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Polluters Pay and the Double Disembedding: Overcoming the Unholy Relation Between Private Law and Environmental Law ‘Beyond the State’

Marija Bartl and Candida Leone

1. Introduction

The relationship between Environmental Law (EL) and Private law (PL) has been described as having long been ‘a controversial and unhappy one’.¹ In particular, individualist principles of private law have appeared to stand in the way of public values expressed in environmental law principles: casting restrictive rules on causation or attribution against the ‘polluter pays’ idea, or freedom of contract and property rights versus the precautionary principle may help explain why we have seen so much environmental destruction in recent decades. Self-interested private action, enabled by private law, has undermined protective environmental law and policy.² But this framing, we argue, overlooks important parallels between the two fields of law. Private law duties of care are not remote from the duties stemming from the precautionary principle; the ‘do no (significant) harm principle’ may be seen as a general principle of private law as much as of environmental law; and the polluter pays principle (PPP) is most plainly given expression in private law, as a demand

¹ David Howarth, ‘Environmental Law and Private Law’ in Emma Lees and Jorge Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019) 1092.

² The gist of the critique of Jean-Philippe Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Policy Press 2020).

that compensation be awarded to individual victims who have suffered harm.³ Thus, the more accurate question should be why, *despite* the two sets of laws and principles both mandating in principle the ‘right thing’, have we seen so much accelerating environmental destruction?

In this chapter, we deploy a ‘view from private law’ to argue that environmental law needs to more explicitly engage not just with the externalities of human economic activities, but with re-embedding the logics of such activities within planetary logics and boundaries, rejecting in particular the creep that has gradually transformed the PPP into ‘making sustainability pay’ discourse. In the piece, we trace this creep to provide analytical insights in the sometimes declared ‘failure of environmental law’.⁴ The core argument is that not only has the PPP gained discursive pre-eminence in questions of global climate ‘governance’ at the expense of other environmental law principles, but the gradual shift in discourse has also emptied the principle of its plural functions, reducing it to essentially a very cheap license to deplete.

We start from a charitable interpretation of the PPP, as articulated by de Sadeleer to include three core functions: *distributive*, namely to prevent the public from bearing the costs of mitigating pollution, the benefits of which accrue to a few economic actors; *preventative* – to indirectly regulate pollution levels by incentivising polluters to stop polluting beyond ‘optimal’ levels; and *curative* – to restore damage suffered by individuals and communities as a result of pollution by providing compensation.⁵ The observed hollowing out is the result of a *double disembedding*: while environmental questions were at the same time globalised and privatised, removing them from meaningful democratic debates, every branch of private law – private international law, company law, contract law, tort law as well as financial law – has been used in order to *free* the wrongdoers from any forms of cost internalisation including, prominently, compensation for harm inflicted.⁶ Private law and environmental law together have broken the double link between harm and responsibility – the public link of democratic deliberation about the distribution of harms,

³ Similarly also Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Brill 2021) 454.

⁴ Jan Laitos and Lauren Wolongevicz, ‘Why Environmental Laws Fail’ (2014) 39 *William & Mary Environmental Law and Policy Review* 1.

⁵ Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2020).

⁶ Horatia Muir Watt, *The Law’s Ultimate Frontier: Towards an Ecological Jurisprudence* (Bloomsbury Publishing 2023).

and a private link of compensation for the damage caused – weakening the central tools of a liberal legal order aiming to protect both people and planet. Ultimately, however, the externalities have returned with a vengeance as a boomerang of harms including climate change, biodiversity loss, plastic pollution, warming oceans, and others.⁷

In what follows, we discuss the ‘double disembedding’ over four different moves that have taken place, without a neat demarcation, over the past decades. First, in a purely local scenario, law and economics reasoning has set the stage for the first separation between the harm, the victim, and the compensation, in the context of growing commitment to the market as a form of social ordering. In a next act, we see the tools of company law and private international law used in order to limit the compensation of victims of significant environmental harms abroad, all while international environmental law had little to add. The neoliberal ‘outsourcing’ received another global boost via the global value chains regime, making the avoidance of environmental regulation the core ‘business model’ of transnational corporations and using contracts to further separate victims and harms from any chance of compensation. Finally, the circle is completed with the financialisation of the environment, with both assets and harms being traded as financial instruments. Ironically, it is mostly the (well-resourced) polluters that stand to benefit most from this new trade.

