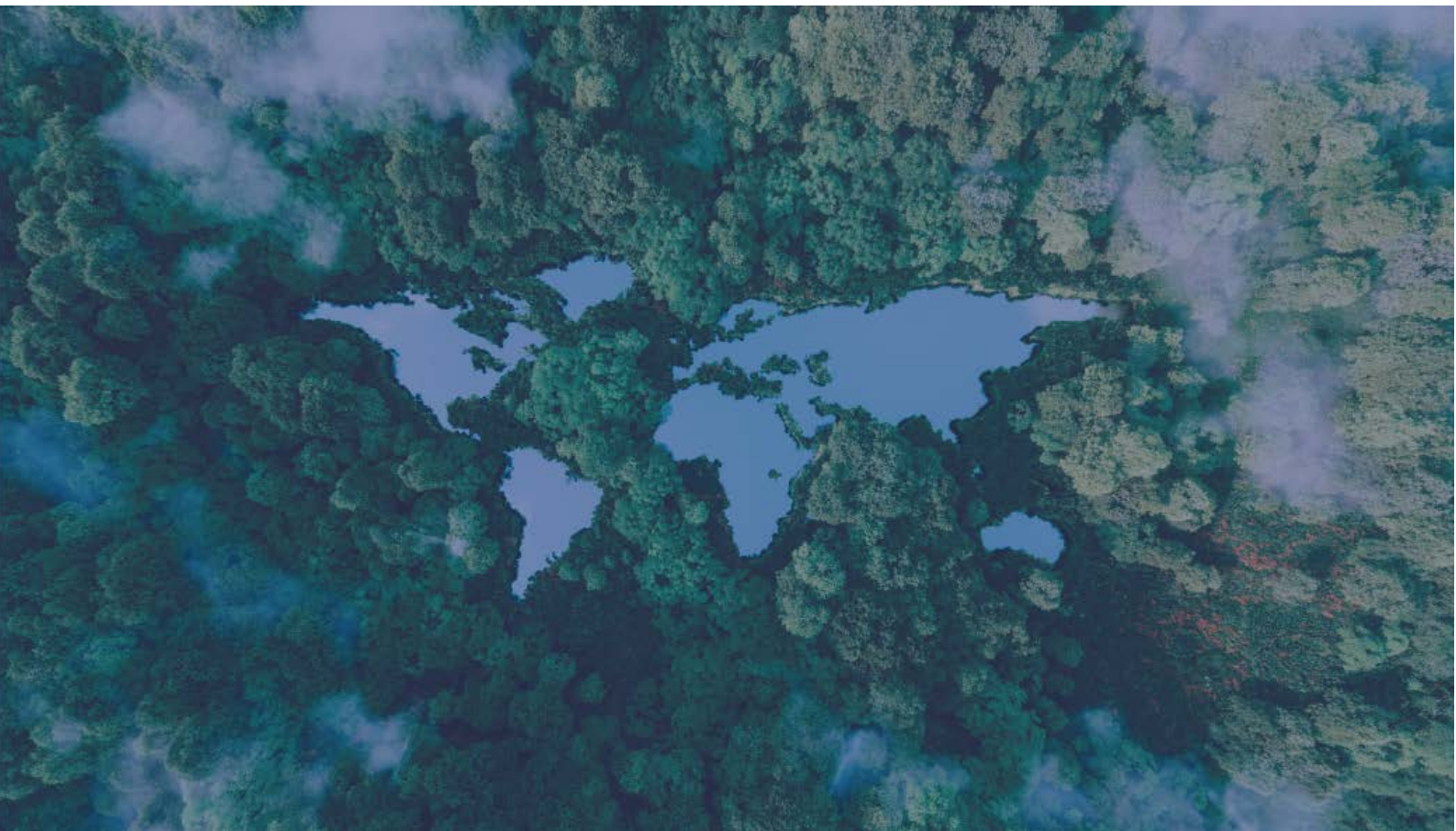




**British Institute of  
International and  
Comparative Law**

# Global Perspectives on Corporate Climate Legal Tactics: Italy National Report

**Professor Attilio Pisanò**





**British Institute of  
International and  
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# Executive Summary

The IEG has investigated the most relevant climate disputes brought in Italy in judicial or para-judicial proceedings against private actors.

The IEG contacted many of the lawyers who initiated the litigation and directly involved them in the subsequent analysis and synthesis work.

The IEG analysed every single climate dispute by filling in the Questionnaire for the National Rapporteurs required by the Project's Background Document.

Thus, the results have been summarised.

Currently, the Italian climate change litigation involving private actors is in its early stages.

The only instance with climate change as the central issue (Peel J, Osofsky H.M, *Climate Change Litigation*, Cambridge, Cambridge University Press, 2015) is the Greenpeace, Re:Common et al. vs ENI case (infra).

As a result, the IEG has chosen to adopt a more general perspective, pointing out certain legal issues connected with climate change. Usually, the IEG's perspective is introduced with the formula, "Generally speaking".

Finally, it is worth noting that there are currently few judgments that specifically pertain to climate litigation since the majority of the cases are still pending.

Most of the decisions are associated with cases of greenwashing.

Consequently, the main perspective of the report is that of the claimants.

## Acknowledgements

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# 1. Causes of Action

## Examples of Italian Cases

The disputes analysed are the following:

- 1) Greenpeace, Re:Common et al. vs ENI;
- 2) Movimento Difesa del Cittadino; Lega Ambiente, European Federation for Transport and Environment vs ENI S.p.A.; (“EniDiesel+” case);
- 3) Codici, Movimento Difesa del Cittadino, Confconsumatori, Codacons, Altroconsumo Cittadinanzattiva Onlus and Federconsumatori Bologna vs Volkswagen Group Italia S.p.A. (VW Italia) and Volkswagen AG (VW AG) (“Dieselgate” case);
- 4) Altroconsumo vs VW Italia e VW AG, Compensatory Class Action (pursuant to Art. 140-bis, paragraph 6, of the Consumer Code, Legislative Decree 206/2005, now repealed by Law No. 31/2019) brought before the Civil Court of Venice;
- 5) G.B et al. vs Municipality of Milan, Ministry of Culture, Milan A.C. S.p.A; Internazionale F.C. S.p.A. (“Milan Stadium” case);
- 6) C.Z. et al. vs Acciaierie d’Italia Holding S.p.A., Acciaierie d’Italia S.p.A., ILVA S.p.A. (“ILVA” case);
- 7) A.B et al. vs Ministero per lo Sviluppo Economico, Trans Adriatic Pipeline AG Italia (TAP) et al. (“TAP” case);
- 8) No. 3 petitions presented by the “Rete Legalità per il Clima”, on behalf of various associations and individuals, before the National Contact Point for the OECD Guidelines vs Cremonini S.p.A. Group, Veronesi Holding S.p.A., ENI S.p.A. (“Cremonini”, “Veronesi”, “ENI” cases);
- 9) Re:Common vs Saipem S.p.A. and ENI S.p.A (“Mozambique LNG Project” case);
- 10) Ikebiri vs ENI (“Ikebiri” case);
- 11) Survival International Italia vs Pasubio S.p.A. (“Pasubio” case).

## General Overview

### *Greenpeace, Re:Common et al. vs ENI*

The only litigation with climate change as the central issue (Peel J, Osofsky H.M, *Climate Change Litigation*, Cambridge, Cambridge University Press, 2015) is the Greenpeace, Re:Common et al. vs ENI case (infra).

The case was brought before the Civil Court of Rome (writ of summons 9 May 2023, [https://www.greenpeace.org/static/planet4-italy-stateless/2023/10/4f80849d-gp-recommon-atto-di-citazione-eni-09.05\\_senza\\_dati\\_sensibili.pdf](https://www.greenpeace.org/static/planet4-italy-stateless/2023/10/4f80849d-gp-recommon-atto-di-citazione-eni-09.05_senza_dati_sensibili.pdf)) by Greenpeace, Re:Common and some Italian citizens. ENI entered an appearance in court in September 2023

<https://www.eni.com/content/dam/enicom/documents/ita/media/causa-eni-greenpeace-recommon/Comparsa-di-costituzione-e-risposta-nellinteresse-di-Eni-SpA.pdf>).

The case is qualified by the same claimants as a “climate litigation”, a legal action brought against ENI (Ente Nazionale Idrocarburi), the most important Italian Company in the field of fossil energy (Oil & Gas).

Preliminarily, ENI dwells on the role of strategic litigation in the fight against human-induced climate change, pointing out that almost all climate cases filed against private companies have been dismissed, with the only exception of the “Shell case”, defined as “an isolated precedent still *sub iudice*”.

Specifically, the claimants argue that the alleged adverse effects of climate change will increasingly impact their rights, particularly the human rights protected by Arts 2 and 8 of the ECHR (a violation already recognized in the Urgenda and Shell cases) (see A. Pisanò, *Il diritto al clima. Il ruolo dei diritti nei contenziosi climatici europei*, Napoli, ESI, 2022).

According to the claimants, the alleged human rights violation (the final adverse effect of climate change, i.e. the event/damage) is (not exclusively) due to ENI’s *contra jus* conducts (infra).

The causal link between ENI’s conduct and the alleged human rights violations at stake (event/damage) would justify the protection of the Claimants under Arts. 2043, 2050, 2051 of the Italian Civil Code (infra Tort Law).

Consequently, the alleged violation of the claimants’ human rights should provide grounds for their legal standing and explains the required pecuniary and non-pecuniary remedies (compensation for the damage suffered and, at the same time, injunction to avoid future damage).

Thereafter, ENI submits that all its activities constitute legitimate business activities and are all subject to specific regulation and administrative authorisation. ENI’s activities cannot be considered *contra jus*, therefore they are not capable of causing unjust damage.

With specific reference to civil liability (Arts 2043, 2050, 2051), ENI argues that its conduct is not *contra jus*, that there is no causal link, that the subjective element (intent or fault) is absent, and that there is no compensable damage (infra).

### ***Movimento Difesa del Cittadino, Lega Ambiente, European Federation for Transport and Environment vs ENI S.p.A.; (EniDiesel+ case)***

Some associations (Movimento Difesa del Cittadino, Lega Ambiente, European Federation for Transport and Environment) complained that ENI S.p.A. violated Arts. 21 and 22 of the Consumer Code (Legislative Decree 2005/2006) and the *Regulation*



on investigative procedures concerning misleading and comparative advertising, unfair commercial practices, violations of consumers' rights in contracts, violation of the prohibition of discrimination and unfair terms (Autorità Garante della Concorrenza e del Mercato, s.c. "Antitrust Authority", 2015).

The case is a typical case of greenwashing concerning climate issues.

Specifically, the case concerned the deceptiveness of ENI S.p.A.'s commercial practice aimed at promoting its fuel *EniDiesel+* composed of 15% *Green Diesel*, a component produced by hydrogenation of vegetable oils (HVO Hydrotreated Vegetable Oil).

Furthermore, the parties introduced the issue of the use of palm oil to produce biodiesel for hydrogenation (*EniDiesel+*) from the point of view of Indirect Land Use Change (ILUC).

In its defence, among other things, ENI specified that, being a large industrial group active in processes with a high environmental impact, ENI is required to inspire, set and orient its entire activity to the strictest and most straightforward compliance with sector regulations. Particularly, ENI argued that it has also adhered to voluntary certification schemes concerning sustainability requirements.

In particular, ENI emphasised that it only procures vegetable oils "from suppliers that are able to provide sustainability certificates issued by voluntary certification schemes approved by the European Commission".

The Antitrust Authority recognized the misleading nature of the messages and information concerning the product *EniDiesel+*. Particularly, the Authority observed that they were structured in such a way as to induce the recipients to confuse the HVO component called *Green Diesel* with the product advertised as *EniDiesel+*, as well as to attribute to the product as a whole the environmental benefits ascribed to that specific component (some of which the Authority did not consider to be well-founded).

As a result, the Antitrust Authority acknowledged the unfairness of the commercial practice pursuant to Arts. 21 and 22 of the Consumer Code, contesting the dissemination of misleading and omissive information regarding the positive environmental impact connected with the use of *EniDiesel+* fuel, as well as regarding the particular characteristics of this fuel both in terms of reduced fuel consumption and reduced gaseous emissions.

The Authority imposed an administrative fine of EUR 5,000,000 on ENI.

ENI appealed against this measure before the Regional Administrative Court of Lazio (n°2232/2020).

With reference to the use of the expression 'green' for advertising purposes, the Regional Administrative Court referred to what was emphasised in the European Commission's Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer



commercial practices in the internal market (2021/C 526/01) specifically concerning the 'environmental claims' and 'green claims'.

The Regional Administrative Court recalled that the Commission observed how the green claims must be truthful, not contain false information and be presented in a clear, specific, accurate and unambiguous manner, so that consumers are not misled.

The Court added that the European Commission's Guidance underlined that environmental claims are likely to be misleading if they consist of vague and general statements of environmental benefits without appropriate substantiation of the benefit nor indications of the relevant aspect of the product the claim refers to.

Actually, according to the Guidance, examples of such claims are 'environmentally friendly', 'eco-friendly', 'eco', 'green', 'nature's friend', 'ecological', 'environmentally correct', 'climate friendly', 'gentle on the environment', 'pollutant free', 'biodegradable', 'zero emissions', 'carbon friendly', 'reduced CO2 emissions' 'carbon neutral', 'climate neutral' and even the broader claims of 'conscious' and 'responsible'.

Consequently, the Regional Administrative Court (November 2021), considered that the Authority had moved in the interpretative groove indicated by the European Commission and rejected all of ENI's grievances.

*Codici, Movimento Difesa del Cittadino, Confconsumatori, Codacons, Altroconsumo Cittadinanzattiva Onlus and Federconsumatori Bologna v Volkswagen Group Italia S.p.A. (VW Italia) and Volkswagen AG. (VW AG) ("Dieselgate" case)*

The proceedings, initiated in 2015 before the Autorità Garante della Concorrenza e del Mercato (s.c. "Antitrust Authority"), concerned the conduct of VW Italia and VW AG consisting in the marketing, as from 2009, on the Italian market of motor vehicles and commercial vehicles whose polluting or environmentally harmful emissions did not comply with the values declared in the type-approval, that is to say, whose type-approval was obtained through the use of software in the engine control unit ('defeat device') able to differentiate the behaviour of the vehicle during the emission control test from the behaviour during normal road use.

The dispute stems from the proceedings against VW AG brought before the US Environmental Protection Agency (EPA).

By order No. 26137 of August 2016, the Antitrust Authority found that the commercial practice carried out by VW Italia and VW AG constituted an unfair commercial practice, pursuant to Arts. 20(2), 21(1)(b), 23(1)(d) of the Consumer Code. As a consequence, the Authority imposed a penalty of EUR 5,000,000.

VW Italia and VW AG, lodged an appeal (No. 12293/2016) before the Regional Administrative Court of Lazio against the Antitrust Authority's measure.

The Regional Administrative Court dismissed the appeal (May 2019) and confirmed the decision of the Competition Authority.

Compensatory Class action (pursuant to Art. 140-bis, paragraph 6, of the Consumer Code, Legislative Decree 206/2005, now repealed by Law No. 31/2019) brought before the Civil Court of Venice (April 2016), against VW AG and VW Italia, by the Association "Altroconsumo", in its capacity as the procedural representative of some consumers who bear homogeneous individual rights, concerning the same facts on which the Antitrust Authority ruled in the so-called "Dieselgate" case (use of the 'defeat device').

As a preliminary step, the parties asked the Court to issue an order of admissibility of the claim pursuant to Art. 140-bis(6) of Legislative Decree No 206/2005 and to declare misleading and unfair the VW's commercial practice linked with the use of the 'defeat device'.

The Court of Venice (Order 3711/2016) declared admissible the action, setting a deadline to join the litigation for consumers who had purchased a Volkswagen, Audi, Seat and Skoda brand car (EA189 Euro 5 engine) in Italy between 2009 and 2015.

VW Italia and VW AG appealed before the Court of Appeal of Venice, which dismissed the complaint by Order 2696/2017.

The Court of Venice, ruling on the merits in July 2021, condemned VW Italia and VW AG to pay both the pecuniary damage recognised to consumers for the ascertained unlawful conduct and the caused moral damage in favour of approximately 63,000 members admitted to the class action.

In February 2022, the appeal proceedings started.

In November 2023 (Sent. 2260/2023), The Court of Appeal of Venice confirmed Volkswagen's unlawful conduct but recognized only the moral damage (not the pecuniary damage).

#### ***G.B et al. v Municipality of Milan, Ministry of Culture, Milan A.C. S.p.A; Internazionale F.C. S.p.A. ('Milan Stadium' case)***

By an appeal lodged with the Lombardy Regional Administrative Court, a group of citizens (G.B. et al.) sought the annulment of the Resolution No 1379/2021 (Municipal Council of Milan) -and of all prior, connected and consequent acts- concerning the Proposal relating to the 'Milan Stadium', which had already been declared -- with conditions and prescriptions -- to be in the public interest.

The Proposal consisted of a feasibility study envisaging the complete demolition of the San Siro Stadium, replaced by a new sports facility, as well as the construction of new volumes for commercial use with the transformation of a vast green area of approximately 290,000 square metres, owned by the municipality.

Among other grounds, the applicants complained of a number of violations of the law and they also complained that the resolution and its approval process conflicted with Art. 4 of the United Nations Framework Convention on Climate Change (UNFCCC).

The plaintiffs, among other things, claimed that the project in question was contrary to the public interest of Milan's citizens not only because of its environmental impact, but also in terms of land consumption.

