new, national laws to implement the civil liability regime required under it, dramatically limiting the likelihood of a common standard. This does not sit comfortably with its explicit acknowledgement of the importance of a 'level playing field' for all undertakings – Union and non-Union – operating in the internal market.[101] Indeed, recital 11 highlights that 'significant' differences between Member States' provisions on due diligence, 'including as regards civil liability' already exist. Thus, as recital 10 notes, further harmonization is needed 'to prevent unfair competitive advantages being created'.[102] In addition, the OECD refers to the need 'to support a level playing field for business that takes into account their impacts on society and the environment'.[103] Thus, the draft CDDCA Directive, and its outsourcing of the difficult decisions around implementation of a civil liability regime to Member States, may exacerbate the distortions of trade that it seeks to prevent.

3 | LEARNING FROM EXISTING REGULATORY APPROACHES

This section examines three techniques used in regulatory frameworks to define the phrase 'adverse environmental impact' or terms equivalent to it. The first is by way example, as evidenced by the OECD Due Diligence Guidance. The second is through direct definition, with the Environmental Protection Act R.S.O. 1990 (EPA) of Ontario, Canada, providing a rare instance of the analogous phrase 'adverse effect' on the environment being defined explicitly in legislation. Similar phrases are present in EU laws but often remain conspicuously undefined within them.[104] The third is by way of indirect definition. This technique does not define the phrase explicitly. It relies on different parts of the framework, operating together, to inform the proper understanding of the phrase. The ELD, for instance, utilizes such an approach.

3.1 | The provision of examples

In a manner similar to the proposed approach under the draft CDDCA Directive,[105] the OECD Due Diligence Guidance provides examples of adverse impacts. These include ecosystem degradation through land degradation, water resource depletion and/or

[94]OECD, 1972 Recommendation (n 59) para 4.

[95]Gaines (n 91) 470; See, e.g., Council Recommendation 75/436/Euratom (n 48) para 1.

[96]*Futura Immobiliare*, Opinion of AG Kokott (n 44) para 33.

[97]RB Stewart, 'Environmental Regulation and International Competitiveness' (1993) 102 Yale Law Journal 2039, 2044.

[98]JC Dernbach, 'Sustainable Development as a Framework for National Governance' (1998) 49 Case Western Reserve Law Review 1, 59.

[99]DA Wirth, 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?' (1995) 29 Georgia Law Review 599, 643–644.

[100]PL Simms, 'Furtive Subsidies: Reframing Fossil Fuel's Regulatory Exceptionalism' (2017) 35 Virginia Environmental Law Journal 420, 434 and 444.

[101]Draft CDDCA Directive (n 5) recital 10.

[102]ibid.

[103]OECD, 'Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct' (adopted 30 May 2018) <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> recital.

[104]For instance, Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups [2014] OJ L330/19 (as amended) recital 7 states that, '[w]here undertakings are required to prepare a non-financial statement, that statement should contain, as regards environmental matters, details of the current and foreseeable *impacts* of the undertaking's operations on the *environment*, and, as appropriate, on health and safety, the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution' (emphasis added). However, 'environment' and 'impact' are undefined.

[105]See Draft CCDCA Directive (n 5) recital 23. This makes clear that the European Parliament's plan is to use an example-based approach in the Directive, should it be enacted. It states that an annex will 'set[] out a list of *types* of business-related adverse impacts on the environment…that are relevant for undertakings' (emphasis added). This appears to conflict with the proposed definition of the phrase 'potential or actual adverse impact on the environment' in Article 3(7). There, it is defined as 'any violation of internationally recognised and Union environmental standards, *as set out in* Annex xxx to this Directive' (emphasis added), appearing to indicate the annex would set out a closed list.

destruction of pristine forests and biodiversity, unsafe levels of biological, chemical or physical hazards in products or services and water pollution (e.g. through discharging wastewater without regard to adequate wastewater infrastructure).[106] In addition, the 'significance' of an impact is to be understood as a function of its likelihood and severity, with 'severity' being judged by its 'scale, scope and irremediable character'.[107] This mirrors the wording of the Commentary to Principle 14 of the UNGPs.[108] A common position on this point between the two standards is clearly intended. There is also a connection with the judicial interpretation that may be given to the phrase 'severe impacts' under the Vigilance Law of France. The UNGPs – and, through analogy, the OECD Due Diligence Guidance – may offer a potential interpretation,[109] given that they offered inspiration for legal developments in France.[110]

The use of illustrative examples of impacts and broad guidance on 'significance' – as opposed to definitive guidelines or definitions – provides a degree of steer to enterprises as to the types and severity of impacts foreseen by the creators of the due diligence norm. It also caters for the fact that a precise codification of 'all' possible impacts may neither be possible nor desirable given that a particular impact may not have been foreseen by the creator of the norm but ought rightly to be included within it. It can, thus, aid the prospective element of due diligence to some degree. But the approach, which largely relies on self-assessment by enterprises as to whether a given impact is 'adverse' (e.g. whether a chemical hazard in a product is 'unsafe'), creates potential for an uneven playing field. Without appropriate regulatory oversight, this may lead to a narrow, shallow construction being used to avoid identification of potentially costly impacts to be prevented, mitigated and/or remediated.

It is also essential to observe that that the role of the OECD Due Diligence Guidance and the UNGPs are, principally, to aid the identification of potential or actual impacts with a view to their prevention. The use of examples has a role to play here. But those voluntary standards do not, as we have seen, create legal liability. A liability regime cannot be built upon the provision of mere examples of impacts. A clear, robust legal definition is essential if it is to be capable of functioning as the basis from which to ascribe liability. In its absence, enterprises on whom liability is sought to be imposed will dispute the fact that liability has been 'triggered'. A purely example-focused approach is, therefore, not tenable where, as in the case of the draft CDDCA Directive, creation of an associated civil liability regime is foreseen. What the UNGPs and the OECD Due Diligence Guidance can do is to inform our understanding of the 'severity' of an impact. But a supplementary liability regime would be needed to both define it and attribute liability for creation of an 'adverse environmental impact'.