2. Double Disembedding: From Fairness to Free for All (Who Have Power)

2.1 Steering privatisation and pollution efficiently

While over the past 50 years we have seen a growing volume of environmental law being produced at the national level, moving far beyond the idea that the solution to pollution is dilution, this development occurred when the relationship between the state, the market, and the ‘commons’ has been deeply transformed.⁸ Growing recognition that the environment must be protected – be it air quality or protection of species – came at the same time as neoliberal ideology was also shrinking the state’s footprint in the economy and society.⁹

⁷ Laitos and Wolongevicz (n 4).

⁸ Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015).

⁹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005).

The move was double. On the one hand, we have seen a growing privatisation of the commons. Services that were previously public or common – such as energy or water – were increasingly to be provided ‘efficiently’, by private actors, via markets and competition.¹⁰ For environmental law, this meant not only the privatisation of natural resources, which according to Hardin were far better managed by private actors,¹¹ but foremost the start of thinking about the environment and environmental law that (despite the Club of Rome Report)¹² showed little interest in the growing material throughput of the economy or economic growth as such.

This move foreshadowed the increasing success, in policy debates, of efficiency-based arguments. De Sadeleer observes in this respect how, from an economic perspective, the PPP started out with a strong *preventive* component – with costs to be internalised *ex ante* in order to deter certain activities – but was successively transformed by a transaction costs approach.¹³ In this framework, not only can the victim and polluter negotiate the ‘price’ of pollution, but in a second step, the victim does not have to necessarily receive the compensation – provided that the ‘overall welfare increase’ would be able to compensate the victim, *in theory*.¹⁴ In both private and environmental law discourses, this type of reasoning has been extremely influential under the banner of the ‘law and economics’ movement.¹⁵

Together, privatisation and ‘externalities’ thinking set an intellectual basis for discourse about the environment that does not question issues related to economic activity – except for the most proximate negative impacts, around spe-

¹⁰ Christoph Hermann and Koen Verhoest, ‘Varieties and Variations of Public Service Liberalisation and Privatisation’ (2008) 1 PIQUE Policy Paper www.boeckler.de/pdf/wsi_pj_piq_policy_paper_1.pdf.

¹¹ Garrett Hardin, ‘The Tragedy of the Commons: The Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality’ (1968) 162 *Science* 1243.

¹² Donella Meadows and others, *The Limits to Growth-Club of Rome* (Potomac Associates 1972).

¹³ De Sadeleer (n 5).

¹⁴ Jedediah Britton-Purdy and others, ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’ (2019) 129 *Yale Law Journal* 1784. This is also the gist of the *ex ante* logic followed e.g., by Dirk Heine, Michael Faure, and Goran Dominioni, ‘The Polluter-Pays Principle in Climate Change Law: An Economic Appraisal’ (2010) 10 *Climate Law* 94.

¹⁵ Richard Posner, ‘The Law and Economics Movement’ (1987) 77 *The American Economic Review* 1.

cific production plants or problematic substances. And where one could think that private law would then at least ‘catch’ some of the harms, and compensate the eventual victims, the individual private rights vis-à-vis polluters have narrowed down, with public law increasingly providing a licence to pollute – and to do so without compensation. The public license to pollute is the most classic defence that industry has vis-à-vis environmental challengers.¹⁶

2.2 Subsidiaries causing harm abroad

The growing internationalisation of trade, even before the WTO inauguration in 1995, has made new forms of economic activity both more feasible and more profitable. What were, before, colonial enterprises, have often turned into ‘subsidiaries’ of companies from the Western world.¹⁷ In the new wave, even companies that did not have a colonial heritage were able to establish production lines abroad, often in ‘developing’ countries, in order to increase production with seductively low costs.