Moving from the Italian Istituto Superiore per la Protezione e Ricerca Ambientale (ISPRA) 2021 report *Land consumption, territorial dynamics and ecosystem services*, the claimants firstly highlighted the impact of land consumption in terms of loss of ecosystem services. Further they observed how Lombardy held the record in absolute and relative terms for land consumption in Italy, while the province of Milan stood at around 32% of land consumed in relation to the provincial surface area.

Reference was also made to the regulations to protect the soil ("a non-renewable resource, a common good of fundamental importance for environmental balance") contained in Regional Law 31/2014 (*Dispositions for the reduction of soil consumption and the redevelopment of degraded soil*).

The appeal emphasised the link between climate, pollutant emissions and air quality (most recently reaffirmed by the Report of the *Special Rapporteur on the issue of human rights, obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/49/53, § 13,) highlighting the impact of the new stadium project due to car mobility, pollution and climate-altering emissions resulting from the construction phase.

Specifically, the appeal complained about the absence of a risk analysis concerning the impact of the new project on climate change, recalling the general indications of the International Panel on Climate Change (IPCC) and the specific ones expressed in the Centro Mediterraneo sul Cambiamento Climatico (CMCC Foundation) Report *Risk Analysis. Climate change in six Italian cities*<sup>1</sup>. The Report was aimed to provide a further scientific contribution to support decision-making, dissemination and dissemination of information to raise awareness on the issue of climate change risk.

The appeal highlighted how the urgency and seriousness of the climate crisis was known to the Municipality of Milan, which was discussing the adoption of the Aria-Clima-2020 Plan and which had also adopted (the City Council), a motion (No. 433/2019) committing the Mayor to declare the climate and environmental emergency and the City Government to adopt initiatives aimed at reducing emissions and introducing renewable energies.

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<sup>1</sup> Available on line: <https://www.cmcc.it/it/rischio-clima-citta-2021>

Therefore, the appellants considered the declaration of public interest of the new Stadium project: a) completely unjustified in relation to the current climate crisis; b) illegitimate in light of the international commitments undertaken by the Italian State; c) profoundly contradictory to the environmental policies implemented by the municipal administration itself.

***C.Z. et al. v Acciaierie d'Italia Holding S.p.A., Acciaierie d'Italia S.p.A., ILVA S.p.A. ('ILVA' case)***

With an appeal of July 2021, pursuant to Art. 840 sexiesdecies (Art. introduced by Law 31/2019) of the Italian Code of Civil Procedure (*Codice di Procedura Civile*, c.p.c.), eleven individuals brought a class action (*azione inhibitoria collettiva*) aimed at obtaining an injunction (“Whoever has an interest in the pronouncement of an injunction of acts and conduct, put in place to the detriment of a plurality of individuals or entities, may act to obtain an order to cease or prohibit the repetition of the omissive or commissive conduct”) for the protection of “homogeneous rights” of the residents of Taranto and neighbouring municipalities.

According to claimants, these rights would be violated by the industrial activity of the steel mill whose ownership is held by ILVA S.p.A. and managed by Acciaierie d'Italia S.p.A. -controlled by Acciaierie d'Italia Holding S.p.A.

Particularly, the applicants sought the protection of their right to health; their right to serenity and tranquillity in the conduct of their lives; and their right to climate.

The applicants claimed that these rights would have been infringed because of the pollution determined by emissions from the ILVA steel plant, which produces six million tonnes of steel per year, using three million tonnes of hard coal.

According to the applicants, the action doesn't aim to ascertain the causal link between those specific pathologies and the polluting emissions of the ILVA plant, nor to get compensation for the damage, but for the elimination of the current 'unfair exposure to risk' of the rights whose full protection is sought (a thesis strongly contested by Acciaierie d'Italia S.p.A., ILVA S.p.A.).

Consequently, the plaintiffs asked the judge to order the closure of the area of the steel plant with the coke ovens and blast furnace or, alternatively, the shutdown of the plant until the fulfilment of the prescriptions that science deems as appropriate aimed at making 'tolerable' the alleged damage that would be caused by the steel mill to the residents' population.

The claimants emphasise that steel plants (which also include two thermoelectric power plants) are the largest source of CO<sub>2</sub> emissions in Italy at an average of around thirteen million tonnes/year.

The plaintiffs asked the court to order the companies involved: “to immediately prepare a business plan to reduce greenhouse gas emissions by no less than 50 percent

compared to the emissions resulting from the production of six million tonnes of steel per year by 2026”.

The claimants also complained that the Italian Integrated National Energy and Climate Plan (Piano Nazionale Integrato per l’Energia e il Clima, PNIEC<sup>2</sup>) did not refer to greenhouse emissions produced from steel plants.

At the moment, the proceedings have been stayed because of a required interpretation of the Court of Justice of the European Union.

***A.B et al. v. Ministero per lo Sviluppo Economico, Trans Adriatic Pipeline AG Italia (TAP) et al. (TAP case)***

B.A. and other citizens requested the annulment of the Decree of the Minister for Economic Development (*Ministro dell’Industria e dello Sviluppo Economico*) of 21 October 2020 concerning the extension to 31 March 2021 of the authorisation for the construction and the commissioning of the TAP pipeline.

Among other things, the MISE justified the extension of the authorisation on the basis of a series of information provided by TAP, which was qualified by the MISE itself as “objective situations occurred during the construction of the pipeline”. These situations would make the extension legitimate, also confirming the legitimacy of both TAP’s activities and the original ministerial authorisation.

Among the “objective situations that occurred during the construction of the pipeline”, the applicants referred to the ascertainment of the climate emergency recognised by international, supranational and national institutions as well as by the scientific community; the necessary strengthening of the already existing climate obligations provided by the European “Green Deal”, on the basis of the scientific evidence produced by the IPCC (*Special Report Global Warming 1.5*); the European Ombudsman’s Decision (17 November 2020) on European Commission’s action concerning sustainability assessment for gas projects on the current List of Projects of Common Interest (case 1991/2019/KR) in the framework of the EU Regulation no. 347/2013, in which it was acknowledged that the procedures on the assessments of gas infrastructures (such as the TAP pipeline), did not take into account their impact of climate compatibility and utility, in the context of the climate emergency (“The Ombudsman notes that the EU’s objectives concerning climate change targets and sustainability have gained in urgency with the increasing awareness of the accelerating climate crisis. In this context, the Ombudsman finds it regrettable that the Commission did not attempt at an earlier stage to improve the available data and the analytical

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<sup>2</sup> Available on line <https://www.mase.gov.it/energia/energia-e-clima-2030>

methodologies applied, so that a ranking of candidate gas Projects of Common Interests based on their sustainability would have been possible”, § 20).

As a result, the applicants argued that both TAP and MISE never said anything about the compatibility and climatic usefulness of the new methane pipeline with respect to the arising, dramatic climatic emergency, substantiating a hypothesis of ‘substantial climatic illegality’ due to the failure to comply with the quantitative and temporal results derived by the climate obligations.

#### **“Rete Legalità per il Clima” vs Gruppo Cremonini S.p.A., Veronesi Holding S.p.A., ENI S.p.A.**

On behalf of several associations and individuals, the “Rete Legalità per il Clima” submitted (2021, 2022) three different petitions to the Italian National Contact Point for the OECD Guidelines for Multinational Enterprises.

The petitions were against Cremonini S.p.A. and Veronesi S.p.A, multinational companies that operate intensive livestock farms in Italy, and ENI, a multinational company operating in 69 countries around the world, active in the oil, natural gas, chemical, and biochemical sectors and production and marketing of electricity from fossil fuels, cogeneration, and renewable sources.

The petitions complained about the alleged systematic violation of the OECD Guidelines, with particular reference to the possible violation of human rights and the negative impacts of the activities of the involved companies in the failure to perform due diligence (declined in the climate emergency by the 2019 OECD document *Background Note on Global Climate Action and Responsible Business Conduct: What does it mean for business to act responsibly in the face of a climate emergency?*, available on line <https://mneguidelines.oecd.org/Session-note-COP25-Global-Climate-Action-and-RBC.pdf>) concerning the impact of their activities on anthropogenic climate change.

The NCP recognised the petitioner (“Rete Legalità per il Clima”) as having a specific and relevant interest in the raised issues, considering that the data and the elements provided by the parties did not allow for the *prima facie* exclusion that the multinationals involved had failed to provide complete, up-to-date, and timely information on the potential effects of their activities with respect to climate emergency conditions.

Furthermore, starting from the claim of the “human right to a stable and safe climate as a prerequisite for the right to life in conditions of non-reversal of the climate system and safe anthropogenic emissive activities in the exclusion of any dangerous interference”, the petitioners complained about the inadequacy of the measures adopted by multinationals to deal with the climate emergency, in violation of the OECD Guidelines.

Several reasons were generally cited for calling for good offices of the NCP, including the need for action also of private (not only public or state) actors in achieving the goals

of the Paris Agreement; the climate emergency condition; what emerged from the Central Bank of Europe's 2020 document entitled *Guidance on Climate and Environmental Risks*, which recalls the centrality of OECD documents for due diligence in climate risk analyses.

Among other things, it is complained about the lack of information made available to citizens on the risk analyses of the strategies followed by multinationals to deal with the climate emergency and the methods used to carry out the analyses, and, above all, the failure to respect the eco-sustainability constraints to which all economic activities in the European legal space should be subjected, which can be derived from a series of Community acts (in particular EU Regulations 2021/1119 and 2020/852).

The Italian NCP, at the end of the preliminary investigation phase, concluded that the issues raised (Cremonini, Veronesi, ENI) deserved to be further investigated, proposing to the parties its good offices to develop a useful dialogue to find a shared solution for the achievement of environmental and climate protection objectives.

#### ***Re:Common vs Saipem S.p.A. and ENI S.p.A. ('Mozambique LNG Project' case)***

The association Re:Common appealed (No 2285/2022) to the Lazio Regional Administrative Court to get an annulment of the silence-denial by the Special Section for Export Credit Insurance (SACE) of the request for environmental information and access to administrative documents and records relating to the natural gas production, liquefaction and marketing projects "Mozambique LNG Project" and "Coral South" promoted by Saipem and ENI and of the decision of the Commission for Access to Administrative Documents at the Office of the Prime Minister dated 24 January 2022 in so far as it rejected the appeal brought by Re:Common (ex art. 25 paragraph 4 of Law 241/1990) for the reconsideration of the aforesaid silence-denial.

The case concerns the right to access environmental information linked with climate issues.

In particular, the applicants claimed to have learned from "official and journalistic sources" that SACE S.p.A. had undertaken financial and insurance commitments with reference to projects in Mozambique.

The Re:Common association, therefore, asked SACE for access to environmental information (Legislative Decree 195/2005) on the two projects with particular reference to the Wood Mackenzie Ltd report containing a specific assessment of climate impacts.

Thirty days after sending the request for access to the documents, in the face of SACE's silence-denial, Re:Common lodged an appeal with the Commission for Access to Administrative Documents at the Presidency of the Council of Ministers, which declared it partially inadmissible on the ground that the matter in issue had ceased to exist and partially rejected it as unfounded.



Re:Common therefore appealed to the Regional Administrative Court of Lazio, which, by judgment 6272 of May 2022, ascertained that the requested documentation had to be qualified as 'environmental information' (Legislative Decree 195/2005), recognising the active legitimacy of the applicants to have access to the requested information and, accordingly, ordered SACE S.p.A. to grant access to them.

The decision was then confirmed by the Council of State in judgement No. 2635/2023.

The projects were financed by SACE and Cassa Depositi e Prestiti through a financial guarantee.

### *Ikebiri vs ENI (Ikebiri case)*

In 2017, a Nigerian community (the Ikebiri community) launched a court case against ENI and its Nigerian subsidiary NAOC in Milan, demanding a clean-up of the 2010 oil spill caused by the failure of the pipeline, and a remedial compensation.

The dispute is one of particular importance because it is the first judicial case in Italy against an Italian multinational corporation for alleged harms and rights violations perpetrated overseas in a foreign country.

Specifically, the Ikebiri case concerns the alleged harmful impacts on the environment and human rights caused by activities realised *in loco* (Niger Delta) by a European (Italian) Multinational Company.

The Ikebiri case clearly sheds light on the harmful effects on climate, environment, biodiversity and ecosystems caused by the fossil fuel-related mining activities, also in violation of the s.c. 'minimum safeguards' under Art. 18 of EU Regulation 2020/852.

The Ikebiri case can be also seen as the first Italian case inspired by the "One Health-Planetary Health" perspective (M. Carducci, *L'approccio One Health nel contenzioso climatico: un'analisi comparata*, Corti supreme e salute, 2002.3).

The dispute was later resolved by an out-of-court settlement. The case was included by the "Mind the Gap" consortium in a collection of court cases dedicated to the impunity enjoyed by multinational corporations that violate human rights (<https://www.mindthegap.ngo/harmful-strategies/avoiding-liability-through-judicial-strategies/settling-cases/eni-settlement-with-a-nigerian-community/>), was mentioned by the European Parliament in the Report 'to legal remedies for victims of corporate human rights abuses in third countries'. [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXP\\_O\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXP_O_STU(2019)603475_EN.pdf), was included by the European Union Agency for Fundamental Rights (FRA) in the report "Business and Human Rights - Access to Remedy" [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf) and was included by ECCJ in its last report related to cases against EU companies for overseas human rights and environmental abuses <https://corporatejustice.org/publications/suing-goliath/>.

### *Survival International Italia ES v Pasubio S.p.A. ('Pasubio' case)*

Survival International Italia ETS, on behalf of the indigenous people of the Ayoreo Totobiegosode, filed a petition with the Italian National Contact Point for the OECD Guidelines for Multinational Enterprises against Conceria Pasubio S.p.A. in 2022.

According to the claimants, the Italian-based multinational Pasubio S.p.A. should be held responsible for the deforestation of the Gran Chaco region of Paraguay, an immense expanse of rivers, swamps and arid, low-vegetation forests that encompasses Argentina, Bolivia, Paraguay and Brazil.

The petitioner demanded that Pasubio S.p.A. immediately stop importing hides and skins from Paraguayan tanneries since this practice is considered responsible for and/or involved in the deforestation of the Ayoreo Totobiegosode's ancestral territory, recognised by the Government as 'Natural and Cultural Heritage of the Totobiegosode people', with possible violation of the Totobiegosode people's human rights and effects on climate change dynamics.

## **A. Climate Change Law/Environmental Law Statutory Provisions**

### **i. International law and 'substantial' climate legality**

The overall background consists of the UNFCCC (particularly Arts. 2, 3, 4), the Paris Agreement, and the Katowice Climate Package.

For example, in the TAP case, the sources of climate law (UNFCCC, Paris Agreement, EU law) and the IPCC's reports have been used to conceptualise the climate emergency as "an unprecedented challenge to the parameters of legitimacy for administrative acts".

According to the claimants, by the expression "climate emergency", therefore, are identified that "critical and destabilising processes of both planetary and local character, inexorably irreversible and worsening for the human coexistence (local and planetary) due to their thermodynamic nature and determined by the same legal sources, by the human use of fossil resources which are able to activate the irreversible atmospheric warming of the planet" (TAP).

In the TAP case, the claimants point out that there are some "specific legal obligations to mitigate", with specific outcome targets established by the UNFCCC and other legal instruments (such as the Paris Agreement) concerning containment and neutralisation of the thermodynamic effects of the use of fossil fuels.

Within this framework, the climate emergency is defined by claimants as a legal issue centred on the obligations derived from international climate law to adopt specific mitigation measures. Consequently, the climate emergency should give rise to a "substantial" – not only formal – "climate legality".

Specifically, according to the claimants, the “substantial climate legality” would define a kind of “legality parameter” entailing both quantitative and temporal targets to be used for assessing the legitimacy of the acts issued by the Public Administration (in the TAP case, the Ministry of Economic Development).

From this substantial perspective, according to the claimants, the administrative act extending TAP’s authorisation should be considered inconsistent with non-regression and sustainable development principles.

The applicants also complained of the lack of information on the usefulness and the compatibility with climate protection of the new methane pipeline on the grounds of the urgent need to face the climate emergency as well as the violation of the Arts. 2 and 3 of the UNFCCC, the Art. 4 of the 2015 Paris Agreement, and the Art. 191 of the Treaty on the Functioning of the European Union (TFEU).

Moreover, according to the claimants, the Ministerial authorization should be declared unlawful due to the violation of Arts. 2, 3 (para. 2), 9 (para. 1), 32 and 33 (para. 1) of the Constitution, in conjunction with Art. 15 of the 1966 UN Covenant on Economic, Social and Cultural Rights and Art. 14 ECHR, given that the authorisation would not take in account the more recent scientific findings concerning the climate emergency as well as the intergenerational equity.

In the *Greenpeace, Re:Common et al. vs ENI* case, claimants use International Climate Law and the several conclusion over the years of Conferences of the Parties (COP) to highlight the exponential increase of knowledge on the gravity of the climate crisis and its human-induced causes as strictly linked to the massive use of fossil fuels.

The *Glasgow Climate Pact* adopted by COP26 plays a fundamental role in the proceedings before the OECD National Contact Point (Veronesi, Cremonini, ENI). The *Glasgow Climate Pact* is repeatedly invoked to confirm the urgent and potentially irreversible threat of anthropogenic climate change.

Specifically with regard to the proceedings before the NCP proceedings involving intensive livestock farming, the *Global Methane Pledge* (COP26) is cited to focus on the immediate harmfulness of methane emissions in the current climate emergency (Veronesi, Cremonini, ENI). In addition, the proceedings refer to the UNEP and Climate & Clean Air Coalition (CCAC) report entitled *Global Methane Assessment, Benefits and Cost of Mitigation Methane Emission* (2021).

The *Global Forest Pledge* (COP26) is cited in the Pasubio case.