[106]OECD Due Diligence Guidance (n 3) 39.

[107]ibid 42.

[108]UNGPs (n 7) Principle 14.

[109]Savourey (n 15) 88.

[110]ibid.

3.2 | Direct definitions

We can find definitions of phrases such as 'significant adverse impacts' in EU environmental law.[111] However, these do not typically establish a threshold at which liability for those impacts may attach.[112] The EPA of Ontario provides a definition of the phrase 'adverse effect' and sets such a threshold. Indeed, as we have seen, that phrase has been used interchangeably with 'adverse environmental impact' by the Supreme Court of Canada,[113] evidencing a close conceptual relationship between them. It is highly instructive for the purposes of this article.

Under s 1(1), 'adverse effect' means:

one or more of,

a. impairment of the quality of the natural environment for any use that can be made of it,
b. injury or damage to property or to plant or animal life,
c. harm or material discomfort to any person,
d. an adverse effect on the health of any person,
e. impairment of the safety of any person,
f. rendering any property or plant or animal life unfit for human use,
g. loss of enjoyment of normal use of property and
h. interference with the normal conduct of business ('conséquence préjudiciable').[114]

Under s 1(1), 'natural environment' means 'the air, land and water, or any combination or part thereof, of the Province of Ontario'.[115] Thus, branch (a) only concerns impairment to air, land and water, offering a somewhat limited conceptualization of the environment. Branch (b) enlarges it by encompassing plants and animals. It is clear from s 1(1) that persons and their property, including their business interests, receive extensive protection under the Act. That it 'protects the natural environment *and those who use it*' reflects the 'broader protections' that the Act was intended to provide.[116]

The triggers in s 1(1) are pertinent in a variety of circumstances, including s 93(1), where an owner of a pollutant, or a person having

[111]See, e.g., Council Regulation (EC) No 734/2008 of 15 July 2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears [2008] OJ L201/8 (Vulnerable Marine Ecosystems Regulation) art 2, which defines 'significant adverse impacts' as, 'impacts (evaluated individually, in combination or cumulatively), which compromise ecosystem integrity in a manner that impairs the ability of affected populations to replace themselves and that degrades the long-term natural productivity of habitats, or causes on more than a temporary basis significant loss of species richness, habitat or community types'.

[112]To develop the example of the Vulnerable Marine Ecosystems Regulation, ibid, if the competent authority concludes that the intended fishing activities are not likely to have significant adverse impacts on vulnerable marine ecosystems then a permit can be issued; ibid art 4(2). Legal liability is not imposed for creation of 'significant adverse impacts'.

[113]*Castonguay* (n 37) para 1.

[114]Environmental Protection Act R.S.O. 1990 (EPA) s 1(1).

[115]ibid s 1(1).

[116]*Castonguay* (n 37) para 34 (Abella J) (original emphasis).

control of a pollutant, that is spilled and that causes or is likely to cause an 'adverse effect' is required to 'do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment'.[117] In addition, under s 99(2), Her Majesty in right of Ontario or in right of Canada, or any other person, has the right to compensation from the owner, or person having control, of the pollutant, for, *inter alia*, 'loss or damage'[118] incurred as a direct result of the spill and for carrying out or attempting to prevent, eliminate or ameliorate the adverse effects or restore the natural environment. The definition is, therefore, highly pertinent to the scope of this article.

Although there is no explicit reference to the polluter-pays principle in the Act, the principle features prominently in Canadian environmental law. The Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd* asserted that it 'assigns polluters the responsibility for *remedying* environmental damage for which they are responsible, thereby *incentivizing* companies to pay attention to the environment in the course of their economic activities'.[119] There is, thus, a similarity with how it is understood in EU law. And the court described the principle as 'firmly entrenched in environmental law in Canada'[120] and as 'a well-recognized tenet of Canadian environmental law'.[121] The normative value in ascribing responsibility to polluters, both in a forward-looking (responsibility of)[122] and backward-looking (accountability for) sense,[123] pervades federal legislation that refers to the principle explicitly. Given the Act's remedial attributes, an implicit conception of the principle can be derived from it.

The Supreme Court in *Castonguay Blasting Ltd. v Ontario (Environment)*[124] provided valuable guidance on how 'adverse effect' ought to be interpreted. The court was required to determine the proper interpretation of a reporting requirement under the Act. Under s 15(1), any person who 'discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment' is required to notify the Ministry of the Environment and Climate Change (formerly the Ministry of the Environment) if the discharge is 'out of the normal course of events' and it 'causes or is likely to cause an *adverse effect*'.[125] Castonguay had been blasting rock for a road-widening project when rock debris was thrown into the air by an explosion, damaging nearby property. It did not, however, report the incident to the Ministry. The question for the court was whether Castonguay was in breach of s 15(1) for failing to report it and guilty of an offence, which it answered in the affirmative.

Castonguay contended that although the discharge of the rock had caused property damage, the discharge had not impaired the natural environment and so it was not required to report the incident to the Ministry. In essence, Castonguay was arguing that although 'adverse effect' had eight branches, branch (a) had to be satisfied first before any of the others could be engaged. The court rejected this argument, asserting that 'all eight branches of "adverse effect" provide *independent triggers* for liability'.[126]

The aspect of the court's reasoning that is of greatest importance to this article is the approach that it took to interpreting 'adverse effect'. There were two aspects to this, each of which sought to exploit fully the utility of the regulatory powers available to the Ministry under the Act. First, the court observed that 'adverse effect' appeared in various provisions detailing when an order to take preventative measures could be made by the Ministry.[127] A restrictive interpretation would 'limit the scope of the [Act's] protective and preventative capacities and, consequently, the Ministry's ability to respond to the broad purposes of the statute'.[128] As set out in s 3(1), this is to protect and conserve the natural environment. Second, it held that a restrictive interpretation should not be adopted as this would narrow the scope of the reporting requirement and thereby inhibit the ability of the Ministry to investigate and remedy environmental harms.[129] Rather, protection of the natural environment required '*maximizing* the circumstances' in which the Ministry could utilize these powers.[130] The court was, thus, of the view that the definition of 'adverse effect' was to be interpreted non-restrictively and purposively to best facilitate the prevention and remediation of environmental harm. In turn, this would aid the flow of compensation to victims for 'loss or damage' suffered as a result of the adverse effect.