This move undermined both the preventive function of the principle – incentives to reduce pollution depending quite obviously on costs thereof – and the ‘curative’ function. Not only did polluters rely on low labour and environmental standards and insulation from local public accountability; thanks to corporate law, the major environmental incidents and catastrophes that have taken place have also left most of the victims either non-compensated or compensated (partially) after decades of struggle.¹⁸ Perhaps the best-known examples of environmental damage were oil ‘spills’, such as those in the Niger

¹⁶ Even in affluent countries, this can come as far as public authorities intentionally disregarding their own rules: see the recent case of noise pollution around Dutch airport Schiphol, ECLI:NL:RBDHA:2024:3734. For years, the state made existing rules on noise levels inapplicable by issuing vague ‘temporary rulings’ with no specific limitations, with the specific goal of avoiding interference with the airport’s business model. See (approving of the defence) Mark Latham, Victor Schwartz and Christopher Appel, ‘The Intersection of Tort and Environment Law: Where the Twains Should Meet and Depart’ (2011) 80 *Fordham Law Review* 737.

¹⁷ Andrea Leiter, ‘Protecting Concessionary Rights: General Principles and the Making of International Investment Law’ (2022) 35 *Leiden Journal of International Law* 55.

¹⁸ Premoboere Edna Ateboh and Morufu Olalekan Raimi, ‘Corporate Civil Liability and Compensation Regime for Environmental Pollution in the Niger Delta’ (2018) 5 *International Journal of Recent Advances in Multidisciplinary Research* 3870.

delta¹⁹ and in Ecuador.²⁰ Both Shell and Chevron have been able to avoid the obligation to clean up the natural environment and compensate the victims whose livelihoods were devastated. They have done that by mobilising, on the one hand, the rules of company law, whereby formally responsible entities were usually the subsidiaries, which had too few financial resources or capacity to compensate. Weak local courts and institutions were unable or unwilling to determine and enforce such compensation. Rules of private international law, meanwhile, were used in order to make access to courts in ‘developed’ home countries much more difficult for victims.²¹ Victims, who usually have far fewer resources, information and capacity than large multinationals, had neither standing nor the tools to carry the burden of proof.²²

These incidents were not accidents.²³ They were weaved into the logic of the economy, where private actors could escape limiting public rules and ‘home state’ institutions, whose private laws did not concern themselves with the suffering abroad. Very much in the spirit of law and economics, pollution thus moved where it was ‘more efficient’ to pollute. When the polluter pays principle was incorporated in the 1992 Rio Declaration on Environment and Development (principle 16), the same declaration made clear that the principle should not stand in the way of international trade and investment, and it became clear over the years that states *could* but were not obliged to consider extraterritorial pollution when allowing products within their markets.²⁴

¹⁹ Ibid.

²⁰ Tineke Lambooy, Mary Varner and Aikaterini Argyrou, ‘The Corporate Responsibility to Remedy (3rd Pillar Ruggie Framework) – Analysis of the Corporate Responses in Three Major Oil Spill Cases: Shell–Nigeria, BP–US (the Gulf), Chevron–Ecuador’ (2011) University of Oslo Faculty of Law Research Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953190.

²¹ See e.g., on the violent repression of civil society movements in the Niger Delta, *Kiobel v Royal Dutch Petroleum* 569 U.S. 108 (2013) holding a presumption against jurisdiction of US courts.

²² Ibid.

²³ Andreas Kotsakis and Avi Boukli, ‘Transversal Harm, Regulation, and the Tolerance of Oil Disasters’ (2023) 12 *Transnational Environmental Law* 71.