## ii. Community and European Union law

### *The Climate Emergency and the Green New Deal*

The overall European Union Law framework is represented by Art. 191 of the Treaty on the Functioning of the European Union (primary law) and, in particular, by the principles of precaution (e.g. ENI), preventive action (191, § 2, e.g. Veronesi, Cremonini, ENI),

sustainable development (191, § 3, para. 3). Remarkably, the European Climate Law (Regulation EU 2021/1119) plays a crucial role as it establishes the framework for achieving climate neutrality<sup>3</sup>.

The European Green Deal is used to emphasise the need for a “strengthening of the already existing climate duties”, also including the EU strategy to reduce methane and prevent its dangerous emissions and the irreversible process of abandoning fossil resources, with the aim to reach the normative targets concerning the reduction of the greenhouse emission by 2030 and 2050 (TAP).

Moreover, according to the claimants, the adoption of the European Green Deal in 2019 would render ‘insufficient’ the Italian PNIEC (January 2020), which still considers the TAP pipeline as useful and compatible with Italy’s climate change commitments<sup>4</sup>.

The priorities set out by the European Commission in the European Green Deal (high level of protection, qualitative improvement of the environment, promotion of fundamental European values) are generally used by claimants in Italian litigations to emphasise the importance of Regulation (EU) 2021/1119 (European Climate Law) in involving public and also private economic actors in achieving climate neutrality by 2050 (ENI).

### *Sustainable Finance and Disclosure*

On the other hand, the Regulation (EU) 2019/2088 (Sustainable Finance Disclosure Regulation - SFDR) is often invoked (together with Regulation 852/2020) with the aim of highlighting the need for a corporate climate change strategy and providing the necessary information on the effectiveness of the strategy itself (ENI)<sup>5</sup>.

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<sup>3</sup> Some other Regulations are used by the complaints, as well as: Regulation (EU) 2021/841 (amending Delegated Regulation (EU) No 640/2014 regarding the rules on non-compliances in relation to the system for the identification and registration for bovine, ovine and caprine animals and on the calculation of the level of administrative penalties in respect of declared animals under animal aid schemes or animal-related support measures) (Veronesi, Cremonini); 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 (s.c. “EU Taxonomy Regulation”); Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (Sustainable Finance Disclosure Regulation - SFDR); Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

<sup>4</sup> Also in the TAP case, reference was made by claimants to the European Ombudsman’s decision of 17 November 2020 on the compatibility and climate utility of new European gas infrastructures, governed by EU Regulation No. 347/2013, in which it was acknowledged that the procedures on gas infrastructure assessments (such as the TAP pipeline) had failed to take into account their climate compatibility and utility impact, in the context of the climate emergency (see also Directive 2009/73/EC concerning common rules for the internal market in natural gas).

<sup>5</sup> Generally speaking, among the other EU sources, it is possible to mention: a) Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) which regulates also the activities of livestock industries, such as intensive poultry and pig farming; b) Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register (Veronesi, Cremonini). The two sources are considered complementary. The Directive 2010/75/EU, in fact, would aim to progressively reduce pollution from the largest agro-industrial installations in the European Union, while maintaining a level playing

In the proceedings before the Italian NCP, a pivotal role is played by the EU Regulation 2020/852 (“EU Taxonomy Regulation”).

To this Regulation should be added the Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities.

The Regulation (EU) 2021/2178 specifies the content, methodology and presentation of the information that financial and non-financial companies must report on environmentally sustainable economic activities (ENI) (see Disclosure).

### ***The OCSE National Contact Point and the EU Regulation 2020/852***

In the proceedings before the NCP, companies are requested to adapt their risk assessment plans to the prognostic and proactive approach defined by EU Regulation 2020/852, aimed at ensuring “minimum safeguards” consistently with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (Art. 18) (Cremonini, Veronesi, ENI).

Specifically, in the proceedings before the Italian NCP, the claimants point out that “the 2011 OECD Guidelines state that companies must prevent the adverse impacts of their activities using environmental *due diligence* on an ongoing basis”.

According to the OECD Guidelines, due diligence is “understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems” (Part II, § 14). As a consequence, the claimants argue that due diligence requires “not only the adoption of all necessary measures to identify environmental risks with the aim of preventing or mitigating the impacts related to companies’ activities but also the implementation of measures to continuously monitor these risks with the aim of adopting the needed changes for effective environmental protection”.

Consequently, the exercise of due diligence should cover all the activities linked with the economic cycle of a company, because such conduct would be required by Chapter VI (Environment) and IV (Human Rights) of the Guidelines (Veronesi, Cremonini, Pasubio).

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field. The Regulation (EC) 166/2006 would establish a tool for monitoring pollution reduction efforts by improving publicly available information on the actual performance of installations. Furthermore, the importance of private involvement for the successful transition of the EU to a low-carbon and climate-resilient economy is always recalled and also stated by the European Commission when the European Green Deal was adopted (Communication from the Commission to the European Parliament, the European Council, The Council, The European Economic and Social Committee and the Committee of the Regions, The European Green Deal COM(2019) 640 final).

Generally speaking, in this regard, it is important to mention that a new edition of the OECD Guidelines for Multinational Enterprises was adopted on June 8, 2023.

Key changes include specific recommendations for enterprises to align with internationally agreed standards on climate change and biodiversity and strengthened procedures to secure the visibility, effectiveness and functional equivalences of NCPs.

From a climate perspective, this might lead to significant changes in the handling of future instances before the Italian NCP.

The relevance of due diligence has been reaffirmed at EU level by European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (Pasubio).

A large part of Italian litigation concern the right to access environmental information, derived from the OECD Guidelines (Chapter III and IV), the Aarhus Convention (1998), a series of European Directives (2003/4/EC; 2003/35CE), Regulations (1367/2006) and domestic sources (Legislative Decree 195/2005) (Cremonini, Veronesi, Pasubio, ENI, Re:Common).

Also relevant is the obligation of non-financial disclosure in achieving a green and climate-neutral economy (Regulation (EU) 2021/119; Directive 2014/95/EU; Legislative Decree 254/2016). Specifically, the Directive 2014/95/EU of the European Parliament and of the Council, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, enshrines the obligation to disclose non-financial information, with particular reference to large companies, highlighting the increasingly responsible role that companies are assuming with regard to human rights and environmental protection (ENI).

Such disclosure obligation equally applies to climate-related information (Communication from the Commission, Guidelines on non-financial reporting: Supplement on reporting climate-related information (2019/C 209/01)) and has also been recognised by the Court of Justice of the European Union (Sent. *Bayer CropScience SA-NV v. College voor de toelating van gewasbeschermingsmiddelen en biociden* of 2016) (Cremonini, Veronesi).

Additionally, the claimants underline that the Directive 2014/52/EU (April 2014), amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, recognises climate change as a factor to be analysed in the context of risk assessment of certain anthropogenic activities (Cremonini, Veronesi).

In the cases before the Italian NCP, the 2019 OECD document '*Background Note on Global Climate Action and Responsible Business Conduct: What does it mean for business to act responsibly in the face of a climate emergency?*' is cited (Cremonini, Veronesi, ENI).

The Document states that the OECD has developed specific *due diligence* guidelines to help companies address risks, including climate-related impacts in specific sectors, e.g. clothing and footwear, minerals, agriculture and finance (Cremonini, Veronesi, ENI).

On the other hand, in the ILVA case, the European Parliament and Council Directive 2010/75/EU on industrial emissions (the so-called “IED Directive”) assumes particular relevance.

According to the claimants, the Directive aims to achieve significant benefits for the environment and human health by reducing harmful industrial emissions.

Actually, the claimants point out that according to Art. 9: “Where emissions of a greenhouse gas from an installation are specified in Annex I to Directive 2003/87/EC in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas, unless necessary to ensure that no significant local pollution is caused” (ILVA). The Annex I of Directive 2003/87/EC expressly refers to coke ovens whose climate impacts are denounced by the claimants.

Furthermore, in the ILVA case, Law 426 of 1998 is cited by claimants, which, among other things, in Art. 1, refers to ‘the implementation commitments of the Kyoto Protocol on climate change’. The claimants also underline that, based on this norm, the ILVA steel mill in Genoa was closed in 2002.

European legislation on the registration of motor vehicles in the EU territory and the emission of pollutant gases is included in the framework of the Volkswagen case.

## B. Human Rights Law

(From both national and international legal sources, including corporate duties of due diligence and new developments.)

### i. Human Rights in the Greenpeace, Re:Common et al. vs ENI case

Human rights play a pivotal role in the case Greenpeace, Re:Common et al. vs ENI.

In this regard, the claimants argue that the adverse effects of climate change will increasingly impact their rights, particularly the human rights protected by Arts. 2 and 8 of the ECHR (a violation already recognized in the Urgenda and Shell cases).

According to the claimants, this alleged human rights violation (the final adverse effect of climate change, i.e. the event/damage) is (not exclusively) due to ENI’s *contra jus* conducts (infra). The causal link between ENI’s conduct and the alleged human rights violations at stake (event/damage) would justify the protection of the Claimants under Arts. 2043, 2050, 2051 of the Italian Civil Code (infra Tort Law).

Consequently, the alleged violation of the claimants’ human rights may provide grounds for their legal standing and explains the required pecuniary and non-pecuniary



remedies (compensation for the damage suffered and at the same time injunction to avoid future damage) (Greenpeace, Re:Common et al. vs ENI).

In fact, in the writ of summons, claimants argue that they (like every living being) are already suffering and will suffer even more in the future (“*metus*”, i.e. “fear of future harmful consequences”) the consequences of human-induced global warming, also in order to justify the claim for non-pecuniary damages (the non-material damage, the s.c. in the Italian legal system “moral damage”).

According to the claimants, the consequences of human-induced global warming are represented by: worsening of the quality of life, to the point of difficulty (if not actual impossibility) of living in one’s own place of residence; proliferation of diseases; further damage, both patrimonial and non-patrimonial that climate change-related events may cause (Greenpeace, Re:Common et al. vs ENI)

According to the claimants, the effects of climate change result in an alleged violation of both individual and collective rights.

According to the claimants, some of the individual rights negatively affected would be the rights to life, food, water, and health. Additionally, the claimants underline that the impact of human-induced climate change on human rights has already been established in the Dutch “Urgenda” case and it has also been addressed by the European Union Court of Justice which (concerning the relationship between climate policy, sustainable energy and the right to life in 2001) stated that “the use of renewable energy sources [... ] contributes to the reduction of greenhouse gas emissions, which are among the main causes of climate change that the European Community and its member States are committed to combating [...]. It should be noted that this policy is also designed to protect people’s health and lives (Preussen Elektra/Schleswag AG, C-379/98 of 13 March 2001, ECLIL: EU:C:2001:160).

According to the claimants, collective rights negatively affected by human-induced climate change would be the rights to food security, economic development and growth, self-determination, cultural preservation, equality and non-discrimination (Greenpeace, Re:Common et al. vs ENI).

Moreover, ENI claims that there is no violation of Arts 2 and 8 of the European Convention on Human Rights (ECHR).

ENI affirms that its conduct cannot be characterised as *contra jus* and that, in any event, violations of the rights protected by the ECHR could be imputable only to States and not to private companies (or individuals) (A. Pisanò, *La responsabilità degli Stati nel contrasto al cambiamento climatico tra obbligazione climatica e diritto al clima*, in “Etica & Politica / Ethics & Politics”, XXIV, 3/2022, pp. 349-366).

According to ENI, a “general degradation of the environment” cannot certainly be invoked as a ground for the violation of Art. 8 of the ECHR. Conversely, it is necessary

to specifically demonstrate “the existence of an adverse effect on the private or family sphere of an individual”.

The European Court of Human Rights also ruled that States (as opposed to private individuals) may incur liability under Art. 8 of the ECHR “only if there is a direct and immediate link between the situation complained of and the applicant’s home, private or family life”. Therefore, any apprehension of “adverse long-term consequences” is irrelevant.

According to ENI, the damages claimed by the plaintiffs are unspecified damages of a pecuniary nature and damages from *metus*. These damages do not amount to that “harmful effect on the private or family sphere” which, as ruled by the European Court of Human Rights, is ground for liability (of States, not of private individuals) under Art. 8 of the ECHR.

The applicants, according to ENI, have in fact merely claimed that they are suffering “the consequences of climate change” and that ENI’s conduct violates the above-mentioned articles of the ECHR, without however specifically inferring or even proving (i) the existence of an actual deterioration of their quality of private or family life; (ii) the “direct and immediate link” between the alleged unlawful conduct and its impact on the enjoyment of the right to respect for private and family life; (iii) the specific harmful and “inauspicious” consequences on their private or family sphere<sup>6</sup>.

## ii. Human Rights and the OECD Guidelines

In the proceedings before the National Contact Point, according to the petitioners, the companies involved (Cremonini, Veronesi, ENI, Pasubio) are attributed with non-compliance with several chapters of the OECD Guidelines, including Chapter IV on Human Rights, with particular reference to paragraphs 1, 2, 3, 4, 5, 6.

In particular, according to the Guidelines enterprises should “carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts” (Chapter IV, § 5)

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<sup>6</sup> In the case *Greenpeace; Re:Common et al. vs ENI*, the negative effect of human-induced climate change on human rights is pointed out by the claimants also through: Resolution 10/4 of the Human Rights Council Human Rights and Climate Change (2009); the Statement by Michelle Bachelet, UN High Commissioner for Human Rights, at the opening of the 42<sup>nd</sup> session of the Human Rights Council (2019), which described climate change as an unprecedented threat to human rights; the Human Rights Committee’s September 2019 Comment No. 36 on Art. 6 of the International Covenant on Civil and Political Rights (CCPR/C/GC/36), which highlighted that “Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life” (§ 62); the decision of the Human Rights Committee of 14 October 2019 on the case *Teitiota vs New Zealand* (CCPR/C/127/D/2728/2016); the landmark Resolution adopted by Human Rights Council (October 2021) on the human right to a clean, healthy and sustainable environment, followed by UN General Assembly Resolution (A/76/L.75) on the human right to a clean, healthy and sustainable environment (July 2022); European Parliament Resolution of 19 May 2021 on “The effects of climate change on human rights and the role of environmental defenders on this matter” (*Greenpeace, Re:Common et al. vs ENI*).

As a consequence, the claimants argue that the enterprises should not only adopt all the necessary measures to identify environmental risks with the aim of preventing or mitigating the impacts associated with their activities, but they should also adopt measures to constantly monitor these risks with the aim of introducing the needed changes for effective environmental protection (Veronesi, Cremonini).

Assuming as a reference Chapter IV of the Human Rights Guidelines, the petitioners claim that the greenhouse emissions from intensive livestock farms contribute to human rights violations in the overall framework of the climate emergency (Veronesi, Cremonini, ENI, Pasubio).

In this specific field, the OECD published in 2019 the *Background Note on Global Climate Action and Responsible Business Conduct: What does it mean for business to act responsibly in the face of a climate emergency?* with the aim of developing specific *due diligence* guidelines to encourage enterprises to address risks, including climate-related impacts in specific sectors (clothing, footwear, minerals, agriculture, finance, etc.) (Veronesi).

With reference to the link between corporate social responsibility in the area of human rights and environmental protection, the imposition of a non-financial disclosure obligation in Directive 2014/95/EU, especially for large companies (ENI), is emphasised before the NCP.

In particular, with reference to climate-related information, the European Commission has provided some guidelines (Communication from the Commission, Guidelines on non-financial reporting: Supplement on reporting climate-related information C/2019/4490) stating that “stakeholders may also be interested in the company’s policies and any associated targets that demonstrate its commitment to climate change mitigation and adaptation, and in its due diligence processes. This will help stakeholders to understand the company’s ability to manage its business to minimise climate-related risk, limit negative impacts on the climate and maximise positive impacts throughout the value chain”. Consequently, according to the petitioners, the due diligence procedures should, therefore, take into account the climate emergency and should also be integrated into the overall enterprise risk- management framework.

Generally speaking, it is worthy to underline that all these elements must also be considered in the light of the changes brought about by Regulation (EU) 2020/852, which established a common classification system (“taxonomy”) of environmentally sustainable economic activities based on specific environmental objectives, one of which is climate change mitigation.

Actually, the *due diligence* system, especially for large companies, is centred on the UN Guiding Principles on Business and Human Rights, the OECD Guidelines, the European Directive 2014/95(EU) (*Non-Financial Reporting*) and, concerning the domestic field,

also on the Legislative Decree 231/2001 on the Regulation on administrative responsibility of legal entities, companies and associations, deriving from offences.

### iii. The Legislative Decree No. 231/2001

Although the Legislative Decree No. 231/2001 does not have immediate application in the identified climate cases *stricto sensu*, it is nonetheless invoked in the writ of summons of the Ikebiri case. Here, the Decree is also mentioned within the framework of Italian legislation concerning due diligence. It is important to specify that the Decree does not impose due diligence duties on companies but incentivizes them to implement due diligence processes and compliance mechanisms to prevent the commission of a wide range of crimes.

Moreover, despite not originally being designed to enhance human rights protection, the substantial scope of the Decree has been extended throughout the years to cover specific human rights violations, such as slavery, human trafficking, forced labour, child prostitution and pornography, female genital mutilation, injuries committed in violation of workplace health and safety laws, crimes of racism and xenophobia, as well as severe environmental offences. In this sense, the Decree No. 231/2001 can be considered, to a certain extent, an example of human rights due diligence legislation.

The legal regime introduced by the Decree envisages an independent system of administrative responsibility for legal entities in relation to specific crimes committed in their interest or to their advantage. Such a regime of corporate liability supplements the criminal liability of the individuals who physically perpetrated those crimes. Companies can be exonerated from administrative responsibility if they prove that they have introduced and implemented adequate organisational models - the so-called 231 Models - to pre-empt the commission of crimes in the context of their operations. It follows that the exemption from liability creates a strong incentive for companies to implement such models, whose adoption, however, remains on a voluntary basis.