The definition of 'adverse effect' provides a useful and viable model for the phrase 'adverse environmental impact'. First, although s 1(1) provides a closed list, it captures a broad range of impacts,[131] including to the environment, animals, people, property and business. In this sense, it is positioned to cover a wide array of actual and potential harms that may be created by activities within an enterprise's value chain, both prospectively (i.e. to enable their prevention) and retrospectively (i.e. to enable their remediation). As a result, it may be viewed as superior to other frameworks of environmental liability, such as the ELD, that only deal with damage to the environment. Second, due diligence has traditionally been focused

[117] EPA (n 114) s 93(1).

[118] Under the Act, '"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income'; EPA (n 114) s 99 (1).

[119] [2019] SCC 5, para 29 (Wagner CJ) (*Orphan Well*).

[120] *Imperial Oil Ltd v Quebec (Minister of the Environment)* [2003] SCC 58, para 23 (Lebel J) (the court held that the polluter-pays principle 'assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution'); ibid para 24.

[121] *Orphan Well* (n 119) para 29.

[122] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, preamble ('the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle').

[123] *Canada Oil and Gas Operations Act*, RSC 1985, c O-7, s 2.1(b.01) ('The purpose of this Act is to promote, in respect of the exploration for and exploitation of oil and gas … accountability in accordance with the "polluter pays" principle').

[124] *Castonguay* (n 37).

[125] EPA (n 114) s 15(1).

[126] *Castonguay* (n 37) para 30 (Abella J) (emphasis added).

[127] ibid para 35.

[128] ibid (Abella J).

[129] ibid paras 31 and 34.

[130] ibid para 34 (emphasis added).

[131] ibid para 34.

on restoring the affected *person(s)* to the situation they would have been in had the adverse impact not occurred.[132] The wide variety of the possible harms to persons and their property, including their business interests, encompassed within s 1(1), in combination with the Act's robust remedial and compensatory attributes, offers a powerful means of facilitating this. Third, the definition can reflect both the 'strict' and 'broad' senses of the polluter-pays principle, permitting a level of cost internalization that is capable of delivering the policy objectives set out in Section 2.

The definition should, however, be enhanced if it is to be used in the context of due diligence. First, although the reference to any 'use' that can be made of the natural environment in s 1(1)(a) has been held to mean 'any use [that is normal and typical of the place in question] that can conceivably be made of the natural environment by any person *or other living creature*',[133] it narrows the scope of the provision and limits unnecessarily its ability to trigger liability. Impairment of the quality of the natural environment itself should be sufficient for liability to arise under branch (a). The trigger ought to be framed in such a way as to best offer protection to the environment itself, not merely its use value.

Second, key terms, such as '*impairment* of the quality of the natural environment' and '*injury* or *damage* to … plant or animal life', are undefined in the Act. The meaning accorded to these terms will determine the degree to which the policy objectives of the polluter-pays principle can be furthered. Lamer CJ held in *Ontario v Canadian Pacific Ltd*, in relation to an earlier version of the Act, that the idea of 'impairment' was 'aimed at persons whose activities contribute *significantly* to an identifiable environmental problem'.[134] Additionally, in relation to the requisite threshold for 'injury or damage to … plant or animal life', the Ontario Court of Appeal in *R. v Dow Chemical Canada Inc*., held that the effect must be more than 'trivial or minimal' for liability to be triggered.[135] Thus, the requisite degree of harm is less than clear in each case. Admittedly, a strict requirement for drafting precision may 'undermine the ability of the legislature to provide for a comprehensive and flexible regime'.[136] However, if these phrases were to be applied unrefined within the context of due diligence then the absence of a clear legal threshold upon which a sanction or liability may be imposed would offer limited direction to those required to enforce or discharge the duty. To counteract this, an appropriate legal threshold would need to be defined, creating a layer of necessary complexity upon what is, on the face of it, a neat, workable list of adverse environmental impacts. The ELD can offer guidance on this.

[132]See, e.g., OECD Due Diligence Guidance (n 3) 34.

[133]*Ontario v Canadian Pacific Ltd*., [1995] 2 SCR 1031 (*Canadian Pacific*) paras 16 and 18 (emphasis added).

[134][1995] 2 SCR 1031, para 23 (Lamer CJ).

[135][2000] 47 OR (3d) 577 (CA) (MacPherson JA), para 30.

[136]*Canadian Pacific* (n 133) para 52 (Lamer CJ).

3.3 | Indirect definitions

Whilst direct definitions of 'adverse environmental impact' in regulatory frameworks are rare, indirect definitions are far more common. This section will analyse three legislative measures that use such an approach. Each can inform the development of a definition of 'adverse environmental impact' in the context of due diligence in their own individual way. A distinction will be drawn between two very different types of frameworks. First, those that create thresholds for the imposition of liability under administrative law in respect of environmental damage/harm, with the ELD being examined. Second, those that relate to the assessment of the environmental impacts of projects and economic activities, with the EU Environmental Impact Assessment (EIA) Directive[137] and the Taxonomy Regulation[138] used as illustrative examples. Although the latter category can inform *ex-ante* determination of when such an impact may be created, they do not provide for liability for their creation.