²⁴ Principle 16 Rio Declaration on Environment and Development; de Sadeleer (n 5) 35–6.

2.3 Contractual externalisation in GVC

Making polluters pay has become ever more difficult with the rise of a new creature of private ordering beyond the state: contractual organisation of transnational business, often discussed as ‘global value chains’ (GVCs). Chains of well-crafted contractual arrangements have allowed ‘lead firms’ to exert a degree of control all but comparable to the conditions of integrated production within a single corporation, while preventing any direct link being established between this firm and the workers, communities or environments in the chain.²⁵ In this conformation, companies could genuinely consider much of the environmental and human costs associated with the products they marketed as falling beyond their ‘operations’.²⁶ Meanwhile, the dirtier production stages were located in countries where prevention was too expensive for local capacity, with the cleaner and cheaper steps taking place in high-capacity contexts.²⁷

The consequences of the new contractual regime are perverse: with a sufficient number of links in a chain, no more than reputational damage can happen to the lead firms, however abominable their purchasing practice or unfair the distribution of value (and harm) in the chain. In some cases, such reputational damage has in the end occurred – yet it took thousands of lives for this to happen. In the aftermath of the Rana Plaza tragedy, it was revealed that many

²⁵ Earlier accounts were more positive, see Peer Zumbansen, ‘The Law of Society: Governance Through Contract’ (2007) 14 *Indiana Journal of Global Legal Studies* 191. Later, more critical accounts include Claire Bright and others, ‘Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?’ (2020) 22 *Business and Politics* 667; Joshua Preiss, ‘Freedom, Autonomy, and Harm in Global Supply Chains’ (2019) 160 *Journal of Business Ethics* 881.

²⁶ See the German supply chain law (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 16. Juli 2021, *Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46*) limiting ‘hard’ due diligence obligations, that is the implementation of preventative measure, to the first layer in the supply chain (§ 6 paras 1, 3, 4 LkSG). Similarly, consider the frequent delimitation of greenhouse gas emissions accounting to ‘scope 1’ emissions. See Anne-Christin Mittwoch and Fernanda Luisa Breckenkamp, ‘The German Supply Chain Act – A Sustainable Regulatory Framework for Internationally Active Market Players?’ (2023) 55 *Review of European and Comparative Law* 189, 213.

²⁷ Erdem Ateş and Selim Şanlısoy, ‘The Impact of Global Value Chains on Climate Change’ (2024) *Journal of Social and Economic Development* <https://doi.org/10.1007/s40847-023-00320-6>.

big clothing retailers were contracting with suppliers on such harsh terms that suppliers themselves could not afford to implement safe working conditions for their workers.²⁸

Such tragedies were usually followed by some sort of self-regulation. On the one hand, there were sustainability clauses, which allow big companies (such as Walmart) to hide behind strict clauses directed toward their suppliers.²⁹ However, these clauses were never intended to be enforced, since that would go against the business model of hyper-extraction.³⁰ An alternative pathway has been to create industry self-regulation agreements – such as the textile sector ‘Accord’ or ‘Alliance’.³¹ However, in these cases, the lead companies also made sure that their liability for what had been going on among their contractors would ultimately be kept at bay. Only recently have decisions like *Begum v Maran* started to pierce the veil of corporate immunity in at least some torts cases.³²

Over time, the troubling situations across value chains have led to legislative interventions, aiming, among others, to limit modern slavery,³³ child labour³⁴ and the illegal cutting of timber.³⁵ A general (albeit significantly watered-down) Corporate Sustainability Due Diligence Directive (CSDDD) has been adopted in the EU, expanding general human rights and environmental sustainability

²⁸ Uttama Barua and Mehedi Ahmed Ansary, ‘Workplace Safety in Bangladesh Ready-Made Garment Sector: 3 Years After the Rana Plaza Collapse’ (2017) 23 *International Journal of Occupational Safety and Ergonomics* 578.