Pursuant to Art. 6 of the Decree, a 231 Model is adequate insofar as it identifies risky activities, provides for protocols and methods suitable for preventing the commission of offences, envisages the obligation to disclose information to the supervisory body and puts in place a disciplinary system to effectively sanction non-compliance with the measures specified in the model. Hence, what constitutes an adequate 231 Model is the implementation of a thorough risk-management system and related mitigation procedures, consistently with the general principles laid out in Art. 6. In this respect, the risk-management system underpinning the 231 Models can be broadly likened to the mechanism of due diligence as introduced by the UNGPs. However, unlike the UNGPs, the Decree does not expect companies to conduct consultations with stakeholders to identify risks nor to publicly disclose information on their 231 Models.

#### iv. Human Rights, Due Diligence and Corporate responsibilities

In *Greenpeace, Re:Common et al. vs ENI* case, according to the claimants, the general rule according to which the private companies must respect human rights (as recognised and protected by the International Covenant on Civil and Political Rights – (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR,) the ECHR) is based on the UNGPs and other soft law instruments.

According to the claimants, besides States, private companies also have a general responsibility to prevent human rights violations (see “Tort Law”). The soft law legal instruments (including the UNGPs) should be considered as a ‘normative parameter’ for assessing the fault liability of private companies for human rights violations caused by their activities (due diligence parameter). Particularly, in the case *Greenpeace, Re:Common et al. vs ENI*, the claimants argue that ENI should be legally bound to respect human rights, also by virtue of its own code of ethics, which is the basis of the company’s Organisation, Management and Control Model (s.c. “231 Model”), by virtue of compliance with Legislative Decree 231/2001.

Moreover, again according to the claimants, ENI’s commitments on Human Rights would be also confirmed by the ENI’s involvement in the “Global Framework Agreement on International Industrial Relations and Corporate Social Responsibility” -renewed in 2019- and in the “Voluntary Principles on Security & Human Rights”. Furthermore, ENI has signed the “Paris Pledge” supporting the Paris goals.

Therefore, according to the claimants, ENI should be considered legally bound to respect human rights, even if a certain kind of conduct would not be sufficiently regulated at the national and international level, due to the lack of national and international hard law agreements or legal instruments.

Finally, according to the claimants, a private multinational company (even controlled by the State) should have a juridical obligation to prevent its activities from leading to wrongdoings and in particular human rights violations.

On the contrary, according to ENI, there is no legal obligation for private companies to reduce emissions. Nevertheless, ENI claims that it has voluntarily entered into a path of support for the objectives of the Paris Agreement, by setting up a climate governance integrated into its corporate governance system in order to improve, starting from 2015, the GHG emissions performance of its assets. Furthermore, ENI argues that, in any case, ENI’s decarbonisation strategy is in line with the pursuit of internationally recognised climate objectives (always on voluntary basis).

## v. Human Rights and the “Sacrifice Zones” in the ILVA case

The violation of a right to climate is denounced by claimants in the ILVA case.

Actually, according to the claimants, the recognition of a specific right concerned with human induced-climate change should follow the pattern of the European litigation against governments (cases Urgenda, *Affaire du Siècle*, *Neuabuer*) based on the interpretation/application of Arts 2 and 8 of the European Convention on Human Rights (ECHR).

At the same time, reference is made to the ruling of The Hague District Court against Royal Dutch Shell, as it holds the company co-responsible for the climate crisis, in the wake of the decision of the Dutch Supreme Court in the Urgenda case.

Always taking into account that the corporate due diligence is something different from the general legal obligation on States to tackle climate change, the climate legal obligation of the States are also mentioned by the claimants in the TAP case, consequent to the particular nature of the case aimed at obtaining the annulment of the MISE Decree which authorised the extension of works on the TAP gas pipeline. The appeal is brought both against the MISE and against TAP.

The State’s climate obligations and the linked quantitative and temporal goals are interpreted by claimants also in the light of the Art. 2051 of the Italian Civil Code (Damage caused by things in custody) according to: “Each person is responsible for the damage caused by the things he/she has in custody, unless he/she proves the damage is caused by a fortuitous event” (TAP).

According to the claimants, it would be possible to derive from the Art. 2051 a duty of “climate fulfilment” for the State and its organs, which should be duly considered in the specific TAP case because the MISE decree extending the authorisation concerns infrastructures to be activated in a situation of irrefutable dramatic climate emergency, which are climate-damaging and which have never been subjected to climate compatibility and usefulness assessments (see Tort Law).

The Arts. 2 and 8 of the ECHR (and the related case law of the European Court of Human Rights) are invoked by the claimants to outline a general positive legal obligation to fight climate change, in order to reduce the risks of violation of the rights protected by the aforementioned Arts. to a reasonable minimum.

In this regard, according to claimants, the Italian State itself has already recognized the severity of such risks of violation given that Italy has adhered to Dec. 1/CP21 2015 (UNFCCC) by which climate change, for the first time in history, is officially declared an “urgent and potentially irreversible threat” (TAP).

In the ILVA case, the claimants expressly ask the Court of Milan to recognise the right to climate as one of the fundamental human rights. Its recognition is requested by

claimants in general terms, but also in relation to the particularity of the geographical situation in which the plaintiffs live (Taranto, UN Sacrifice Zone).

Generally speaking, the concept of “sacrifice zones” is introduced by the Report *The Right to a Clean, Healthy and Sustainable Environment: non-toxic environment* by the Special Rapporteur for the United Nations, David R. Boyd, on behalf of the *Human Rights Council*.

The report analyses the effects of environmental pollution on the human right to a clean, healthy and sustainable environment, identifying the so-called “sacrificial zones” as extremely toxic places where marginalised communities and vulnerable people have their human rights violated to a greater extent than other social groups, due to excessive and unbalanced exposure to pollution and hazardous substances.

Taranto is cited as a sacrificial zone (§45) due to the presence of ILVA which “has compromised people’s health and violated human rights for decades by discharging vast volumes of toxic air pollution”<sup>7</sup>.

Consequently, the ILVA applicants should be qualified as “holders of a qualified climate right”. According to the claimants this specific juridical qualification should require the ILVA to significantly cut greenhouse green-house emissions with the immediate adoption of a business plan to achieve this.

The request could be also supported by Art. 9 of the so-called IED Directive (2010/75/EU on industrial emissions -integrated pollution prevention and control), stating that “where emissions of a greenhouse gas from an installation are specified in Annex I to Directive 2003/87/EC in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas, unless necessary to ensure that no significant local pollution is caused”.

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<sup>7</sup> The Report also points out that “Nearby residents suffer from elevated levels of respiratory illnesses, heart disease, cancer, debilitating neurological ailments and premature mortality. Clean-up and remediation activities that were supposed to commence in 2012 have been delayed to 2023, with the Government introducing special legislative decrees allowing the plant to continue operating. In 2019, the European Court of Human Rights concluded that environmental pollution was continuing, endangering the health of the applicants and, more generally, that of the entire population living in the areas at risk”. With specific reference to the climate perspective, § 13, in particular, highlights the connection between the emission of toxic substances, the climate emergency and the loss of biodiversity (the s.c. “world’s triple environmental crisis”). The Report points out that “The chemical industry exacerbates the climate emergency by consuming more than 10 percent of fossil fuels produced globally and emitting an estimated 3.3 billion tons of greenhouse gas emissions annually. Global warming contributes to the release and remobilisation of hazardous pollutants from melting glaciers and thawing permafrost. Pollution and toxic substances are also one of the five main drivers of the catastrophic decline in biodiversity, with particularly negative impacts on pollinators, insects, freshwater and marine ecosystems (including coral reefs) and bird populations”.



## C. Tort Law

### General Rules

Generally speaking, the Italian legal system is based on the general principle of “*neminem laedere*” (“do no harm”), which only partly coincides with the general category of “Tort Law” (F. De Franchis, *Law Dictionary. 1 English-Italian*, Milan, Giuffrè, 1984, entry: Tort, p. 1448 ff.).

This general principle (*neminem laedere*) is declined in different ways by the Italian Civil Code (Arts. 844, 2043, 2050, 2051, etc.), with the specific goal to protect both patrimonial interests and fundamental rights.

Moreover, the Italian *neminem laedere* has been interpreted by higher courts (Constitutional Court, Court of Cassation, Council of State) as a constitutional principle of protection of human dignity.

The less than perfect analogy between “tort law” and “*neminem laedere*” also emerges from the European framework. In fact, the attempt to create ‘European principles’ of ‘Tort Law’ (the so-called PETL, <http://www.egtl.org/PETLEnglish.html>) does not include all the Italian ways of declining “*neminem laedere*” (M. Zarro, *Danno da cambiamento climatico e funzione sociale della responsabilità civile*, ESI, 2022).

Moreover, in the current cases in Italy, these different declinations have not been taken into account, as corporate liability has been discussed on the basis of specific provisions concerning specific conduct (OECD Guidelines, fairness in public information, European pollution standards, etc.).

Furthermore, most Italian litigation (e.g. ILVA) is mainly of an injunctive and preventive nature. I.e. it does not claim damage that has already occurred, for which the direct and immediate causal link between the company’s conduct and the damage suffered must be established, but it rather aims to obtain a ‘*facere*’ order (an order to do something, i.e. to reduce in the next future the greenhouse emissions) so that future damage is avoided.

Looking at the climate cases analysed from an overall perspective, the issue of causality, therefore, mainly takes on a prognostic –rather than diagnostic– approach.

The constitutional basis for this approach is offered by the Italian Constitutional Court (Sent. 641/1987) which specified that Art. 2043 of the Italian Civil Code must be read in accordance with Arts. 2 and 32 of the Constitution, and therefore as a tool to enforce non-contractual liability (Tort Law) also in a preventive manner, with respect to “all the harmful consequences” of conduct damaging human health and the environment.

This approach is applicable to companies, especially when their activities can be considered as ‘dangerous’ activities, within the meaning of Art. 2050 of the Italian Civil Code.

### *Tort Law in the Greenpeace, Re:Common et al. vs ENI*

The only Italian Climate Change Litigation against a private company which specifically involves the Tort Law field is the case Greenpeace, Re:Common et al. vs ENI.

Within the framework of the “Attribution Science”, the claimants aim at obtaining both pecuniary and non-pecuniary remedies (*infra*), arguing that direct and/or indirect greenhouse gas emissions by ENI violate their human rights and, consequently, this alleged harmful conduct (due to fault or negligence, *infra*) should be evaluated according to the Arts. 2043, 2050, 2051 of the Italian Civil Code.

Specifically, according to the claimants, the conducts of ENI, by impacting on climate system (with all that this entails in terms of environmental risks and health consequences), would violate human rights protected both by the Italian Constitution and by international legal instruments (hard law) which are binding on states and companies too.

According to the claimants, the alleged violation of these legal rules concerning human rights (effect/damage of the conduct) entails the commission of illicit conduct against which the claimants invoke the protection offered by Arts. 2043, 2050 and 2051 of the Italian Civil Code, read in conjunction with Arts. 2 and 8 of the ECHR.

The violations of the Arts. 2043, 2050, 2051 require both patrimonial remedies and non-patrimonial remedies, including judicial measures aimed at reducing greenhouse gases emissions (also the emissions sourced by private companies).

Specifically, according to the claimants, the judicial injunction against ENI would be justified by the increase in the planet’s temperature, which is already detrimental to claimants, and which will be even detrimental in the next future if the goals set at the 2015 Paris Conference are not going to be respected.

With reference to civil liability (Articles 2043, 2050 and 2051), ENI argues that its conduct is not *contra jus*, that there is no causal link, no subjective element (intent or fault) and no compensable damage.

In addition, ENI underlines that the “soft law rules” concerning the private sector (multinational companies) are merely programmatic in nature and too general in scope to form the legal basis of a binding obligation, the potential violation of which gives rise to civil liability.

### *The ENI’s conduct*

According to some scientific databases cited by the claimants, among other things, ENI’s cumulative CO<sub>2</sub> and CH<sub>4</sub> emissions over the period 1988-2015 would amount to 0.6% of global cumulative industrial emissions.

According to the claimants, the greenhouse gases emissions for which ENI would be responsible are: direct emissions from sources owned or controlled by the Company

(Emissions Scope 1); indirect greenhouse gases emissions associated with the production of electricity, heat, or steam purchased by the company (Emissions Scope 2); all other indirect emissions, such as emissions associated with the extraction and production of materials, fuels and services, including transport in vehicles owned or controlled by the company, waste management, outsourced business activities (Emissions Scope 3).

ENI submits that neither 'attribution science' nor 'source attribution' makes it possible to identify whether, and to what extent, the effects of climate change can be attributed to ENI (<https://www.eni.com/content/dam/enicom/documents/ita/media/causa-eni-greenpeace-recommon/Doc-04-Relazione-Bocchiola.pdf>). Neither does it provide clarity on the degree or pro-rata allocation of such effects. Due to this impossibility, it follows that the precise identification of the alleged conduct *contra jus* of ENI is also impossible. Consequently, ENI would be held liable merely because it operates in the Oil & Gas field.

ENI reiterates that its activities are not *contra jus* and, among other things, emphasises that most of the emissions attributable to ENI fall within so-called 'Scope 3' (between 85 and 90 %) and are therefore emissions which are only indirectly controllable by oil companies, thus including ENI, since they depend on the use of fossil fuels in a plurality of end uses.

ENI claims that there is no demonstration of the specific hazardous nature of the conduct since the sole gas emissions attributable to ENI cannot be deemed responsible for the adverse effects of climate change. According to ENI, it is not tenable to argue that, merely because a given activity produces, contributes to production or facilitates greenhouse gas emissions, it is sufficient to establish legal liability (in particular under Art. 2050 of the Civil Code).

### ***The violation of human rights and unlawful conduct***

According to the claimants, ENI's conduct would cause violations of the human rights protected by the Italian Constitution, because, according to them, it would be widely recognised that human rights obligations and responsibilities have specific implications in relation to climate change and they would be legally binding both for States and the private companies. Consequently, ENI's conduct would contribute to the violation of their rights, especially those recognised and protected by Arts. 2 and 8 of the ECHR.

The violation of human rights, therefore, would find protection in domestic law both at a constitutional level (Arts. 10 and 11) and at the level of civil law (Arts. 2043, 2050, 2051 of the Italian Civil Code), as well as by constant case law.

According to the claimants, ENI's wrongful act would be manifest in all its evidence because the company with its conduct would have infringed at the very least Arts. 2 and 8 of the ECHR, in addition to other normative sources (domestic, constitutional, and Community) concerning human rights.

According to the claimants, the violation of human rights qualifies ENI's conduct as *contra ius*.

Among the many arguments, the claimants point out that in the Italian legal system, during the years, the courts have progressively expanded the concept of "undue damage" (*contra ius*), recognizing the recoverability of the damage even if the damage does not really consist in an actual violation of subjective rights. Consequently, the recoverability of the damage should be recognized also if the conduct consists in a violation of a juridical situation generally protected by the law – even if that situation is not qualified as "subjective right".

Consequently, the plaintiffs point out that ENI's conduct would be counted among those conducts so-called "*non iure*", since it cannot be considered as "justified" by the exercise of business activity when the exercise has harmful consequences on personal juridical situations generally protected by the law (abuse of right). According to the claimants, consequences suffered because of the ENI's conduct may be qualified as harmful by the law, based on national and supranational legal sources.

With reference to the violation of Arts. 2 and 8, ENI maintains that it did not engage in any unlawful conduct and that, in any event, the violation of ECHR rights could at most be ascribable to one of the States bound by the Convention, not to individual companies or individuals (see Section B, Human Rights Law).

### ***The subjective element***

According to the claimants, ENI would be liable for intent or fault.

With regard to intent, ENI would be responsible because the damage caused by greenhouse gas emissions has been generally known for some time (the first scientific contribution dates back to 1938, G. Callendar, *The Artificial Production of Carbon Dioxide and its influence on Temperature*).

Again, according to the claimants, the alleged damage was known by the Carbon Majors which would have implemented during the years specific strategies of concealment and disinformation (see N. Oreskes, E.M Conway, *Merchants of Doubt*, 2010), as well as increasingly frequent practices of greenwashing (Greenpeace, *Re:Common et al. vs ENI*).

According to the claimants, ENI itself would have been aware of the harmful effects of greenhouse emissions since the 1970s. (*Greenpeace, Re:Common et al. vs ENI*).

ENI, on the other hand, argues that the alleged conduct attributed to ENI is not relevant because it is insufficient to establish intent or fault. Additionally, ENI contends that the conduct dates back in time and, therefore, raises a plea of limitation (under Article 2947 of the Civil Code).

ENI emphasises that, from a juridical perspective, it cannot be in any way argued that the alleged concealment by all oil companies, and particularly ENI, of the causes and consequences of climate change is a matter of common knowledge.

ENI points out that: (i) the evolution of scientific knowledge and, with it, of the international community's awareness has been progressive and, only in recent decades, has led to recognition of the potential of a phased energy transition, as part of a wide-ranging debate in which various causes and solutions to the climate crisis have been advanced and discussed over the years; (ii) ENI has from the outset voluntarily adopted a business model that is progressively capable of effectively addressing the challenges of the s.c. "energy trilemma" (respect for environmental sustainability; security of supply and energy equity) (L. Cardelli, *Il "trilemma energetico e il contenzioso climatico contro ENI, la Costituzione.info* <https://www.lacostituzione.info/index.php/2024/01/29/l-trilemma-energetico-e-il-contenzioso-climatico-contro-eni/>).