3.3.1 | Environmental Liability Directive

The ELD creates a framework of liability that is 'based' on the polluter-pays principle.[139] Its aim is to prevent and remedy specific types of 'environmental damage'.[140] The ELD conceives of the principle as meaning that an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures.[141] It understands 'remedial measures' differently to the (human) stakeholder-focused idea of remediation in due diligence norms,[142] defining it in Article 2(11) as 'any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services'.[143]

Unlike the EPA of Ontario, the ELD does not facilitate provision of financial compensation to the public.[144] It does not apply to 'traditional damage'.[145] This is damage caused to persons by an activity and may include damage to their property, bodily injury (including

[137]Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2001 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 (EIA Directive). This was amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 [2014] OJ L124/1.

[138]Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2019] OJ L198/13 (Taxonomy Regulation).

[139]ELD (n 67) art 1.

[140]ibid.

[141]ibid recital 18.

[142]See, for example, n 5 in relation the way remediation is understood in the context of the draft CDDCA Directive. And see the text accompanying n 71 in relation to remediation under the OECD Due Diligence Guidance.

[143]ELD (n 67) art 2(11).

[144]ibid Annex II, para 1.1.3.

[145]ibid recital 14.

loss of life) and economic loss suffered by them.[146] Originally, traditional damage was to be included in what would become the ELD, but it was contentious and subsequently excised 'due to the demands of political compromise rather than environmental needs'.[147] Member States wanted their own national systems of tort law, built up and shaped by jurisprudence over decades and even centuries, to remain untouched.[148] And differences between the approaches of common law and civil law jurisdictions within the EU compounded the ability to achieve a common approach.[149]

The ELD covers damage to (i) protected species and natural habitats,[150] (ii) water and (iii) land. Damage to water refers to damage that significantly adversely affects the ecological, chemical or quantitative status or the ecological potential of the waters concerned,[151] or the environmental status of the marine waters concerned.[152] Damage to land refers to 'land *contamination*' that creates a significant risk of human health being adversely affected due to the direct or indirect introduction, in, on or under land, of substances, preparations or organisms/micro-organisms; actual harm to human health need not be proven.[153] Damage to protected species and natural habitats refers to damage that has significant adverse effects on reaching or maintaining the favourable conservation status of protected species or habitats. Article 2(4) defines 'favourable' and 'conservation status'.

The term 'damage', which pervades each category, is defined as a measurable adverse change in a natural resource or measurable impairment of a natural resource service.[154] Measurability, understood as quantifiable or capable of estimation, is key to determining whether 'environmental damage' has been caused.[155] It must be possible to compare the position before and after the damaging occurrence meaningfully.[156] Scientific assessment will be critical.[157] If the threshold of 'environmental damage' is not met, the incident will be governed by national law (if it exists), not the ELD.[158] It is important to observe that the ELD does not merely impose liability to prevent and remediate damage caused by pollution.[159] It will also cover, for example, damage to a protected species or natural habitat from the abstraction of water and damage to a river's ecological status caused by fluctuations in the water level from the operation of a hydroelectric power plant.[160] The removal of trees or minerals,[161] the clearance of land features or killing of individuals of a protected species will also be captured.[162]

Although 'air' is captured by the definition of the 'natural environment' in s 1(1) of the EPA of Ontario, damage to air is conspicuously absent from the definition of 'environmental damage' under the ELD. This is something which the European Parliament asked the Commission to reconsider given the harm caused by air pollution to human health and the environment.[163] Nitrogen dioxide and particulate matter pollution pose particularly serious health risks.[164] In light of this, the European Parliament called for 'ecosystems' to be included in the definition of 'environmental damage' and 'natural resource'.[165] This would, of course, result in better promotion of the polluter-pays principle.[166] Italy has taken the innovative step of implementing 'damage to the atmosphere' in its domestic law, which may apply even where there has been no measurable and significant impact on land, water and protected species and natural habitats.[167] This provides an example of a Member State exercising its power under the Directive to enact requirements stricter than those set out in it.[168] But it remains the case that the ELD does not currently cover impairment of air quality and, in itself, air pollution does not constitute 'environmental damage'.[169] That said, recital 4 asserts that environmental damage, 'also includes damage caused by *airborne elements* as far as they cause *damage* to water, land or protected species or natural habitats'.[170] Thus, the ELD applies where water, land, protected species or natural habitats are damaged by emissions to air, of the type that may be expected to derive, for example, from industrial stacks.

[146]Commission (EU) 'Commission Staff Working Document: REFIT Evaluation of the Environmental Liability Directive' (Staff Working Document) SWD(2016) 121 final, 14 April 2016, 12–13.

[147]G Winter et al, 'Weighing up the EC Environmental Liability Directive' (2008) 20 Journal of Environmental Law 163, 191.

[148]ibid 165.

[149]ibid.

[150]As defined under ELD (n 67) art 2(4).

[151]As defined in Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1. With the exception of adverse effects, where Article 4(7) of that Directive applies.

[152]As defined in Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19. In so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC.

[153]ELD (n 67) art 2(1)(c).

[154]ibid art 2(2).

[155]Commission Notice (n 68) para 44.

[156]ibid.

[157]V Fogleman, 'Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions' (2006) 4 Environmental Liability 127, 136.

[158]V Fogleman, 'The Duty to Prevent Environmental Damage in the Environmental Liability Directive: A Catalyst for Halting the Deterioration of Water and Wildlife' (2020) 20 ERA Forum 707, 711.

[159]ibid 708.

[160]ibid.

[161]Commission Notice (n 68) para 18.

[162]ibid.

[163]European Parliament, Resolution of 26 October 2017 on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the 'ELD')' (2016/2251(INI)) para 34.

[164]ibid para 28.

[165]ibid.

[166]A Vanhellemont, 'Towards a Better Environmental Liability Directive' in B Pozzo and V Jacometti (eds), *Environmental Loss and Damage in a Comparative Law Perspective* (Intersentia 2021) 29, 31.

[167]'Report from the Italian Government to the European Commission Pursuant to Article 18(1) of Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage' (July 2013) <https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/IT.pdf> 8.

[168]ELD (n 67) art 3(2).

[169]Case C-129/16, *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség*, ECLI:EU:C:2017:136, Opinion of AG Kokott, paras 26 and 41.