²⁹ For instance, the model clauses proposed by <https://chancerylaneproject.org/clauses/sustainability-clauses-in-supply-chain-contracts/>.

³⁰ *Ibid.* See also Vibe Ulfbeck and Ole Hansen, ‘Sustainability Clauses in an Unsustainable Contract Law?’ (2020) 16 *European Review of Contract Law* 186.

³¹ Jimmy Donaghey and Juliane Reinecke, ‘When Industrial Democracy Meets Corporate Social Responsibility – A Comparison of the Bangladesh Accord and Alliance as Responses to the Rana Plaza Disaster’ (2018) 56 *British Journal of Industrial Relations* 14.

³² *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326, [2022] 1 All ER (Comm) 940.

³³ UK Modern Slavery Act 2015.

³⁴ Dutch Child Labor Due Diligence Act 2019.

³⁵ Regulation 995/2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23.

‘due diligence’ obligations to companies with more than 1000 workers and a yearly turnover of €450 million.³⁶

2.4 The financialisation of environmental law: making sustainability pay

To complete the picture, the most recent round of externalisation and delocalisation of harm has been the financialisation of environmental law. The turning point for the ‘assetisation’ of the environment was, somewhat paradoxically, also the first serious binding agreement on the lowering of emissions: the Kyoto Protocol.³⁷ The strengthening of climate ambitions in the Kyoto Protocol took place against the background of far-reaching trade liberalisation and booming financial markets,³⁸ pointing thus rather naturally to the most *efficient* way of steering climate action – via markets. Emissions trading under the protocol, in the words of the UNFCCC, ‘created’ a ‘new commodity in the form of emission reduction or removals’.³⁹ Countries subject to reduction obligations under the protocol could buy and sell emission rights and ultimately ‘earn’ emissions rights for their local producers by taking part in Joint Implementation projects; they could also, under the parallel Clean Development Mechanism, buy credits resulting from emissions reduction projects in developing countries to meet their own reduction targets. While Joint Implementation has arguably not been a success,⁴⁰ these mechanisms have further reinforced the idea of efficiency as a way to a ‘win–win’ scenario, where emissions reductions can be achieved at lower cost for polluters *while* helping the economic development of less affluent countries.

These *market-based* instruments⁴¹ have since taken up an outsized role in global sustainability policy, contributing to further decoupling victims from compensation. The great attraction of these instruments is not only that the

³⁶ Art 2 of Directive (EU) 2024/1760 on corporate sustainability due diligence [2024] OJ L2024/1760. An adapted threshold applies to companies vested outside the EU that operate in the Union.

³⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

³⁸ See the trade protection clauses in the Protocol.

³⁹ Emissions Trading under the Kyoto Protocol <https://unfccc.int/process/the-kyoto-protocol/mechanisms/emissions-trading>.

⁴⁰ The UN supervision committee in charge of it was terminated in 2022 due to low activity levels.

⁴¹ Romain Pirard, ‘Market-Based Instruments for Biodiversity and Ecosystem Services: A Lexicon’ (2012) 19 *Environmental Science & Policy* 59.

polluter does not necessarily have to *pay* for compensating harms, but polluters could eventually even make a profit on trading in them. To attribute financial ‘value’ to nature, along with making specific ecosystems or areas ‘assets’, one also has to create *liquidity* in those assets or markets.⁴² And once accruing financial value is linked to the circulation of these assets, the realisation of financial value and the material reality where the impact or harm is taking place, become ever further removed from each other. This extractive mode will leave (as usual) very little space for the actual compensation of health and environmental issues arising far away from where the carbon markets are.