As far as the fault is concerned, the claimants use the legal instruments of "soft law" as a normative parameter of ENI's fault (due diligence).

According to claimants, ENI's liability for fault would be rooted in its violations of all those precautionary rules, inspired by the criteria of foreseeability and preventability, compliance with which should have avoided the unjust damage.

Therefore, according to the claimants, the 'soft law' legal instruments express an objective parameter for ascertaining fault, also taking into consideration that a specific form of culpable liability is yet recognized by the Italian case law in case of violation of "guidelines".

Consequently, according to the claimants, ENI's conduct would not be limited to violating the aforementioned articles of the Civil Code (2043, 2050, 2051), the ECHR (Arts. 2 and 8) and the Constitution of the Italian Republic, but also other internationally recognised juridical rule (both hard and soft law), such as the United Nations Guiding Principles on Business and Human Rights, the United Nations Global Compact and the OECD Guidelines for Multinational Enterprises (Greenpeace, *Re:Common et al. vs ENI*).

According to ENI, on the other hand, there is no, nor has it been proven, negligent conduct on ENI's part such as to give rise to liability under Art. 2043 of the Civil Code, not least because ENI reiterates that so-called soft law cannot contribute to qualifying the specific fault required under Art. 2043 of the Civil Code. ENI stresses that soft law rules have a mere programmatic nature and such a generic scope that they cannot form the legal basis for a binding obligation whose (possible) breach gives rise to a liability under Art. 2043 of the Civil Code on the part of a specific person (in the present case, ENI).

Finally, according to the claimants, ENI should be considered legally bound by the prohibition to violate human rights, even if certain conduct is not sufficiently regulated

at the national and international level due to the lack of national and international agreements, instruments and resources.

According to the claimants, a company, specifically a Carbon Major as ENI, always has a general obligation to prevent its activities from leading to wrongdoing and, in particular, human rights violations (Greenpeace, Re:Common et al. vs ENI).

### **Causation**

According to the claimants, the principle of causality is inherent in the paradigm of civil liability, especially the non-contractual liability (Tort Law) under Art. 2043 of the Civil Code.

Indeed, this norm is built on causation, given that it states that a juridical obligation can arise from a conduct which, for intent or fault, “causes an undue damage to others”. (Greenpeace, Re:Common et al. vs ENI).

Moreover, again according to the claimants, Eni’s decisive contribution to the occurrence of the damage-event (the violation of individual and collective rights) should be assessed according to the so-called criterion of “prevailing probability” or “more probable than not”, which is valid in ascertaining the causal link in civil liability (Civil Cassation Court, sno. 25884/2022).

In addition, the claimants argue that the compensable damage should be also that damage caused by the so-called “mediate causality”, according to the rule whereby “*causa causae est causa causati*”.

This would mean that “with respect to the compensability of damage resulting from an unlawful act, the causal link must be understood in such a way as to include in the compensation also indirect and mediated damages which occur as a normal effect of the event, according to the principle of ‘causal regularity’”.

Consequently, according to claimants, ENI would be liable for the adverse effects of climate change and related rights violations, due to its contribution to altering the climate equilibrium through the emission of enormous quantities of greenhouse gases. (Greenpeace, Re:Common et al. vs ENI).

Finally, according to the claimants, the circumstance that climate change would also be caused by other factors (e.g. greenhouse emissions emitted by other carbon major or public or private entities) is certainly not sufficient to exclude the defendant’s liability and its aetiological contribution to climate change (and its deleterious effects, specifically on human rights), because, according to Art. 41(3) of the Italian Criminal Code (on the subject of causality), the unlawful act of others, in which the pre-existing or simultaneous or supervening cause may arise, does not, however, exclude the causal relationship between the action or omission and the event.

However, it is important to highlight that, according to Art. 2055 of the Civil Code, when the harmful event is attributable to more than one person, all are jointly and severally obliged to pay compensation for the damage. Therefore, according to the claimants, ENI would be civilly liable for the damage caused by climate change that it caused or contributed to causing (Greenpeace, Re:Common et al. vs ENI).

With reference to the causal link, ENI further underscores that the causation is interrupted when the defendant's conduct and the harmful event are separated by other conduct, of third parties or of the injured party itself. This conduct, inherently capable of producing the harmful event, deprives any defendant's unlawful conduct of causal efficiency and reduces it to a mere occasion, and therefore, devoid of legal significance.

Moreover, ENI submits that, when seeking compensation for damage manifested long after the alleged harmful conduct, the elapse of a considerable amount of time between that conduct and the resulting damage, while not excluding the causal link per se, diminishes its probability considerably and demands particularly accurate and more compelling evidence in establishing causation.

Furthermore, according to ENI, the examination of the causal link must always occur at a normative level, requiring the existence of a positive duty of conduct whose infringement has led, on the basis of an adequate assessment of causation, to a harmful event.

This principle also applies in cases of omission, requiring the identification – in such instances – of a pre-existing legal obligation to act based on a statutory provision or contractually assumed obligation. According to ENI, there is no legal obligation.

### *The rules of the Civil Code*

According to the claimants, the violation of rights caused by the significant environmental damage caused by ENI (Art. 300 Legislative Decree 152/2006) legitimises their action, pursuant to Arts. 2043, 2050, 2051 of the Italian Civil Code.

Art. 2043 provides for the general principle of *neminem laedere* whereby "(a)ny wilful or negligent act which causes unjust damage to others obliges the person who has committed the act to compensate for the damage".

Art. 2050 provides that "(h)owever causes damage to others in the exercise of a dangerous activity by its nature or by the nature of the means used, shall be liable to pay compensation, unless they prove that they have taken all appropriate measures to avoid the damage".

Art. 2051 provides that "Everyone shall be liable for the damage caused by things in their custody, unless they prove force majeure". In this specific case, the alleged damages are those caused by emissions from ENI's industrial plants (industrial greenhouse emissions into the atmosphere).



It should be noted that in the case of Arts. 2050 and 2051, with a reversed burden of proof, it is the defendant who must prove that they took all measures to avoid the damage (2050) or that the damage was caused by accident (2051).

With reference to Art. 2051, ENI submits that neither the specific activity carried out by ENI, nor the dangerous nature of that activity has been demonstrated.

Indeed, according to ENI, it cannot be argued that, merely because a given activity produces, contributes to producing or facilitates greenhouse gas emissions, it is sufficient to give rise to liability under Art. 2050 of the Civil Code, invoked by the plaintiffs. If this were so, not only the production of hydrocarbons, but also most other entrepreneurial activities (e.g. the production of motor vehicles and transport, agriculture, livestock farming, etc.) would have to be qualified as dangerous, thus turning the special and exceptional case governed by Art. 2050 of the Civil Code into a general rule.

### *The separation of powers and the new Arts. 9 and 41 of the Italian Constitution*

With the aim of legitimising the courts' intervention, the claimants cite Arts. 9 and 41 of the Italian Constitution, as recently amended by Constitutional Law No. 1/2022.

The new Art. 9 of the Constitution provides that "(t)he Republic shall promote the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation. It protects the environment, biodiversity and ecosystems, also in the interest of future generations. State law regulates the ways and forms of animal protection'.

The Reformed Art. 41 of the Constitution instead states that: "(p)ivate economic initiative is free. It may not be carried out in conflict with social utility or in such a way as to damage security, freedom, human dignity, health and the environment. The law shall determine appropriate programmes and controls so that public and private economic activity may be directed and coordinated for social and environmental purposes".

According to the claimants, the reform of the Constitution paves the way for judgments similar to that of the German Federal Constitutional Court in 2021, which ordered a more balanced review of the use of the German carbon budget in the period 2021-2030 and 2030-2050.

In the present case, according to the claimants, ENI would intend to increase -rather than decrease- its production of hydrocarbons (oil and gas) in the short term, up to the production peak of 2026. This means *de facto* postponing emission cuts and not decarbonising its energy mix, relying only on offsetting instruments, in contrast with the indications of the scientific community on the urgency of reducing most greenhouse emissions in the current decade (within 2030).

According to the claimants, the new constitutional rules thus would open the way to a broader judicial review of environmental/climate interests, also in the interest of future generations.

That appears especially true in terms of judicial standing, through the inevitable broader interpretation of the conditions for access to justice for individuals, associations and NGOs with express statutory purposes of environmental and climate protection declined in terms of intergenerational equity, such as Greenpeace and ReCommon.

Secondly, such constitutional rules open the way to a broader judicial review in terms of passive legitimation (ENI), in the sense that the 'broad access' to environmental and climate justice of individuals and associations, prescribed by international conventions (first and foremost the 'Aarhus Convention'), should be guaranteed.

According to the claimants, it is to private companies that the constitutional legislator refers when, in the new Art. 41, it prescribes that private economic initiative may not be carried out in conflict with social utility or in such a way as to damage (in addition to security, freedom and human dignity, also) "health" and "the environment", identifying in the latter public interests two precise limits of private economic activity, which is thus obliged to prevent environmental/health damage, starting with the most exasperating damage constituted by climate prejudice (Greenpeace, Re:Common et al. vs ENI)

In terms of passive legitimation, it should be also added that according to the claimants the new paragraph 3 of Art. 41 of the Constitution paves the way for a profound change in the relations between law and economy, foreseeing the intervention of the State aimed at orienting economic initiative towards a new model of development (from the Welfare State to the Environmental State) with actions of direction and coordination of the public and private economy for environmental and climate protection (Greenpeace, Re:Common et al. vs ENI).

The reform of Arts. 9 and 41 of the Charter has essentially constitutionalised two principles already enunciated in the Italian legal system, contained in the amended and supplemented Legislative Decree 152/2006 (the so-called Code of Environment) (F.M. Maffezzoni, *Riflessioni sui "nuovi limiti ed orientamenti dell'iniziativa economica private (intorno al "nuovo" art. 41 Cost.)*, in "federalism.it Rivista di Diritto Pubblico Italiano, Comparato ed Europeo", 22 febbraio 2023, pp. 53-78; E. Jona, *La libertà di iniziativa economica e la protezione dell'ambiente e della salute*, in "federalism.it Rivista di Diritto Pubblico Italiano, Comparato ed Europeo", 25 gennaio 2023, pp. 104-119; C. Buzzacchi, *Attività economiche e ambiente nel prisma (o mantra?) della «sostenibilità»*, in Rivista AIC. Associazione Italiana Costituzionalisti n° 4/2023, pp. 207-226).

Hence, according to the claimants, the full justiciability of the rights of individuals and associations against activities of private companies conducted inconsistently with the protection of rights and likely to cause environmental/climate damage.

The aim is to foster corporate strategies intended to ensure sustainable development and the preservation of people's health and the environment from the harmful consequences of climate change as a result of greenhouse emissions (Greenpeace, Re:Common et al. vs ENI).

With reference to the alleged violation of Arts. 9 and 41, ENI emphasises that Articles 9 and 41 of the Constitution are not directly applicable to the Company (and, in general, in "horizontal" relations between private individuals) because they concern only relations between the State and private individuals. ENI, moreover, emphasises that the protection of fundamental rights can never be "absolute", but must be balanced with distinct and competing rights involved.

ENI underscores that the direct reference to constitutional principles constitutes the claimants' attempt to overcome the lack of binding International, European, or national rule concerning ENI's alleged obligations to decarbonise and phase out fossil fuels.

In conclusion, ENI points out that measures to tackle human-induced climate change fall within the exercise of legislative or executive powers and lie outside the jurisdictional function. This is because they must reflect "an articulated approach" an approach that adheres to the principles of the "energy trilemma".

ENI therefore contends the absolute lack of jurisdiction of the court, which cannot replace the legislator and impose serious limitations to its law-making activity.

#### **i. Public and private nuisance**

At the moment, Italian climate change litigation does not contain any elements that can be categorised as close to public or private nuisance.

Generally speaking, in the Italian legal system, a discipline similar to "private nuisance" can be found in the Italian Civil Code (Art. 844) concerning the overall regulation of "emissions".

The Italian Law grants injunctive protection to the person harmed by emissions exceeding normal tolerability.

Actually, pursuant to Art. 844 (1) of the Civil Code, the owner of a land may prevent emissions from a near land exceeding normal tolerability by obtaining from the judicial authority the cessation of the activity (so-called "negative injunction").

Additionally, legal actions aimed at protecting the property can be brought. For example, according to Art. 949 (2) Civil Code, a "negatory action" (Art. 949 Civil Code) can be brought with the goal to stop harmful activities against propriety.

At same time, the Italian Civil Code provides for legal actions in defence of possession, such as "possessory actions" (Arts. 1171 and 1172 of the Civil Code). The judges can also adopt injunctions which require adopting specific measures so that intolerable emissions are no longer issued (so-called "positive injunction").

It should be stressed that the interpretation of Art. 844 has undergone a significant evolution since the early 1970s, when a part of the jurisprudence began to affirm the idea that Art. 844 of the Italian Civil Code could be applied as a provision protecting not only the interests of the owner but also individual rights, as for example to health and a healthy environment.

However, the Art. 844 remains undoubtedly a provision aimed at specifically regulating conflicts between neighbouring owners and, therefore, it can only mediately offer protection to different interests or rights.

The protection of these interests/rights must, therefore, find its own basis in the injunction as a general remedy, the scope of which, by virtue of the perceptive provision in Art. 24 of the Constitution, cannot be limited solely to the cases expressly provided for by the legislator.

Based on this interpretation, it is not necessary to refer to Art. 844 of the Civil Code to justify an injunction for the protection of individual rights, as it would be sufficient to refer to the general clause of Art. 2043 of the Civil Code.

In recent Italian jurisprudence, one of the most recent issues pertains to the identification of a position of control by the public administration over private activities that are harmful to the environment and related to the production of emissions. Consequently, it concerns the identification of the relevant aspects of liability and the competent court to handle the related disputes. Some recent judgements are noteworthy for their attempt to adopt private models to define the relationship between private individuals and the public administration. These pronouncements could be usefully experimented with in disputes over climate change damage, given that emissions (greenhouse) are one of the main factors contributing to climate change.

Indeed, according to Cassation Court's sentence 23436/2022, an action for damages against the public administration for the violation of individual rights (such as health or personal integrity), as a result of the omission of powers conferred by law (in the case in point, the administration had not exercised its powers to prevent nuisance exhalations from a farm), is devolved to the ordinary judge.

The Public Administration's failure to adopt appropriate measures to protect the right to health entitles the private individual to claim compensation for non-pecuniary damage resulting from intolerable emissions.

The failure of the public administration to observe the due diligence in the management of its property could be reported by the private individual before the ordinary court not only to obtain a sentence to pay damages, but also to order the Public Administration to do something, in accordance with the general principle of *neminem laedere*.

## ii. Negligent failure to mitigate or adapt to climate change

The applicability of the *tort of negligence* to climate change damages would presuppose the prior configurability of a general duty of care specifically concerning climate change.

This duty should correspond to a specific right of the person to the climate stability, the violation of which is susceptible of compensation. This general approach is the basis of the Greenpeace, Re:Common et al. vs ENI case.

However, generally speaking, the greatest difficulty is the need to conceptualise a specific duty of care regarding greenhouse emissions from private actors (as Carbon Major). This conceptualization allows to consider the damage caused by the greenhouse emissions to third parties as an “unfair” damage, protectable under Art. 2043 of the Civil Code (see Greenpeace, Re:Common et al. vs ENI).

## iii. Negligent or strict liability for failure to warn

Generally speaking, in Italy this type of action, based on a duty of diligence, could be brought under Art. 2043 of the Civil Code, or, if the damage derives from the exercise of a dangerous activity, under Art. 2050 of the Civil Code (see Greenpeace, Re:Common et al. vs ENI).

Considering that all human activities have a greater or lesser degree of dangerousness, in order to understand whether liability for the relevant damage should be governed by Art. 2043 or by Art. 2050, a distinction must be made between the dangerousness of the conduct and the dangerousness of the activity as such: the first hypothesis occurs in the presence of a normally harmless activity that takes on the characteristics of dangerousness due to the imprudent or negligent conduct of the operator, and which, if it causes the production of damage to third parties, it constitutes an essential element of liability under Art. 2043; the second relates to an activity which, on the other hand, is potentially harmful *per se* due to the high probability of damage it may cause, by reason of its nature or the type of means used (Art. 2050) (see Greenpeace, Re:Common et al. vs ENI).

Moreover, it should not be forgotten that it is also possible to resort to the discipline of damages caused by things in custody, pursuant to Art. 2051 of the Civil Code. (see Greenpeace, Re:Common et al. vs ENI).

## iv. Trespass

Generally speaking, in the Italian legal system, trespass can be assimilated to the general duty of *neminem laedere* under Art. 2043 of the Civil Code.

Compared to common law systems and German civil law, where the liability arises in the presence of typical cases, Italian and French civil law contemplate a general clause that gives rise to the obligation to compensate damage in the presence of any wrongful act committed with fault or intent.

In addition to the general clause of liability derived by Art. 2043, the Italian Law recognizes many other specific liability cases that envisage autonomous imputation criteria and consequent specific exonerating clauses (in Italian law, see Arts. 2047 et seq. of the Civil Code), to which must be added a plethora of torts envisaged by special rules.

In light of this, it is not possible to completely assimilate the action of *trespass*, that is proper to common law, with the action for damages under Art. 2043, that is instead distinctive of the Italian legal system.

In Italy, the only climate litigation grounded on art. 2043 is the Greenpeace, Re:Common et al. vs ENI case.