[170]ELD (n 67) recital 4.

The concept of 'significance' lies at the heart of the ELD. Although it leaves the final determination of significance in each case to the relevant competent authority,[171] guidance is provided in Annex 1. This asserts that it should be determined through measurable data such as the number of individuals, their density or the area covered and the habitat's capacity for natural regeneration. Damage with a proven effect on human health must be classified as significant damage, a statement that we also see in other frameworks, such as the International Law Commission's Draft Principles on the Protection of the Environment in Relation to Armed Conflict.[172]

Although instructive, the ELD exhibits serious limitations which are problematic from the perspective of the polluter-pays principle and the theory of cost internalization it is built on. First, it limits interpretation of the term 'environment' to protected habitats and species, land and water and, to some extent, humans (where there is a significant risk to their health as a result of damage to land). It, thus, exhibits a 'narrow identification' of 'damage' and the environment.[173] In addition, as we have seen, it does not cover traditional damage,[174] a common side-effect of pure environmental damage.

The narrow construction of damage under the ELD is further evidenced by the fact that the polluter need only pay for damage to land where a significant risk of human health is created. This means that for damage to land to be actionable by a competent authority it is likely that there must be human activity in the vicinity of the damage. Thus, it may not be possible to impose liability in respect of the remediation of areas of wetlands and forests where there is no human activity,[175] a troubling gap should this type of definition be deployed with the context of due diligence. And Winter and colleagues find it 'perplexing' that damage to land that is not related to contamination, such as land erosion, is not covered by the ELD.[176] Protected species, habitats and waters are protected under the ELD even when damage to them does not create a risk to human health.[177] Soil is certainly no lesser an environmental component than species and may even be viewed as a more important environmental resource.[178] Thus, there is much scope to better protect 'land' through due diligence, specifically in relation to detaching the need for there to be contamination to it before an adverse impact can be deemed to exist. As we shall see in Section 3.3.2, the EIA Directive and the Taxonomy Regulation help us to better understand how the 'environment' could be conceived of in a more expansive manner in law.

Second, the ELD does not apply to damage that does not reach the requisite degree of seriousness (i.e. 'significant').[179] In such circumstances, there is no 'environmental damage' as defined by the ELD. However, uncertainty over the meaning of 'significant' has proven to be one of the main barriers to an effective and uniform application of the ELD.[180] The thresholds for liability are also perceived to be too high. For instance, the Commission has found that the threshold for damage to a protected species or natural habitat will not be exceeded in many instances of damage.[181] It has, however, spent a substantial amount of time and resources clarifying some of the difficult terminology relating to these issues, with a view to rendering the ELD of greater operational use by competent authorities. The Commission published guidelines in March 2021 to facilitate a common understanding of the term 'environmental damage'.[182] These provide important detail with which to understand 'significance' and the range of adverse effects encompassed by 'environmental damage'. A core message imparted is that determination of significance across the categories of environmental damage 'is a matter of objective, technical assessment based on measurable data'.[183] And, importantly for comprehension of that term in the context of due diligence, 'arbitrary, subjective opinions' of what is significant should play no part in its determination.[184] Expert judgement will be necessary,[185] so too will be the availability of pertinent data on pre- and post-damage conditions.

3.3.2 | Frameworks that relate to the assessment of environmental impacts

In this section, two examples from EU law, the EIA Directive (as amended) and the Taxonomy Regulation will be analysed. They have been selected as they can inform how we conceive the 'environment' in law and help us understand the types of adverse impacts to it that may be created by enterprises. Importantly, as neither deals with sanctions nor liability, they can only partially aid the conceptualization of 'adverse environmental impact' sought in this article.

The EIA Directive concerns the *ex-ante* assessment of the environmental effects of public and private projects.[186] The 'fundamental objective' of the Directive,[187] which is set out in Article 2(1), is that projects '*likely* to have *significant effects* on the environment' are

[171]eftec and Stratus Consulting, 'Environmental Liability Directive: Training Handbook and Accompanying Slides' (February 2013) 24.

[172]International Law Commission (ILC), 'Protection of the Environment in Relation to Armed Conflicts' UN Doc A/CN.4/L.937 (6 June 2019), Commentary on Principle 2, para 7 ('harm that is likely to prejudice the health and well-being of the population of the occupied territory would amount to "significant harm"').

[173]M Lee, 'New Environmental Liabilities: The Purpose and Scope of the Contaminated Land Regime and the Environmental Liability Directive' (2009) 11 Environmental Law Review 264, 267.

[174]ELD (n 67) recital 14.

[175]ibid.

[176]Winter et al (n 147) 173.

[177]ibid.

[178]ibid 173–174.

[179]Case C-297/19, *Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV*, ECLI:EU:C:2020:533, para 34.

[180]European Parliament (n 163) para 9.

[181]Commission (EU) 'Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage' COM(2016) 204 final, 14 April 2016, 5.

[182]Commission Notice (n 68).

[183]ibid para 76.

[184]ibid para 77.

[185]ibid para 225.

[186]EIA Directive (n 137) art 1(1).

[187]Case C-329/17, *Prenninger and Others*, ECLI:EU:C:2018:640, para 35; Case C-287/98, *Linster*, EU:C:2000:468, para 52.

to be made subject to a requirement for an assessment of their effects on the environment before development consent can be given.[188] Although 'likely to have significant effects on the environment' is not defined, its component terms are contextualized by other provisions of the Directive. For example, according to Article 3(1), the EIA shall identify, describe and assess the direct and indirect 'significant effects' of a project on a range of factors: population and human health, biodiversity, land, soil, water, air and climate, material assets, cultural heritage, the landscape and the interaction between these factors. These give substance to the term 'environment' in Article 2(1), which is helpful as it is not defined explicitly in the Directive. In line with the 'wide scope' and 'broad purpose' of the Directive,[189] the term is not to be understood restrictively and encompasses a wide range of factors, including humans.