This financialised logic resonates with polluter pays principle (PPP) language but stands in the way of other established principles of environmental law, such as prevention (at source) and precaution.⁴³ Crucially, such financial instruments are largely decoupled from *capping* mechanisms and from taxation accruing to public coffers,⁴⁴ focusing on private schemes and private instruments. This abdication of public prerogatives is already obvious in the European Emission Trading Scheme, which, while setting binding goals (‘caps’) leaves parties with significant margins to decide how to achieve them.⁴⁵ Much more unconstrained by ideas of limitations or public benefit, however, is the logic of the emerging offset markets, which are embedded in, for example, the international CORSIA aviation scheme.⁴⁶ While a consensus has emerged

⁴² See ‘Legal Implications of Voluntary Carbon Credits’ (ISDA, 2021) www.isda.org/a/38ngE/Legal-Implications-of-Voluntary-Carbon-Credits.pdf 4.

⁴³ See de Sadeleer (n 5); Ludwig Krämer, ‘Chapter VI.14: The Principle of Fighting Environmental Harm at Source (Source Principle)’ in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2023).

⁴⁴ We have seen that discussions of carbon taxation have often been stalled by opposition, to the point that IMF chief Georgieva has somewhat timidly proposed that regulation may in fact be more politically feasible. Fiona Harvey, ‘Carbon Pricing Would Raise Trillions Needed to Tackle Climate Crisis, Says IMF’ *The Guardian* (7 December 2023) www.theguardian.com/environment/2023/dec/07/carbon-pricing-would-raise-trillions-needed-to-tackle-climate-crisis-says-imf.

⁴⁵ Directive (EU) 2023/959 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, [2023] OJ L130/134.

⁴⁶ Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), <https://www.icao.int/environmental-protection/CORSIA/Pages/default.aspx>.

that, in consumer advertising, equating prevention/reduction of emissions and offsetting is a misleading practice,⁴⁷ offsetting markets remain popular in policy circles. So much so that despite an almost endless array of scandals,⁴⁸ and no real proof of their effectiveness, European governments seem in a rush to *rescue* voluntary carbon markets.⁴⁹

In sum, it seems that to avoid ecosystem collapse, much trust is now vested in ‘making sustainability pay’ and mustering the financial tools to do so, mainly by means of direct and indirect public support for private initiatives.⁵⁰ While the idea – that giving nature a price will solve the problem of the ‘devaluation’ of what is priceless – may be elegant and, in some ways, attractive, it obscures the fact that relying on market non-coordination or distorted and delocalised price mechanisms is at best risky and, at worst, a reckless approach to the unfolding environmental catastrophe.⁵¹

⁴⁷ See the recent European action against airlines: ‘Commission and national consumer protection authorities starts action against 20 airlines for misleading greenwashing’, 30 April 2024 https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2322. The recently adopted European Sustainability Reporting Standards seem comparably skeptical, asking companies to report on the ‘credibility and integrity’ of the carbon credits used and on their relation to achievement of emission reductions targets, see E 1-7, para 61, Commission Delegated Regulation (EU) 2023/2772 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards [2023] OJ L2023/2772.

⁴⁸ For an overview of reported failings, see Nina Lakhani, ‘Revealed: Top Carbon Offset Projects May Not Cut Planet-Heating Emissions’, *The Guardian* (19 September 2023) <https://www.theguardian.com/environment/2023/sep/19/do-carbon-credit-reduce-emissions-greenhouse-gases>.

⁴⁹ Ministerie van Economische Zaken en Klimaat, ‘COP28: Netherlands, Germany, France, Spain, Finland, the federal government of Belgium and Austria propose framework to prevent greenwashing and restore integrity in voluntary carbon markets’ (10 December 2023) <https://www.government.nl/latest/news/2023/12/10/cop28-netherlands-germany-france-spain-finland-belgium-and-austria-propose-framework-to-prevent-greenwashing-and-restore-integrity-in-voluntary-carbon-markets>.

⁵⁰ Daniela Gabor, ‘The Wall Street Consensus’ (2021) 52 *Development and Change* 429.