#### v. Impairment of public trust resources

Generally speaking, Italian law attributes to environmental assets a plurality of interests that cannot be claimed only by individuals but can also be brought to courts by entities such as the State and other administrative bodies. Indeed, according to the Art. 311 of the "Code of the Environment" (D.Lgs. n. 152/2006), the only processual actor with legal standing to seek compensation for environmental damage is the Minister for the Environment.

However, although the path indicated by Art. 311 of the Italian Civil Code appears quite narrow, it was nevertheless possible to argue that, within the general framework of non-contractual civil liability, certain constraints could be overcome, such as for example by qualifying as unjust damage under Art. 2043 not only injuries to property, health and other similar positions, but also the damage suffered as a consequence of facts causing environmental damage (see Greenpeace, Re:Common et al. vs ENI).

#### vi. Fraudulent misrepresentation

Generally speaking, in the Italian legal system, the so-called *misrepresentation* may be related to the so-called "incomplete defects of the will", particularly concerned with the violation of the general obligation of transparency and information as to all the terms of the juridical obligation. It must be underlined that the "incomplete defects of the will" are something other than the general causes of invalidity of the contract, which are expressly dealt with in Art. 1338 of the Civil Code.

The expression "incomplete defects of the will" refers to cases in which the misconduct of one of the parties (although not so serious as to constitute one of the complete defects of the will as causes for the annulment or rescission of the contract, i.e. essential and recognisable mistake, wilful misconduct, moral violence, taking advantage of the counterparty's state of need or state of danger in the cases referred to in Arts. 1447, 1448 of the Civil Code) has conditioned the counterparty's consent.

#### vii. Civil conspiracy

In Italian law, there is no similar legal institution.

### viii. Product liability

While in the United States, product liability has been a basis for promoting action against climate change (*Exxon Mobil Corp. v. City of New York*), in Italy there are no similar cases.

In the Italian legal system, however, a possible action against the manufacturer responsible for placing defective goods on the market could find its discipline in the relevant liability (Art. 114-127 of the Consumer Code). Moreover, in the case of the sale of consumer goods (as in cases of greenwashing), the special rules on warranty and lack of conformity (Art. 133 of the Consumer Code) may be invoked.

### ix. Insurance liability

At the moment the Italian climate change litigation is not concerned with insurance liability. Specific policies related to the insurance of damage caused by climate change appear marginal.

It should be noted, however, that under Law No. 213 of 30 December 2023 (the so-called “Legge di Bilancio 2024”), companies with legal headquarters or permanent establishment in Italy must arrange compulsory insurance by 2024 for damage caused by calamitous events (so-called ‘Climate Damage’).

### x. Unjust enrichment

Unjust enrichment can be considered similar to unjust enrichment without cause in the Italian code (Art. 2041 of the Italian Civil Code). At the moment, there are no climate cases brought on the basis of the action for unjust enrichment under Art. 2041 of the Italian Civil Code. However, there do not seem to be any obstacles as to the applicability of the cited provision to climate cases.

Notwithstanding, because of the subsidiarity of this legal action (Art. 2042), an unjust enrichment action cannot be brought when the injured party can bring *in concreto* another action to be compensated for the injury suffered.

The type of request is also different from other, more mainstream actions (e.g., damages), since compensation (and not damages) is provided in the amount of the lesser sum between the enrichment achieved by the counterpart and the depletion.



## D. Company and Financial Laws

At the moment, company and financial laws are not particularly concerned with the Italian climate litigations against private companies (see section B of the Report for the specific issues concerned with human rights and corporate duties of due diligence).

Nevertheless, generally speaking, it needs to be underlined that recently, in the Italian and European regulatory framework, there have been several interventions focused on environmental protection and the fight against climate change concerning company and financial laws.

Actually, the pursuance of sustainability goals is increasingly becoming one the purposes of a company incorporated under Italian law; in such cases, depending on the circumstances, the scope of the directors' ordinary duties may be further expanded, and this could potentially give rise to a liability in case of failure to comply with such duties.

These duties relate to 3 specific contexts, namely:

- 1) whether the company is listed and mandatorily or voluntarily adopts the Italian Corporate Governance Code which requires the relevant company to pursue its sustainable success;
- 2) whether the company is a "società benefit" ("benefit corporation") under Law No. 208/2015;
- 3) whether the company has voluntarily adopted an internal code or adhered to soft law standards which introduce in the company's strategy and operations specific standards and obligations of means or of results in respect of one or more sustainability goals.

In addition, following the implementation in Italy of the EU Corporate Sustainability Due Diligence Directive further duties may be imposed on companies and on directors.

Taking into consideration the domestic law, on 8 February 2022, the Italian Chamber of Deputies definitively approved the amendments of Arts. 9 («The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation. It protects the environment, biodiversity and ecosystems, also in the interests of future generations. The State's law determines the ways and the forms of animal protection») and 41 («The Private economic initiative is free. It may not be carried out in contravention of social utility or in a manner which adversely affects health, the environment, safety, freedom, human dignity. The State's law determines the appropriate programs and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes») of the Italian Constitution.

Specifically concerning the amendment of Art. 41, it is strictly linked with the European Union (-Reg. (UE) 2021/1119; Reg. UE 2020/852 concerning the criteria for

environmentally sustainable economic activities for the purposes of establishing the degree to which an investment is environmentally sustainable) vision of society and law, sensitive to ecological issues, intended as a tool for protecting the environment with reference to the sustainable development of economic/productive activity.

In this framework, looking at the future developments, the companies are called upon to deal not only with stakeholders influencing strategic decisions regarding the environment, but also with a category of stakeholders “with an intergenerational profile” (R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, in *Analisi Giuridica dell’Economia*, 1, 2022)

This approach may impose on companies some specific duties aimed at preserving and protecting health, environment, safety, freedom and human dignity (art. 41). Consequently, the private companies should take all the necessary measures aimed at preventing harmful activities which may also affect future generations (art. 9) (L. Bartolucci, *Il più recente cammino delle generazioni future nel diritto costituzionale*, in *Osservatorio AIC*, 4, 2021, p. 212 ss.).

In line with the new version of art. 41 of the Italian Constitution, it is possible that in the next future a new entrepreneurial model will be emerging, characterised by the implementation of the precautionary and sustainability principles<sup>8</sup>.

The amendment of Art. 41 must be placed within a more general International and European context (see R. Mongillo, *Ambiente, sviluppo sostenibile e proprietà intellettuale*, in M.A. Icolari, ed. by, *La tutela dell’ambiente al tempo della crisi pandemica*, Torino, 2021, p. 105 ss.) sensitive to the principle of sustainable development, as reported in Art. 3 of the Treaty on European Union (see F. Pastore, *Costituzione e ambiente*, in M.A. Icolari, ed. by, *La tutela dell’ambiente al tempo della crisi pandemica*, Torino, 2021, p. 24 ss.) and achievable through a single market towards a sustainable economy.

In fact, proposals for directives and rules based on the commitment of all sectors of societies are indispensable for achieving the transition to a green and climate-neutral economy postulated in the Green Deal, realisable through the promotion of sustainable forms of corporate governance<sup>9</sup>.

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<sup>8</sup> This model ‘inserted’ in the discipline outlined in the art. 2086 (“The entrepreneur is the head of the company and his employees depend on him hierarchically”) of the Italian Civil Code (see A. Sacco Ginevri, *Divagazioni su corporate governance e sostenibilità*, in *Rivista trimestrale di diritti dell’economia*, Suppl. 3, 1, 2022, p. 88 ss.) will contribute to the correct regulation of decision-making processes (see P. Ricci, *Art. 41 of the Italian Constitution and the Italian Model of Corporate Social Responsibility*, in *Review of International Comparative Management*, 12, 3, 2011, p. 499) regarding the internal organisation and behaviour of the company on the market, helping the entrepreneur in his “free power of enterprise” to respect the environment and all present and future stakeholders, and consequently directing public and private economic activities towards a socially responsible action.

<sup>9</sup> The first example of proposal is the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022, saying that «undertakings themselves stand to benefit from carrying out high-quality reporting

The EU's focus on business/environmental disclosure and communication does not stop at non-financial or sustainability declarations but finds implementation in the proposal for a Directive of the European Parliament and of the Council of 30 March 2022 amending Directives 2005/29/EC and 2011/83/EU<sup>10</sup>.

Furthermore, even the financial world is moving towards green development. Actually, the European Central Bank (ECB) and the European Banking Authority (EBA) have begun to outline strategies and measures to be adopted in credit granting policies<sup>11</sup>.

## E. Consumer Protection Laws

The main cases in Italy concern 'greenwashing' practices (Diesel+, Dieselgate) that integrate the extremes of unfair and/or deceptive commercial practices as defined by the Consumer Code (Legislative Decree 206/2005, modified by the Law No 31/2019).

In particular, Legislative Decree 206/2005 defined unfair commercial practices as those practices that are contrary to "professional diligence", are "false" or capable of distorting to an appreciable extent the economic behaviour, in relation to the product, of the average consumer" (Art. 20).

Commercial practices considered misleading are instead defined in Arts. 21, 22, 23.

Art. 21 considers a commercial practice to be misleading if it contains information not responding to the truth or, information which, albeit in fact correct, in any way, including

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on sustainability matters. The growth in the number of investment products that aim to pursue sustainability objectives means that good sustainability reporting can enhance an undertaking's access to financial capital. Sustainability reporting can help undertakings to identify and manage their own risks and opportunities related to sustainability matters. It can provide a basis for better dialogue and communication between undertakings and their stakeholders and can help undertakings to improve their reputation. Moreover, a consistent basis for sustainability reporting in the form of sustainability reporting standards would lead to relevant and sufficient information being provided and thus significantly decrease ad hoc requests for information».

Further example is the Directive of the European Parliament and of the Council on the Corporate sustainability due diligence amending Directive (EU) 2019/1937, in which companies and enterprises are called to have policies in order to mitigate the negative impacts of their activities on human rights and the environment by enhancing sustainability practices in corporate governance and management systems with the inclusion of climate and environmental impact assessments.

<sup>10</sup> This proposal aims to the diffusion of sustainable products at fair prices for consumers and encourages an active participation in the circular economy by consumers themselves with the goal of a green transition and protection from unfair practices and information as established in the Circular Economy (see D. Chiaroni, *L'impresa circolare. Modelli di business, sistemi di misura, leve manageriali*, Milano, 2022) Action Plan and the European Green Deal.

<sup>11</sup> These adoptions will achieve and promote sustainable development from an environmental as well as an economic and social point of view. Therefore, there also will be included the environmental and climate risk in mortgage granting policies in the prudential supervisory system, subject of future revision according to the ESG (Environmental, Social, Governance) perspective of capital requirements for exposures held. The ECB reiterated that banks will be required by 2024 to integrate climate risks into their balance sheet, leading to inevitable consequences on the lending policies of institutions and to a classification based not only on the creditworthiness of credit applicants, but also on climate risk (see EBA, *The role of environmental risks in the prudential framework*, Discussion Paper, EBA/DP/2022/02, 2 May 2022). Therefore, these interventions should be considered as attempts to overcome the prejudice of environmental protection constraints placed on companies as a sort of 'hidden tax' and burden to bear. Thus, coming to the agreements, the companies are the only means of protecting and guaranteeing future generations and the future of the ecosystem.

in its overall presentation, misleads or is likely to mislead the average consumer (para. 1) or it induces, or it is likely to induce him to take a commercial decision that he would not otherwise have taken (para. 2).

Art. 22 deals specifically with misleading omissions, while Art. 23 defines a number of practices that are considered misleading in any case (e.g. untrue claim to be a signatory of a code of conduct, Art. 23 para. 1, a).

It seems particularly relevant the Art. 140-bis of the Consumer Code which introduced into the Italian legal system the class action aimed at obtaining damages for each member of a group of consumers damaged by the same fact (now provided for by Law No. 31 of 2019).

## F. Fraud Laws

The most relevant Italian cases concerned with fraudulent behaviours involve consumer protection law (see Consumer Protection Law).

## G. Contractual Obligations

Generally speaking, the regulation concerning contractual liability is provided for by the Art. 1218 of the Civil Code according to a debtor who does not perform correctly what he must perform shall be liable for compensation for the damage, unless he proves that the default or delay was caused by the impossibility of the performance resulting from causes not attributable to him.

At the moment, the Italian Climate litigation does not specifically concern issues focused on the violation of contractual obligations. The only cases that involve the breach of contractual obligations are linked to actions aimed at cancelling a contract for defects of will and, if the injured party is a consumer, to the discipline of unfair commercial practices under the Consumer Code (Art. 18 et seq. Legislative Decree No. 206 of 2005).

The issue is particularly important, as far as environmental protection issues are concerned, in relation to the phenomenon of the so-called *greenwashing*. In fact, in a political, social and entrepreneurial context which is increasingly devoted to sustainability issues, companies have well understood that the theme of environmental sustainability could become a very effective promotional tool on which to base their advertising and marketing campaigns (the so-called *green claims*).

However, when the green claims themselves are not reflected in the characteristics of the goods and/or services sold, one evidently falls into an illicit practice. This occurs, for instance, when the advertising message contains false information, when its content leads one to believe that the advertised product is more sustainable or in any case less harmful to the environment than competing products and, again, when there is

insufficient scientific evidence in this regard or the message is too vague or generic (*Eni Diesel+*).

## H. Planning and Permitting Laws

### *European regulatory framework: Directive 2011/92/EU and Directive 2014/52/EU*

Directive 2011/92/EU on EIA is based on the EU principles of precaution, prevention and 'polluter pays', and establishes common and general principles on authorisation procedures for public and private projects that have potentially significant effects on: (a) human beings, fauna and flora; (b) soil, water, air, climate and the landscape; (c) material assets and the cultural heritage; (d) the interaction between the factors referred to in points (a), (b) and (c). (see Art. 3).

Directive 2014/52/EU amended the 2011 Directive and, moving from the principle of sustainable development, emphasised the need to consider climate change and the protection of biodiversity in the EIA procedure. Recital 13 of the 2014 Directive explicitly mentions that EIAs should take into account the climate consequences of a project and its vulnerability to climate change.

Generally speaking, among the new provisions, the 2014 Directive amends Annex III and Annex IV to the Directive, requiring that: (i) in order to determine whether a project is subject to an EIA, the risks of major accidents and/or disasters related to the project in question, including those due to climate change, as well as risks to human health due, for example, to water contamination or air pollution, must be taken into account; (ii) the applicant provides information concerning the project's impact on climate, such as the nature and extent of GHG emissions, as well as the project's resilience to the consequences of climate change.

### *National regulatory framework: Legislative Decree 152/2006 and SNPA Guidelines*

Legislative Decree no. 152/2006 (the 'Environment Code') dedicates the entire Part II to Environmental Impact Assessment Procedures. The Environment Code was amended by Legislative Decree 104/2017, which transposed the 2014 European Directive and included the assessment of project impacts on climate in the EIA procedures.

According to Art. 4(b) of the Environmental Code, "the environmental assessment of projects has the aim of protecting human health, contributing to the quality of life with a better environment, providing for the maintenance of species and preserving the reproductive capacity of ecosystems as essential resources for life". Art. 5(b) defines EIA as the process that includes "the preparation and presentation of the environmental impact study by the proponent, the conduct of consultations, the evaluation of the environmental impact study, of any additional information provided by the proponent and of the results of the consultations, the adoption of the EIA measure on the environmental impacts of the project, the integration of the EIA measure into the project

approval or authorisation measure". Furthermore, Art. 5 (c) defines the environmental impacts to be considered in the EIA procedure as "significant direct and indirect effects of a plan, programme or project on the following factors:

- population and human health;
- biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
- land, soil, water, air and climate;
- material assets, cultural heritage, landscape;
- interaction between the factors listed above.

The Environmental Code incorporates the 2014 Directive and adopts the same forward-looking perspective, requiring the proponent to provide information on the possible development of environmental aspects by considering different scenarios, both in terms of time (short, medium and long term), and from a factual point of view, formulating forecasts for the 'baseline scenario' in the absence of the project and for the scenarios in which the project is implemented or potential alternatives.

In 2020, the National System for Environmental Protection ('SNPA') issued Guidelines No. 28/2020 where climate change plays a relevant role.

The Guidelines define 'climate' as *"the totality of climatic conditions in the area under examination, which exert an influence on atmospheric pollution phenomena"*.

The Guidelines specify that all predictions of environmental impacts must be made taking into account the consequences of global warming and a specific annex - Annex 2 - is dedicated to adaptation to climate change.

Moreover, the proponent is required to consider the effects of climate change already recognised in the area, as well as their possible evolution, by adopting at least a 30-year forward-looking scenario. Following this assessment, the proposer shall provide a report as to the advisability of implementing the project under assessment, describing the option adopted against the alternatives considered. With reference to the possible alternatives, the Guidelines identify as a rewarding criterion the limitation of soil consumption, favouring projects in areas already provided with infrastructure / already compromised ("brownfield") instead of projects that would require the occupation of greenfield. The particular importance given to this criterion is linked to the capacity of the soil to absorb, store or emit climate-altering gases.

Guidelines consider climate change in a double dimension: on the one hand, the proponent must indicate in the report the relationship between the project and climate change, highlighting both the impacts that the former may produce on the latter, and the project's vulnerability to the consequences of global warming. On the other hand, climate change is considered transversally, taking into account the interrelationships between it and all the other subjects under assessment: for example, in the case of the analysis of the impacts that the project may produce on water, the proponent is required

to “take into account scenarios of sea level rise due to global warming and extreme events as a result of climate change”.

With reference to the analysis of the impacts on the air and climate, the Guidelines require the proponents to provide detailed information on the atmospheric emissions deriving from the plant, including an estimate of the contributions to the emission of climate-altering gases and an indication of the calculation methodology used, as well as an analysis of the compatibility of the work with the plans for the protection and restoration of air quality, which are usually also established in light of climate objectives (e.g. limitation of global warming within the 1.5° threshold).