Projects listed in Annex I are automatically subject to an EIA.[190] They are deemed to have significant effects on the environment and include, for example, crude-oil refineries, nuclear power stations and quarries and open-cast mining projects above a given scale. The use of a closed 'list' informs our understanding of the significance of an impact in the sense that specified activities are *predetermined* to produce such an impact, an approach adopted by the draft CCDCA Directive in respect of the violation of certain listed environmental standards.[191]

For projects listed in Annex II, it is for the Member States to decide whether the project is to be subject to an assessment through a case-by-case examination or application of specified thresholds or criteria.[192] These projects may have significant effects on the environment, but not necessarily in every case. This is where *discretion* is exercised, an issue which the Commission noted was one of the most significant problems for the effectiveness of the Directive.[193] It had found that the decision whether to require an EIA for Annex II projects was not being implemented in a harmonized way among Member States.[194] Criteria to be considered in determining whether a project should be subject to an EIA are set out in Annex III.[195] They include the characteristics of the project (e.g. its size and design, pollution and nuisances), its location, and the type and characteristics of the potential impact (e.g. magnitude and spatial extent, nature, intensity and complexity). The developer must also provide information on the characteristics of the project and its likely significant effects on the environment.[196] The competent authority will then determine the need for an EIA.[197]

The EIA Directive can inform our understanding of the phrase 'adverse environmental impact'. Its elucidation of the meaning of 'environment' through provision of a rich list of factors in Article 3(2) enables that term to be conceptualized through law. It is conceived far more widely than, for instance, it is in the ELD, presenting a more *holistic* conception which is powerful when rethinking the scope of a potential liability regime. And its inclusion of human health as a factor to be considered provides further evidence that this should be captured in understandings of the 'environment' in due diligence.

Much like the problems that we have seen with the phrase 'adverse environmental impact' in the context of due diligence, Arabadjieva observes that the phrase 'significant effects' in Article 2(1) 'is an *open-ended*, *vague* standard which does not provide clear guidance as to the precise point at which a legal obligation to conduct an EIA is triggered.'[198] Indeed, the courts have long appeared unwilling to derive a more precise understanding of it, with competent authorities subject to an 'unequivocal obligation' to carry out an assessment of the effects of certain projects on the environment.[199] That task *requires* that discretion be exercised.[200] However, in the context of the EIA Directive, Arabadjieva does not view this as problematic and contends that the 'open texture' of the Article 2(1) obligation 'is not a flaw, but a valuable feature of the Directive' for it 'creates *space* for the decision maker to consider a vast array of relevant factors in the assessment of 'significance' and … prompts *reflection and deliberation* on environmental values within that space'.[201] There is thus merit in its lack of specificity.

Open-endedness in conceptualizing the term 'environment' or the meaning of 'significant' in the context of the requisite threshold for an 'adverse environmental impact' to be deemed to occur could generate such opportunities. The space that it would create for (self-)reflection and deliberation may contribute to the value of due diligence as a primarily preventative process, enabling socially minded enterprises to step back and think more seriously about their wider impacts. It also recognizes that precise codification of what the 'environment' means in law is complex and will be controversial, especially where certain aspects fell outside of that definition and so were not protected by that law. This, as we have seen, has been the case in the context of the ELD.

But open-endedness also poses threats. It creates stumbling blocks when it comes to the need to work from clear, legally certain 'triggers' for the imposition of sanctions and/or liability. These, by their very nature, do not exist in an open-ended approach to the assessment of impacts, such as is the case with the EIA Directive. And the discretionary space would, in the context of due diligence, be occupied by *enterprises*, not competent authorities. It may inject too great a degree of discretion in relation to how enterprises assess

[188] EIA Directive (n 137) art 2(1).

[189] Case C-72/95, *Kraaijeveld and Others*, EU:C:1996:404, para 31.

[190] EIA Directive (n 137) art 4(1).

[191] As we have seen, the draft CDDCA Directive defines the phrase 'potential or actual adverse impact on the environment' in Article 3(7) with reference to a list of standards to be set out in an annex.

[192] EIA Directive (n 137) art 4(2).

[193] Commission (EU) 'Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2011/92/EU' (Staff Working Document) SWD(2012) 355 final, 26 October 2012, 77.

[194] ibid.

[195] EIA Directive (n 137) art 4(3).

[196] ibid art 4(4). The requisite information is set out in Annex IIA.

[197] ibid.

[198] K Arabadjieva, 'Vagueness and Discretion in the Scope of the EIA Directive' (2017) 29 Journal of Environmental Law 417, 417 (emphasis added).

[199] Case C-431/92, *Commission v Germany*, ECLI:EU:C:1995:260, paras 39–40.

[200] Case C-72/95, *Aannemersbedrijf PK Kraaijeveld BV and Others v Gedeputeerde Staten Van Zuid-Holland*, ECLI:EU:C:1996:404, Opinion of AG Elmer, para 73; Case C-427/07, *Commission v Ireland*, EU:C:2009:457, paras 41–42.

[201] Arabadjieva (n 198) 418 (emphasis added).

the impacts and risks posed by their activities, creating the prospect for diverging interpretations between enterprises. This is more likely where the identification of impacts and risks will have a corresponding (upward) cost burden for the enterprise. As there is no guarantee that the discretion will not be used self-servingly by enterprises, there is value in moving towards a far more prescriptive approach for due diligence. Indeed, this must be viewed as a necessary component of any regime that provides for sanctions and liability. This brings to the fore an inherent tension that exists at the interface of the prospective (i.e. identification of impacts) and retrospective (i.e. remediation of impacts) elements of due diligence; openness in the conceptualization of 'adverse environmental impact' may be beneficial for the former, but detrimental to the latter.

The Taxonomy Regulation, although not a liability regime, offers a higher level of legal precision. It has a purpose different to the EIA Directive. The Regulation seeks to channel capital flows towards 'sustainable investments' to heighten the likelihood of achieving the Sustainable Development Goals within the EU.[202] Its utility for the purposes of this article derives from its sophisticated articulation of a series of defined environmental objectives and its conceptualization of the threshold at which those objectives are deemed to have been harmed. These, in turn, facilitate a more concrete understanding of when and where 'adverse environmental impacts' are created within a value chain.