⁵¹ Katherine Richardson et al., ‘Earth Beyond Six of Nine Planetary Boundaries’ (2023) 9 *Science Advances* DOI:10.1126/sciadv.eadh2458; the UNFCCC has declared a ‘triple crisis’ consisting of climate change, pollution and biodiversity loss.

3. Conclusions: Re-embedding Nature in Private Law and Environmental Law ‘Beyond the State’

We have seen how, through the movements described above, the PPP has both gained discursive weight – in addressing diffuse harmful conduct – and lost many of its original functions: victims of climate and environmental damages struggle to find compensation, damaging activities are hardly discouraged (with the required speed) and the public carries much of the costs (in a globally unjust fashion). On the private law side, certain movements seek to go in a more promising direction: (some) courts are cautiously opening the doors to increased corporate accountability,⁵² more attention is being paid to compensation for pollution,⁵³ and (some) hope is now placed in the recently adopted EU CSDDD.⁵⁴ These moves, which can be seen as fostering internalisation of (among others) climate and environmental costs, are mirrored in Europe by the controversial Carbon Border Adjustment Mechanism⁵⁵ (CBAM), aiming to prevent ‘carbon leakage’ from stringent regulations. But the problem with such unilateral regulation is that it often does not, and perhaps cannot, take sufficiently into account the particulars of those many countries that have been on the receiving end of European regulation (and of the pollution involved in making products for European citizens).⁵⁶ This concern with asymmetrical consequences further affirms the limitations of the polluter pays principle in dealing with climate change and other issues of planetary boundaries. We need more. We conclude with some suggestions for future developments.

First, operationalising the idea of ‘common but differentiated responsibilities’⁵⁷ beyond international law seems like a promising first step to foreground distributive dimension of the PPP and inject a modicum of justice. Developing this doctrine for private actors will help us answer seemingly difficult questions

⁵² See e.g., *Lungowe v Vedanta Resources* [2019] UKSC 20; *Okpabi v Royal Dutch Shell* [2021] UKSC 3.

⁵³ See article 79a in the revised Industrial Emissions Directive, PE-CONS 87/23, still unpublished, available at <https://data.consilium.europa.eu/doc/document/PE-87-2023-INIT/en/pdf> – limited however to health damages.

⁵⁴ EU Corporate Sustainability Due Diligence Directive.

⁵⁵ Regulation 2023/956 establishing a carbon border adjustment mechanism [2023] OJ L130/52.

⁵⁶ Markus Trilling, ‘Blackmailing the Global South on EU Carbon Border Tax Won’t Work’ *EUobserver* (22 February 2024) <https://euobserver.com/africa/ard1345c09>.

⁵⁷ UNFCCC art 3(1), and art 4(1).

like ‘if Shell is ordered to reduce emissions, are we up next?’ Crucially, explicitly implementing the principle of differentiated responsibilities in private law (from liability to property and the interpretation of e.g., sustainability clauses) and core economic law would offer a defence against the widespread feeling that common citizens are asked to carry an outsized burden for the green transition, such as in the recent German heat pump controversy.⁵⁸ When and how should Europeans – and consumers in other affluent countries – reduce demand?⁵⁹ From the perspective of material throughput, and acknowledging that the demand in ‘developing’ countries needs to grow, reducing demand by affluent consumers seems to be an urgent move towards re-embedding nature.⁶⁰

Within this framework of differentiated responsibility, ‘do no significant harm’ could apply to the way we think about consumption (and production).⁶¹ It could orient policies to make sure that they are *just* environmental policies – for instance, starting from conspicuous consumption by banning private jets or oversized SUVs,⁶² and making general measures, such as taxes on flying,

⁵⁸ Hans von der Burchard, ‘How Heat Pumps Exploded Germany’s Ruling Coalition’ *Politico* (7 September 2023) www.politico.eu/article/heat-pumps-exploded-germany-ruling-coalition-green-law/.

⁵⁹ See Davies, ‘Degrowth: An Idea for Our Time’, ch 16 in this Volume.