Finally, the Guidelines devote a special section to the analysis of climate change.

First, the proponent will have to describe the ante-operam scenario by indicating its characteristics from a climate point of view (e.g. GHG emissions). Second, the proponent will have to describe the post-operam scenario by collecting information on (i) energy consumption, (ii) possible non-energy sources of pollution (e.g. industrial processes), (iii) estimated climate-altering gas emissions. The report should contain a description of the likely climate impacts and, based on the nature and extent of the emissions identified, a description of the techniques chosen to prevent or reduce these emissions in the light of the best available techniques.

In requiring the analysis of the level of emissions, the Guidelines also take into consideration indirect emissions, which are however considered according to a significantly narrower meaning compared to the definition adopted at EU level (e.g. in the framework of the Corporate Sustainability Reporting Directive - CSRD, indirect emissions include the entire value chain). The Guidelines only consider indirect emissions: (i) related to an increased demand for energy connected to the plant activity; (ii) deriving from activities or infrastructures directly connected to the project (e.g. transport); and (iii) deriving from project-related activities.

The report should also contain information on the adaptation measures to be implemented to increase the project’s resilience to climate change and the monitoring of these measures.

Once the analysis of the project’s impact on climate change has been concluded, the compatibility of the project with national, regional and local GHG emission reduction targets, as well as the extent to which the project under assessment could contribute to their achievement, must be assessed.

Moreover, in order to make assumptions about possible future climate impacts, the Guidelines also require to take into account the different emission scenarios formulated by the Intergovernmental Panel on Climate Change (‘IPCC’) and to adopt a long-term view, taking into account as a minimum the date of decommissioning or cessation of the project activity.



Against this framework, the practice shows that only some of the prescriptions provided for in the SNPA Guidelines have been formally implemented by the proponents, while, for instance, no attention is given to the formulation of different emission scenarios; no long-term perspective is adopted that goes beyond the decommissioning phase of the project; compensation measures are mostly based on 'green' or 'soft' measures such as reforestation projects; monitoring plans are missing.

### *Italian Case Law*

The Italian case-law on climate EIA is still underdeveloped, especially at national level.

Recently, appeals challenging the erroneous assessment of atmospheric emissions by the competent authorities have increased. However, the judgements have constantly rejected said appeals by recognising the wide discretion of the public administration in assessing the public and private interests at stake in EIA procedures. The Italian case-law is therefore still reluctant to admit the possibility of challenging the results of an EIA on strictly climate-related grounds.

Examples of recent case-law on limited judicial review of EIA evaluations conducted by public authorities:

- Tar Lazio (Lazio Regional Administrative Court), ruling No. 7041 of 2021, rejected the appeal of two environmental associations that complained that in the authorisation procedure for the expansion of a recycling and composting plant, the competent administrative authority had wrongly assessed the project's atmospheric emissions, which, according to the plaintiffs, were outside the standards. The Court emphasised the wide discretionary power of the administrative authority in the context of EIA proceedings, stating that: *'the environmental impact assessment is not a mere technical act of management or administration in the strict sense of the term' but 'a measure with which a real political-administrative function is exercised with particular reference to the correct use of the territory, in a broad sense, through the care and balancing of the multiplicity of opposing public interests (urban, natural, landscape, as well as economic-social development) and private interests'.*
- The Council of State, in Judgment No. 1761 of 2022, ruled on the authorisation of a project for the demolition and reconstruction of a poultry farm, rejecting the objections raised concerning the administrative authority's erroneous assessment of emissions. The Council of State, confirming the judgement of the Regional Administrative Court of Emilia Romagna no. 756 of 2021, emphasised the wide discretion attributed to the administrative authority in EIA proceedings also with regard to the assessment of emissions into the atmosphere. The Council of State stated that it did not intend to depart *'from the exegetical approaches reached by (international and national) case law, from which emerges the broad discretionary nature of the choices made, justified in light of*

*the primary and absolute values involved (cfr., most recently, Council of State, section VI, 13 June 2011, no. 3561; section IV, 5 July 2010, no. 4246; section V, 12 June 2009, no. 3770; Court of Justice, 25 July 2008, c-142/07; Constitutional Court, 7 November 2007, no. 367, to which reference should be made in view of the combined provisions of Arts. 74, para. 1, and 88, para. 2, letter d) of the Code of Civil Procedure)' and that 'The administrative judge's review in this matter is therefore necessarily limited to manifest illogicality and inconsistency, to the misrepresentation of facts or to macroscopic defects of preliminary investigation or when the act lacks adequate motivation (cfr. ex multis, Cons. Stato, sect. II, no. 5451 of 2020; sect. II, no. 5379 of 2020; sect. V, no. 1783 of 2013; sect. VI, no. 458 of 2014)'.*

## I. Other Causes of Action

### *The Proceedings before the Italian OECD NCP*

A particular role is played in Italy by the proceedings brought before the Italian OECD NCP (Cremonini, Veronesi, ENI Pasubio).

As known, the main role of the NCPs is to “further the effectiveness of the Guidelines”, operating in accordance with core criteria, namely visibility, accessibility, transparency, and accountability.

Specifically in the chapter on the “Implementation of Specific Instances”, the Guidelines call for the establishment of a non-judicial grievance mechanism aimed at facilitating the resolution of issues arising between one or more enterprises and one or more interested stakeholders.

This function must be exercised in a “manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines”.

In Italy, the Italian NCP was established in 2002 and it is housed within the Ministry of Economic Development. The organisational structure of Italian NCP includes: The President representing the NCP and adopting its final acts; the Secretariat in charge of the general administration; the Committee, composed by institutional representatives and other stakeholders and holding a consulting function.

Generally speaking, with regard to the specific procedures for non-judicial grievance mechanism of the Italian NCP, anyone who is a stakeholder with respect to the issue arisen can submit a specific instance to the NCP. Moreover, it is allowed to “submit and carry on a specific instance and act in the procedure on behalf of identified other parties”. The instance can address one or more Italian multinational enterprises or foreign multinational enterprises operating in Italy, provided that the latter are based in one of the Countries adhering to the Guidelines.

As a general principle, the procedure should be concluded within 12 months after the reception of the specific instance. However, this term could be extended depending on special circumstances, as in the case of issues arising in non-member countries. The Italian procedure for managing instances submitted to NCP envisages three main phases: the initial assessment, a phase of assistance to the parties, and a final phase with the publication of the case outcome.

The initial assessment, consistent with the guidelines, will determine whether the instance is submitted bona fide and whether the issue is relevant to the implementation of the Guidelines. This phase lasts approximately three months, during which the NCP should consider:

"(i) the identity of the party concerned and its interest in the matter; (ii) whether the issue is material and substantiated; (iii) whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance; (iv) the relevance of applicable law and procedures, including court rulings; (v) how similar issues have been, or are being, treated in other domestic or international proceedings; (vi) whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines".

The NCP examines the instance, the documentation and the memories and may, also, request for an integration of the information received. When the enterprise(s) submits a written reply to the request of the NCP, the complainant may be authorised to submit a written counter-reply. At the end of this phase, if the initial assessment is positive, the NCP communicates the outcome to the parties and offers its good offices to resolve the dispute. In this case, the assessment might not be published if such a decision could facilitate the agreement between the parties. If the NCP decides that the issue does not merit further examination, it discloses the information by publishing a statement on its website, specifying the details of the instance and the reasons of that outcome.

During the phase of assistance to the parties, the parties shall designate, in agreement with the NCP, the person in charge of conducting the conciliation /mediation phase, chosen from the NCP Committee, the NCP Secretariat or outside the NCP (provided that this personality satisfies the criteria of competence and authoritativeness). At this point, the parties sign the terms of reference for the mediation and conciliation, to which they commit to comply.

The final stage of the proceeding coincides with the conclusion of the phase of assistance to the parties and the publication of the outcomes. In this regard, there are five possible scenarios: (i) the parties reach an agreement, (ii) at least one of the parties refuses the offer of good offices, (iii) the parties do not reach an agreement within the established deadline, (iv) during the course of the phase of assistance, at least one of the parties declares it is not willing to participate in good faith in the procedure, (v) there is an objective impossibility to reach an agreement.

In the first case - where the agreement has been achieved, the parties shall determine how and to what extent the agreement's content will be made publicly available. Upon consultation with the parties and within three months after the agreement has been reached, the NCP publishes a report with information on the specific instance and on the content of the agreement. In all the other cases - in which the agreement has not been achieved, the NCP issues a statement on its website communicating the negative outcome.

## 2. Procedures and evidence

### A. Actors involved

#### i. Claimants

- 1) In the case of Greenpeace, Re:Common et al. vs ENI, the plaintiffs are environmental associations, operating in the national and international fields, and private individuals residing in areas particularly exposed to climate change (the Po delta area, the Venice lagoon, residents in coastal areas, residents in the Po Valley and finally or mountainous areas), all of whom have suffered and are suffering the consequences of ENI's conduct on climate change.
- 2) The "Rete Legalità per il Clima" is a network of researchers, jurists and lawyers expert in climate law which claims "the human right to a stable and safe climate, as a prerequisite for the right to life in conditions of non-reversal of the climate system and safe anthropogenic emissive activities in the exclusion of any dangerous interference", on its own behalf and on behalf of several citizens and associations has promoted the Veronesi, Cremonini, ENI cases before the OECD NCP.
- 3) The NGO Survival International Italia on behalf of the Ayoreo Totobiegosode indigenous people promoted the Pasubio case before the OECD NCP;
- 4) The Ikebiri case was launched by the leader of an indigenous peoples group on behalf of the entire community;
- 5) The Ilva case was brought by 11 individual claimants who acted as holders of "homogeneous rights" (according to the Italian Law), common to all residents of Taranto and surrounding areas, who are exposed to risks caused by the emission of harmful and toxic substances by the ILVA steel plants;
- 6) The TAP case was initiated by 58 citizens from the municipality of Melendugno (Lecce) as they live in the area where the pipeline will arrive from the Adriatic Sea;
- 7) The proceedings before the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority) against ENI were brought by several associations (Movimento Difesa del Cittadino, Legambiente, European Federation for Transport and Environment AISBL);
- 8) The Class Action against Volkswagen ('Dieselgate') was initiated by several associations on behalf of a number of citizens (Associations Codici, Movimento Difesa del Cittadino, Confconsumatori, Codacons, Altroconsumo, Cittadinanzattiva Onlus and Federconsumatori Bologna);
- 9) The action against the Municipality of Milan ('Milan Stadium') was brought in the interest of several citizens;
- 10) The action against Cassa Depositi e Prestiti ('Mozambique LNG Project') was brought by an association called Re:Common.

## ii. Defendants

ENI is the most important Italian energy company, controlled by the State through the Ministry of Economy and Cassa Depositi e Prestiti. For this reason (ENI is controlled by the State), according to the claimants, ENI should respect the global climate targets to be reached by the Italian State, in accordance with the Climate International and European Law (Paris Agreement). The action is also directed against the Ministry of the Economy and Cassa Depositi e Prestiti, which are considered jointly and severally liable for the damage caused by ENI's conduct (the greenhouse emissions). According to the claimants, therefore, the Ministry of the Economy and Cassa Deposito e Prestiti are jointly responsible for ENI's corporate choices made in terms of energy-climate strategies and the consequent emissions of CO<sub>2</sub> and other greenhouse gases (Greenpeace, Re:Common et al. vs ENI);

- 11) The intensive livestock farming cases were launched against two enterprises operating in the intensive livestock sector: Veronesi Holding and Cremonini S.p.A.;
- 12) The Gruppo Pasubio case was launched against a leading Italian leather tanning company allocated for the car market;
- 13) The Ikebiri case was launched against ENI and its Nigerian subsidiary Nigerian Agip Oil Company (NAOC);
- 14) The ILVA case was brought against ILVA, S.p.A. (currently under administration), and the operators of the steel mill: Acciaierie D'Italia S.p.A. and Acciaierie D'Italia Holding S.p.A.;
- 15) The "Milan Stadium" case was brought against the Municipality of Milan, the Ministry of Culture, Milan A.C. S.p.A., Internazionale F.C. S.p.A.;
- 16) The Dieselpgate case was brought against Volkswagen AG and Volkswagen Group Italia;
- 17) The Mozambique LNG Project was brought against the Ministry of Economy and Finance; Ministry of Foreign Affairs and International Cooperation; Presidency of the Council of Ministers; Italian Agency for Development Cooperation; and Cassa Depositi e Prestiti S.p.A. (a publicly controlled financial institution), Saipem S.p.A.

## iii. Third-party intervenors

The Italian legal system does not provide for the figure of the *Amicus Curiae*.

In civil proceedings, third-party intervenors could only be parties interested in participating in climate litigation against corporations (Art. 105 of the Code of Civil Procedure), in the case of litigation for liability not derived from a contract (Tort Law).

Third parties may also intervene to support the arguments of any party when it has an interest of its own.

In the administrative process (Art. 28 of the Administrative Process Code), who has a specific legitimate interest may intervene in the case of appeals concerning companies (e.g. TAP or Milan Stadium).

#### iv. Potential claimants, defendants or third party intervenors

For the procedural legitimacy (standing) of associations, NGOs, etc., it is to consider the so-called 'double track' criterion, which distinguishes between:

- Legitimacy *ex lege* of the recognised national environmental protection associations (Arts. 13 and 18 of Law No 349/86), identified by a special decree of the Ministry of Ecological Transition, which may intervene in judgments of environmental damage and to appeal to the administrative courts for the annulment of unlawful acts;

In order for environmental associations to be recognised as having standing in environmental proceedings, they must statutorily pursue environmental protection objectives in a non-occasional manner, they must possess an adequate degree of representativeness and stability, and they must have an area of relevance that can be linked to the area in which the asset for collective use that is allegedly injured is located.

- Judicial legitimacy, with reference to those unrecognised associations and/or territorial branches of recognised ones, which should be ascertained by the court on a case-by-case basis and having regard to the existence of three prerequisites, such as:
  - i. Bodies must pursue environmental protection and human rights objectives related to the environment in a non-occasional manner;
  - ii. They must possess an adequate degree of representativeness and stability;
  - iii. They must have an area of relevance that can be linked to the area in which the asset for collective use that is allegedly harmed is located (criterion of "territorial *vicinitas*- if it is a question of the protection of a physical asset (e.g. a park, etc.) - or "axiological" proximity - if it is a question of the protection of the human right to life with respect to the environment)

The dual-track criterion is justified by Art. 118 c. 4 of the Constitution, which recognises and encourages 'the autonomous initiative of citizens, both individual and associated, to carry out activities in the general interest, on the basis of the principle of subsidiarity'.

## B. Elements of the Procedural Framework

### i. Standing

In Italy, pursuant to the art. 311 of the "Code of the Environment" (D.Lgs. n. 152/2006), the only processual actor with legal standing to seek compensation for environmental damage is the Minister for the Environment.

In the *Greenpeace, Re:Common et al. vs ENI* case, claimants, however, do not claim compensation for environmental damage. They claim to be harmed by the "productive fact of environmental damage". Therefore, as such, associations and private individuals



would be entitled directly to take legal action against who is responsible for the fact causing environmental damage when the fact causes harmful effects (or violation of human rights) on someone (art. 313 § 7 D. Lgs. 152/2006). The actors, therefore, would be entitled to act for violation of Art. 2043, 2050 and 2051 c.c.

The associations, Greenpeace and Re:Common, on the other hand, would have the right, according to the statutes of their respective associations, to take action to combat the injuries and damage to the environment and the climate caused by the defendants, as well as for the compensation of expenses incurred over the years to study, denounce and combat the climate change (Greenpeace, Re:Common et al. vs ENI).

ENI, among other things, argues that the parties acted on behalf of a collective interest, not an individual right. Moreover, ENI claims that the consequences of climate change do not constitute environmental damage and that in any case if they were framed as environmental damage, only the State, (Art. 311 of the Environmental Code), in the person of the Minister of the Environment, would have exclusive legitimacy to act.

The plaintiffs could only initiate the administrative procedure provided for in Art. 309 of the Environmental Code, by submitting to the Minister of the Environment complaints and observations, accompanied by documents and information, concerning any case of environmental damage or imminent threat of environmental damage, and requesting State intervention to protect the environment.

Individual citizens initiated the 'Milan Stadium' (67 claimants) and 'TAP' (58 claimants) litigation. In both cases, the appeals were brought before the competent Administrative Courts (Milan and Rome) by citizens who considered their legitimate interests harmed by an administrative act (the Deliberation of the Milan City Council on the declaration of public interest for the construction of the new Milan stadium or the Decree of the Ministry of Economic Development that extended the authorisation for the construction and actual operation of the TAP pipeline).

The ILVA and Dieselgate cases are instead class actions.

Class actions are governed by Art. 840 sexiesdecies of the Code of Civil Procedure, introduced by Law No. 31/2019, which configured the class action as a general remedy (no longer limited to consumer protection), distinguished between "injunctive class action" (ILVA case) and "compensatory class action".

Law No. 31/2019 repealed Art. 140 bis of Legislative Decree 206/2005 (Consumer Code). Consequently, the class actions aimed at protecting consumers interests are covered now by the new Art. 840 sexiesdecies.

It should be noted that the litigation against Volkswagen in the Dieselgate case (under Art. 140a of the Consumer Code) was initiated in 2016, before the 2019 reform.

In the ILVA case, the injunctive class action (not compensatory) was justified by the need to face the progressive increase in subjective legal positions with non-pecuniary content

damaged by the steel mill. Furthermore, the injunctive class action's goal was the protection of a right rather than the compensation that follows its violation.