Under Article 3, an activity qualifies as 'environmentally sustainable' where it, *inter alia*, does not '*significantly* harm' environmental objectives set out in Article 9.[203] These include, *inter alia*, climate change mitigation, the sustainable use and protection of water and marine resources, pollution prevention and control and the protection and restoration of biodiversity and ecosystems. The activity will be environmentally *un*stainable when these objectives are so harmed. Article 17, a key provision within the framework, details when an economic activity is deemed to cause 'significant harm' (and so be environmentally unsustainable). It will, for instance, 'significantly harm' climate change mitigation where it 'leads to significant greenhouse gas emissions'.[204] In addition, in respect of pollution prevention and control, it will occur 'where that activity leads to a significant increase in the emissions of pollutants into air, water or land, compared with the situation before the activity started'.[205]

Article 17 certainly aids our comprehension of the scope of the prospective element of due diligence by providing an expansive but legally precise range of circumstances under which an economic activity may cause significant harm to the environment. Additionally, in this sense, it may have greater operability than the EIA Directive given the clear thresholds that it sets for categorizing environmentally harmful behaviours. An 'adverse environmental impact' would be deemed to arise when those were met. However, there is the potential for it to suffer from the same issues that the EIA Directive has struggled with, specifically the definition of 'significant'. The Regulation does not define 'significant' (e.g. in the context of a '*significant* increase'), a term which operates as the threshold to determine whether an activity qualifies as 'environmentally sustainable'. Recital 38 does state that the conditions for 'significant harm' should be specified with 'more granularity for different economic activities and should be updated regularly'.[206] This indicates that more granular detail will be forthcoming. This is necessary and will ensure that the task of deriving such important definitions was not placed solely in the hands of Member States. Variations between nations pose the risk of creating distortions in trade.

4 | A WAY FORWARD: DEFINING 'ADVERSE ENVIRONMENTAL IMPACT'

In this section, a definition of 'adverse environmental impact' will be proposed. As we have seen, that phrase is pivotal to the efficacy of a due diligence norm. It will determine which factors are to be protected through due diligence (and, in turn, which are not to be so protected) and which impacts, in the event of their materialization, will need to be remedied and/or in respect of which a sanction or liability imposed. A narrow interpretation would restrict the opportunity for the preventative and remedial capacities of due diligence to operate to full effect. Nor would it further the cost-internalizing function of the polluter-pays principle. And whilst a very wide interpretation may enhance the protection afforded to the 'environment', it will enlarge the regulatory burden imposed upon enterprises. Although challenging, the phrase must be defined in a way that balances these competing concerns and can, most importantly, deliver the overarching objective of environmental due diligence: preventing adverse impacts to the environment from being created in the first place.

In Section 2, it was emphasized that a polluting enterprise's costs of production may be altered dramatically by the robustness of a jurisdiction's definition of 'adverse environmental impact'. This may impact upon its attractiveness as a business location. While jurisdictions will weigh other factors into the equation, such as the benefits attained through effective environmental protection measures, it could, in the absence of harmonization of the definition, lead to a 'race to the bottom', with some choosing to enact narrow, weak definitions with high thresholds to be met before liability will arise to provide a competitive advantage for their domestic enterprises.[207] This may produce short-term economic gains but is bad for the environment, human health, and local communities. Thus, harmonization of: (i) the definition of 'adverse environmental impact'; (ii) the point at which sanctions can be imposed for breach of the due diligence law and (iii) the liability regime necessary to implement the

[202]Taxonomy Regulation (n 138) recital 9.

[203]ibid art 3.

[204]ibid art 17(a).

[205]ibid art 17(c).

[206]ibid recital 38.

[207]Stewart (n 96) 2058–2059.

polluter-pays principle efficaciously, is required if this potential for distortion of trade is to be avoided.

With the normative steer provided by the polluter-pays principle of EU law, the phrase 'adverse environmental impact' ought to be defined as *one or more of* the following:[208]

a. significant damage to the environment ('environmental damage');
b. damage to property;
c. harm or material discomfort to any person;
d. an adverse effect on the health of any person;
e. impairment of the safety of any person;
f. rendering any property or plant or animal life unfit for human use;
g. loss of enjoyment of normal use of property and
h. interference with the normal conduct of business.

And the term 'environment' should be defined as *including* (i.e. not a closed list) the following:[209]

a. all flora and fauna;
b. land, soil, water, air and
c. the atmosphere.

The definition of 'adverse environmental impact' proposed in this article addresses pure ecological damage under branch (a): significant damage to the environment ('environmental damage'). This would cover damage to the environment itself and would not require any person to have suffered damage or losses. It could pave the way for liability regimes in domestic law to require enterprises that failed to prevent 'significant damage to the environment' in their value chain to remedy the environmental damage, wherever that may be, limit its impacts and prevent further damage. 'Traditional damage' is covered under branches (b)-(h). This includes damage caused to persons by the activity and may include damage to their property, bodily injury (including loss of life) and economic loss suffered by them. Inclusion of this type of damage is in keeping with the tone of the draft CDDCA Directive as one of its core aims is to encourage access to remedies for the human victims of adverse impacts.[210] It is, however, essential to observe that, typically, damages paid to claimants in respect of successful claims under branches of liability (b)-(h) need not be used to correct the environmental damage caused, limit its impacts, or prevent further damage. Thus, in the absence of branch (a), environmental costs may be externalized, contrary to the policy driving the polluter-pays principle under EU law. The inclusion of branch (a) provides a more comprehensive means of internalizing the true costs to society created by an activity than a civil liability regime could achieve on its own.[211] Indeed, as Krämer contends, restoration of the environment 'should be a priority for any rational environmental policy, since only when a polluter has to bear the costs of remediation can there be a preventive, deterrent effect on him and on other potential polluters'.[212] The deterrence generated by a firm implementation of the polluter-pays principle could reduce occurrence of environmental damage in the first place, 'meaning that there would be less concern about liability, compensation and restoration'.[213]

The term 'damage', in the context of 'significant *damage* to the environment', would be defined as per the ELD as a measurable adverse change or measurable impairment. The baseline condition is, according to Article 2(14) of the ELD, to be estimated using best information available. Accurate information concerning the condition of the affected natural resource prior to the harmful event (i.e. before being impacted) is necessary to enable measurement of an adverse change.[214] Such information may not always be available, making it difficult to evidence the existence of an adverse change. This is problematic as hypothetical reconstruction of the baseline condition – *post*-adverse environmental impact – may be expected to be disputed by an enterprise where accurate, measurable data was not available, and the baseline condition was estimated based on generalized or unreliable data.