⁶⁰ See in this regard the recent proposal for a frequent flyer levy: Angela Symons, ‘Taking more than 2 flights a year? € 50 frequent flyer tax could raise much-needed € 64bn for climate’ *Euronews* (17 October 2024) <https://www.euronews.com/green/2024/10/17/taking-more-than-2-flights-a-year-50-frequent-flyer-tax-could-raise-much-needed-64bn-for-c>.

⁶¹ The principle has recently found resonance in EU sustainable finance frameworks, with implications that will only become clearer in the future – see European Securities and Markets Authority, ‘Do No Significant Harm Definitions and Criteria Across the EU Sustainable Finance Framework’, ESMA30-379-2281, 22 November 2023 www.esma.europa.eu/sites/default/files/2023-11/ESMA30-379-2281_Note_DNSH_definitions_and_criteria_across_the_EU_Sustainable_Finance_framework.pdf. It remains an under-specified principle, which nevertheless seems to explicitly aim at addressing Anthropocene harms in a way that more established principles fail to capture. See Joyeeta Gupta and Susanna Schmeier, ‘Future Proofing the Principle of No Significant Harm’ (2020) 20 *International Environmental Agreements: Politics, Law and Economics* 731.

⁶² Laura Cozzi and Apostolos Petropoulos, ‘SUVs Are Setting New Sales Records Each Year – And So Are Their Emissions’ *IEA* (28 May 2024) www.iea.org/commentaries/suvs-are-setting-new-sales-records-each-year-and-so-are-their-emissions.

progressive. While general utilitarian arguments point to the significance of behaviours that are shared by larger proportions of the relevant populations, a principled approach would potentially be both more in line with people's moral intuitions and political preferences,⁶³ and help de-glamourise highly polluting practices.

Finally, the precautionary principle should be integrated more broadly into economic law, expanding product governance frameworks to a much broader set of risks.⁶⁴ Such frameworks should cover, among others with an environmental outlook, harmful commercial communication and the deployment of new consumer goods and services – including retail application of carbon-intensive AI technologies.⁶⁵ The EU AI Act is, in this respect, a blatant missed opportunity in that it failed to explicitly include environmental concerns within its risk assessment framework.⁶⁶ If we want humans to become a less disruptive part of environmental systems, we need them to reconnect to what is around them: a system that continuously creates new wishes to be chased is not compatible with a socially feasible environmental future.⁶⁷

⁶³ Davide Furceri, Michael Ganslmeier and Jonathan Ostry, 'Are Climate Change Policies Politically Costly?' (2023) 178 *Energy Policy* 113575.

⁶⁴ For a proposal to include 'regulatory precaution' in financial product regulation, see Saule T Omarova, 'License to Deal: Mandatory Approval of Complex Financial Products' (2012) 90 *Wash UL Rev* 64.

⁶⁵ For a proposal concerning 'green' financial policy, see 'Developing a Precautionary Approach to Financial Policy – from Climate to Biodiversity' Grantham Research Institute on Climate Change and the Environment www.lse.ac.uk/granthaminstitute/publication/developing-a-precautionary-approach-to-financial-policy-from-climate-to-biodiversity/. Concerning AI, see Philipp Hacker, 'Sustainable AI Regulation' (2024) 61 *Common Market Law Review* 345.

⁶⁶ José Renato Laranjeira de Pereira, 'The EU AI Act and Environmental Protection: The Case for a Missed Opportunity' Heinrich Böll Stiftung (8 April 2024) <https://eu.boell.org/en/2024/04/08/eu-ai-act-missed-opportunity>; the need for appropriate governance is also highlighted by Amy Luers and others, 'Will AI Accelerate or Delay the Race to Net-Zero Emissions?' (2024) 628 *Nature* 718.

⁶⁷ Zygmunt Bauman, *Consuming Life* (John Wiley & Sons 2013).