A solution must be found as measurability is essential to the efficacy of the remedial processes connected to due diligence, particularly where a liability regime that could facilitate remediation of 'environmental damage' was being considered by a national legislature. It could, for instance, become a requirement under due diligence norms for enterprises to have an environmental audit, conducted by an independent third-party, undertaken at 'higher risk' sites or facilities to determine their baseline conditions. Indeed, such audits may become a standard condition of pertinent insurance policies or bonds and guarantees purchased by enterprises to shield themselves from any new legal risks associated with due diligence laws. This would create potential to harness third parties, such as insurers and financial institutions, as 'surrogate' regulators of an enterprise's activities.[215] In so doing, providers of such financial products could augment the monitoring and enforcement capacities of competent authorities and create a more robust regulatory regime.[216] The assessment may not capture the historic pollution existing at the site or facility and best efforts should be made to determine this. However, as a 'next best' option, establishing an accurate, present-day baseline would enable scientific assessment to

[208]This is adopted from the ELD (n 66) art 2; the EPA (n 114) s 1(1).

[209]This is inspired by EIA Directive (n 137) art 3(1). Although the 2014 amendment to the EIA Directive replaced 'flora and fauna' with 'biodiversity', 'flora and fauna' is used for present purposes due to its greater precision for the purposes of imposing liability.

[210]See, e.g., Draft CDDCA Directive (n 5) recital 14: '*anyone* who has suffered harm' ought to be able to 'effectively exercise the right to a fair trial before a court and the right to obtain remedies in accordance with national law' (emphasis added).

[211]M Lee, 'Tort, Regulation and Environmental Liability' (2002) 22 Legal Studies 33, 43

[212]L Krämer, 'The EU and the System of Environmental Loss and Damage: Liability, Restoration and Compensation' in Pozzo and Jacometti (n 166) 3, 9.

[213]ibid 27.

[214]GM van den Broek, 'Environmental Liability and Nature Protection Areas – Will the EU Environmental Liability Directive Actually Lead to the Restoration of Damaged Natural Resources' (2009) 5 Utrecht Law Review 117, 123.

[215]C Mackie, 'The Regulatory Potential of Financial Security to Reduce Environmental Risk' (2014) 26 Journal of Environmental Law 189, 191.

[216]ibid.

clearly and determine defensibly if the relevant threshold had been met in relation to impacts that may arise in the future.

An appropriate definition of 'significant' must also be set. Whilst uncertainty over the meaning of that term has been one of the main barriers to an effective and uniform application of the ELD,[217] the guidance recently published by the Commission can certainly inform how it is understood under branch (a) of the proposed definition.[218] Although, to be clear, the threshold of significance adopted for due diligence need not be as high as that envisioned under the ELD. It is important to observe that, according to Annex I of the ELD, 'damage with a *proven* effect on human health must be classified as significant damage'.[219] This can aid our understanding of the meaning of 'significant' damage to the environment through recognition that such categorization would occur automatically where that effect was proven.

5 | CONCLUSION

This article sought to determine how the phrase 'adverse environmental impact' (or its variants) should be defined in the context of due diligence. Whilst the efficacy of an environmental due diligence norm hinges on the meaning of that phrase, it is often undefined within them. A lack of certainty surrounding its interpretation means that these norms cannot articulate with precision the impacts to be prevented, mitigated, and remedied and, where relevant, when sanctions and/or liability may be imposed upon an enterprise for causing or contributing to them. This will, undoubtedly, hinder their regulatory utility.

The article has argued that the polluter-pays principle provides a stable normative base from which to sculpt an appropriate definition. Under EU environmental law, that principle requires that a polluting enterprise's environmental and social costs be included in its costs of production (i.e. internalized). The definition accorded to 'adverse environmental impact' ought to facilitate this. As a somewhat abstract statement of environmental policy, the principle cannot generate absolute precision in that definition. Precision can, however, be garnered from exemplar legal frameworks that may be seen to reflect explicit and implicit conceptions of it. The EU Environmental Liability Directive and the Environmental Protection Act R.S.O. 1990 of Ontario, Canada are particularly informative in this regard. They have been used to construct a definition that is deemed able to reflect the wide array of costs that enterprises and their global value chains might create. This encompasses both the costs of restoring the environment (defined as all flora and fauna, land, soil, water, air and the atmosphere) and those associated with civil liability for harm caused, including that arising from breach of a due diligence law. The latter could relate to various forms of harm, such as damage to property, harm to human health and business interference. The internalization facilitated by the proposed definition will help to ensure that the cost of producing goods and providing services reflects their true cost to society more accurately. And through the deterrent effect of liability or obligation to provide a remedy, powerful incentives may be generated to prevent impacts from arising in the first place.

When augmented by an efficacious liability regime, the proposed definition will ensure that the principle is taken seriously by encompassing both traditional damage and damage to the environment itself. Whilst no legal definition will be perfect, we need one, and a robust one at that if we are to fulfil the venerable preventative-focused goals that due diligence must strive to achieve.

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[217] European Parliament (n 163) para 9.

[218] Commission Notice (n 68).

[219] ELD (n 67) Annex I.