Among other things, the injunctive class action may be brought to protect personality rights (ILVA), when the plaintiffs have sought protection of rights such as the right to life, health, and the peaceful conduct of family life, which they consider have been impaired or otherwise endangered.

Particularly, Art. 840 sexiesdecies states that "Anyone who has an interest in obtaining an injunction concerning acts and conducts which prejudice to a plurality of individuals or entities, may bring an action to obtain an order to cease or prohibit the repetition of the omissive or commissive conducts. Non-profit organisations or associations whose statutory objectives include the protection of the interests prejudiced by the conducts are entitled to bring the action if they are registered in the list referred to in Art. 840a(2)"

Art. 840bis, paragraph 2, provides that "homogeneous individual rights may also be protected by class action" and that "a non-profit organisation or association whose statutory objectives include the protection of the aforesaid rights or each member of the class may bring an action against the author of the injurious conduct for ascertainment of liability and for an order to pay damages and restitution". As was said organisations and associations must be registered in a public list established at the Ministry of Justice.

Therefore, the ILVA case was promoted by 11 citizens from Taranto who acted as holders of homogeneous rights "common to all residents of Taranto and neighbouring areas, exposed to risk due to the emission of harmful and toxic substances by the steel plants owned by ILVA".

"Homogeneous rights" are those rights of individuals (and as such they could be autonomously enforced) that take on a homogeneous connotation when several persons have the same position of interest, as well as the same claims for compensation, with reference to similar legal relationships.

The requirement of homogeneity between rights must be verified on a case-by-case basis by reference to the object of protection and the legal reasons on which the object is rooted.

The Dieselgate case was brought by several associations under Art. 140 bis of Legislative Decree No 206 of 2005 (so-called 'Consumer Code'), now repealed by Law No 31 of 2019.

Art. 140 bis regulated the hypothesis of 'compensatory class action' to protect homogeneous individual rights.

The object of the action is the ascertainment of liability and the conduct to damages and restitution in favour of consumers for the protection of contractual rights and homogenous rights.

Paragraph 2 defined homogenous rights as those rights to which consumers of a given product or service are entitled vis-à-vis the producer thereof, even irrespective of a direct contractual relationship; and those rights to compensation for the harm caused to the same consumers and users by unfair commercial practices or anti-competitive conduct.

Paragraph 1 of Art. 31 of the 2019 Law provided that the class action could be brought by each class member or by associations to which the class member mandates. If allowed (as in the Dieselgate case), all class members with an interest in damages may subsequently join the action.

The cases brought before the Antitrust Authority (EniDiesel+ and Volkswagen Dieselgate) were initiated by associations. Art. 4 of the Regulation on Investigative Procedures for Consumer Protection (Deliberation of the Authority No. 25411/2015) provides that "any organisation, which has an interest, may request through a communication, the intervention of the Authority with regard to advertising that it considers misleading or with regard to unfair commercial practices".

The Mozambique LNG Project case was initiated by an association Re:Common and concerns access to environmental information.

In particular, the access to environmental information is regulated by Legislative Decree No 195/2005, which guarantees the right of access and dissemination of environmental information held by authorities. Art. 3(1) states that the public authority shall make environmental information available "to anyone who requests it, without his having to declare an interest".

Re:Common's subsequent appeal to the Regional Administrative Court concerned the annulment of the decision of the Commission for Access to Administrative Documents at the Presidency of the Council of Ministers concerning the lack of access to the requested environmental information.

The cases brought before the NCP (Cremonini, ENI, Pasubio, Veronesi) are promoted by several associations.

The OECD Guidelines for Multinational Enterprises and the Guide for National Contact Points on the Initial Assessment of Specific Instances provide that applications should be submitted by those who have "some interest in the matters they raise in their submissions" (p. 6).

The Italian NCP recognised the submitters ("Rete Legalità per il Clima"; Survival International Italia) as having a specific and relevant interest in the issues raised, given that NCP practice is oriented towards admitting that if a non-governmental organisation pursues environmental protection objectives, even of transnational nature and in the interest of individuals or communities, also understood as present and future generations, it is legitimated to raise a specific instance to the NCP.

For the Ikebiri case, ENI's and NAOC's lawyers raised several preliminary objections, including those of lack of standing of the plaintiff (the Representative of the Community of Ikebiri, Kingdom of Ikebiri), lack of jurisdiction of the Italian court, and lack of the prerequisites for justiciability. The Judge, without ever directly and explicitly addressing these exceptions, decided to enter into the merits of the dispute.

## ii. Justiciability

With particular reference to the climatic disputes analysed, the procedure before the OECD NCP (Cremonini, Veronesi, ENI, Pasubio) is similar to a mediation and the 'decision-making body' invested (the NCP) is a kind of mediator offering its 'good offices', which the parties may also not accept, to try to settle the dispute.

In the case of an injunctive class action (ILVA) the court could order to cease or prohibit the repetition of omissive or commissive conducts.

In the ILVA case, the plaintiffs sought the protection of their human rights to life, health, and the peaceful conduct of family life, which had been seriously impaired or endangered by the emissions from steel mill. As a result, the claimants asked the court to order the closure of the area of the steelworks where are collocated the coke ovens and the blast furnaces from which harmful substances are released, or, at the very least, the shutdown of the plant until the prescriptions that science deems appropriate to make the health damage caused to the resident population tolerable are fulfilled.

In the case of a compensatory class action ('Dieselgate', Court of Appeal of Venice), the judge has ordered compensation for non-pecuniary damage.

In proceedings before the Regional Administrative Court (Milan Stadium, TAP), the court may annul the contested measures issued by public authorities.

In proceedings concerning misleading or unfair advertising (EniDiesel+, Dieselgate), the Competition and Market Authority may impose an administrative fine and prohibit the dissemination or continuation of the commercial practice.

In proceedings concerning access to environmental information (Mozambique LNG Project), the administrative judge may order public authorities to produce the information and documents which are the subject of the access request.

## iii. Jurisdiction

As of right now, Italian climate litigation only involves defendants domiciled in Italy.

Actually, the European system of private international law and the Italian private international law do not provide for forms of extraterritorial jurisdiction that would allow proceedings to be brought in Italy also against persons not domiciled in Italy (in this case, companies with their statutory seat, central administration or principal place of business established outside the territory of Italy) (see N. Perrone, *Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European*

*Directive on Corporate Sustainability Due Diligence*, in “The Italian Review of International and Comparative Law, n°3/2003, pp. 389-408).

There is no provision, for example, for *forum necessitatis*, which would allow a European court to be seized with a guarantee of impartiality in cases where the continuation of proceedings in the State where the defendant is domiciled would be unreasonable or impossible.

It would be possible to bring proceedings in Italy against subsidiaries of Italian companies, only by virtue of the close link between parent and subsidiary and the duty of care of the former towards the latter (as in Ikebiri case).

Italian disputes are brought before independent authorities (EniDiesel+, Volkswagen Dieselgate), administrative courts (TAP, Milan Stadium, Mozambique LNG Project), civil courts (Dieselgate, ILVA), mediation bodies (Cremonini, Veronesi, Pasubio, ENI).

#### iv. Group litigation / class actions

Injunctive class action (ILVA) and compensatory class action (Volkswagen)

#### v. Apportionment

Generally speaking, the main problem concerning Italian (not only climate) litigation is time. In fact, Italian justice (especially civil justice) is very slow.

Concerning the NCP procedures, bearing in mind that we are talking about a mediation procedure, the most obvious obstacles are two:

- 18) timing; the Italian NCP is extremely slow; it does not meet the deadlines laid down in the Guidelines without giving any explanation;
- 19) the apparent partiality; the Italian NCP is not composed of independent experts, but was set up at the Ministry of Economic Development, i.e. within the Ministry that helps companies. The same officials who manage state aid to corporations and business incentives are then in charge of the NCP.

#### vi. Disclosure

Moving through the regulations within the Italian legal system concerning the disclosure requirements for a defendant company during a trial can be a challenging endeavor. Nevertheless, in recent years, there has been a growing emphasis on regulating nonfinancial disclosures, particularly by the European Union.

Specifically, the Directive (EU) 2022/2464 of the European Parliament and the Council, issued on December 14, 2022 (See Gruppo di lavoro della Giunta Assonime coordinato da Corrado Passera, *L'evoluzione dell'organo amministrativo tra sostenibilità e trasformazione digitale*, Note e studi, 1, 2023) on Corporate Sustainability Reporting, grants free access to sustainability information deemed essential, relevant, and reliable (see G. Ferrarini, ZHU, *Is There a Role for Benefit Corporations in the New Sustainable Governance Framework?*, ECGI, Law Working

Paper n°. 588/2021, 2021, p. 30). This accessibility is designed to facilitate the evaluation of investments characterized by sustainable and/or ESG (Environmental, Social, and Governance, see M. Maugeri, *Informazione non finanziaria e interesse sociale*, *Rivista delle Società*, 5, 2019, p. 992 ss.) business models and activities. Beyond the scope of Italian Legislative Decree No. 254 dated December 30, 2016, the directive aims to enhance, in a digital context, the comparability and utility of information.

The goal is to establish European reporting standards (see European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, Brussels, 21.4.2021 COM(2021) 189 final, p. 4. Cfr. European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, Brussels, 21.4.2021 COM(2021) 189 final, p. 3) that ensure consistent and dependable information across Europe, achieved through advanced standards concerning the selection of information related to the principle of double materiality (see Cfr. G. Palmieri, *L'informazione non finanziaria e il bilancio di sostenibilità*, *Orizzonti del diritto commerciale*, 1, 2023 p. 273 ss).

Importantly, this directive extends its focus beyond sustainability statements to include greenwashing and green claims, providing a comprehensive approach to safeguarding consumers (see M. Crivellaro, G. Vecchiato, F. Scalco, *Sostenibilità e rischio greenwashing*, Padova, 2012).

We also need to consider recent developments in the world of finance as outlined in the Corporate Governance Code on sustainable development and directors' actions, and, additionally, the introduction of EU Regulations 2020/852 and 2022/1288 on sustainable finance and related disclosure has brought about significant changes. It is imperative for directors' actions to be guided, and if proven, align with the future model proposed by the Corporate Sustainability Due Diligence Directive. This entails the establishment of suitable organizational structures under Article 2086 of the Civil Code, subject to evaluation based on the nature of the company's activities.

Specifically concerning a company's type of activity and the prevention of environmental crimes, reference can be made to Law No. 121/2011, which transposes EC Directive 2008/99 on the criminal protection of the environment. Additionally, Art. 25-undecies under Legislative Decree 231/2001 (see Assonime, *Reati ambientali e responsabilità amministrativa degli enti*, Circolare n. 15 del 28 maggio 2012 and L. Cornacchia e E.D. Crespo, *Responsabilità da reato degli enti collettivi*, Torino, 2023) holds entities accountable for environmental crimes. This responsibility is further reinforced by the Consolidated Environmental Act under Legislative Decree 152/2006 and Law No. 68/2015, addressing 'eco-crimes' and revising criminal regulations for environmental protection.

The legislator has expanded the scope of environmental protection cases by framing them as crimes, broadening entities' liability to encompass the most severe environmental offenses. Article 25-undecies (in particular, encompasses offenses such as environmental pollution, environmental disaster, culpable offenses against the environment, and trafficking in and abandonment of highly radioactive material). The reform has notably enhanced the legislative framework for corporate liability, acknowledging that the most serious acts harming the environment are often committed for the benefit and in the interest of the companies themselves.

## C. Defences

The Greenpeace, Re:Common et al. vs ENI case is the only one that has climate change as a central issue.

As already pointed out, the claimants support the responsibility of ENI for human rights violations (in particular Arts. 2 and 8 ECHR) according to the logic of *Attribution Science*. The violation of rights would result in the civil liability of ENI ex Arts. 2043, 2050, 2051.

ENI filed its statement of appearance and response in September 2023 arguing, among other things, that all its activities constitute legitimate business activities and are subject to specific regulation and administrative authorisation and therefore cannot be considered *contra jus*, therefore not capable of causing unjust damage.

Moreover, ENI argued that the goal of Net Zero by 2050 cannot be achieved through rulings requiring a single private company to reduce its industrial activity (justiciability) abruptly and drastically.

Among other things, ENI argued that part of its activities was not held in Italy, but abroad, and were held by foreign companies which are distinct and autonomous from ENI and which, moreover, habitually carry out their activities in joint ventures with local government companies (see the Ikebiri case, however).

With reference to the causal link, ENI argued that there is no causal link between its conduct (in any case lawful) and the damage caused by climate change (in any event unproven) because it is impossible from a scientific and legal point of view to identify a single conduct or cause that determines climate change and its adverse effects, especially considering that there is a "time-lag" between the conduct that impacts climate change and the damage caused by it.

ENI further argues that neither "attribution science" nor "source attribution" makes it possible to identify whether, and to what extent, the effects of climate change are attributable to ENI - not even pro rata.

The ILVA case is probably the one in which the arguments and defences are more focused on climate change, although the ILVA case is not a litigation with climate change as the central issue.



The claimants' thesis that the greenhouse emissions from the ILVA steel mill are not controlled is strongly contested by the defence attorneys who sustain the ILVA plant's emissions have always been within the legal limits (even within the thresholds set by Directive 2003/87/EC, ETS Directive).

Furthermore, according to ILVA attorneys the legal action should have been brought against the State (not ILVA) because the defendants, private law entities, are not intended to have direct obligations under the Paris Agreement.

Thus, it is pointed out that, unlike in international environmental law, in climate law there are no international or regional conventions or agreements (hard law) concerning the liability profiles of private companies. This argument is used to highlight that States, when deciding to ratify global or regional conventions or agreements, they do not intend to impose obligations on private parties.

The causal link is also contested (since there is no evidence that greenhouse gas emissions from ILVA affect global warming) as well as the correlation between climate-changing emissions and the worsening of living conditions and health of the citizens of Taranto.

It is also underlined by the ILVA attorneys that there is no legal obligation to close plants because of climate-changing emissions. Specifically, it is noted that the main question is not the quantity of CO<sub>2</sub> emitted by the Taranto plant, but whether this quantity violates national and supranational emission regulations.

In addition, ILVA attorneys point out the distorting effect on competition, due to inorganic global action on climate change.

Concerning the reference to the Dutch Shell case, the defendants point out that in Italy (unlike in the Netherlands) there are no legal sources from which it can be derived a binding value for the principles established by soft law instruments, with the consequence that no Italian court could follow an argumentative path similar to that one followed by the District Court of The Hague (L. Serafinelli, edited by, *How We Defeated Shell. Milieudéfense et al. c. Royal Dutch Shell. Uno sguardo dietro le quinte*, Sapienza Università Editrice, 2024)

For the Ikebiri case, the main argument raised by the plaintiff is that reasons of substantive justice dictate that, when an enterprise is wholly controlled by another enterprise, the latter should also be liable for damages caused by the former, especially if this occurs in countries where the judicial system is inefficient or highly corruptible.

The main argument raised by the defendants is that such a case cannot be dealt with by an Italian court because the other party is Nigerian and the damage occurred in Nigeria.

For the other cases, always bearing in mind that the proceedings in question were launched not before a court but before a mediation body, in the ENI and intensive

livestock farming cases (numbers 1 and 2 above) the multinationals defended themselves on the one hand by pointing out that the petitioners did not have standing, because they were not directly affected by the harmful consequences of the activity they considered detrimental to the climate system, and on the other by minimising their responsibility in contributing to the climate emergency, pointing out that climate change is a global issue.

With regard to the petitioners' arguments, reference was made to the NCP operational guides and other OECD documents specific to the climate emergency.

## D. Evidence

Generally speaking, in the Italian legal system (as in other systems), in order to recognise the legal liability of a subject, it is necessary that a certain event is attributable to his conduct.

The relationship between conduct and event is referred to as a 'causal link'.

The terms of this relationship are not always the same.

For example, in an action for damages, in order to recognise the legal liability of a company, a specific harmful event must be linked to a specific conduct. In the case of a compensatory climate action, one would have to prove that the damage complained of was caused by emissions produced by the sued company.

This demonstration is quite complex. However, most climate litigations (even against companies) are not compensatory in nature, but rather they seek an injunction 'to do something' (e.g. cut emissions). In this type of lawsuit, the causal relationship that plaintiffs must prove exists is not between the conduct and the harmful events, but rather between the conduct and the dangerous situations. A lawsuit is brought against the company because the emissions produced aggravate the climate emergency or, to put it another way, because its conduct is not capable of removing the existing state of danger, but rather aggravates it. It is clear that this causal relationship is of a different nature from the first, and the evidentiary burden asked of the plaintiffs is to link the conduct of the companies with the continuation of the state of danger; in this case, scientific findings play a decisive role.

The main source of evidence is represented by the IPCC Reports (e.g. Ilva).

In the *Greenpeace, Re:Common et al. vs ENI* case, the main conclusions of the COPs are used by claimants with the aim of highlighting the exponential increase of knowledge on the gravity of the climate issue and its anthropogenic causes, related to the use of fossil fuels.

The goal of claimants is to highlight how ENI and the Carbon Majors were aware of all the harmful effects on the climate system of greenhouse emissions, at least since the Report of the *International Conference on the Assessment of the Role of Carbon Dioxide*

and of other greenhouse gases in climate violations and associate impacts, published by the World Climate Programme (International Council of Scientific Unions, United Nations Environment Programme, World Meteorological Organization) in 1985 and since the conclusions of the *Toronto Conference on the Changing Atmosphere: Implications for Global Security* (Toronto, 1988) (Greenpeace, Re:Common et al. vs ENI).

In particular, according to the claimants, the final appeal of the 1988 Toronto Conference must be recognized as a historic event since, for the first time in a scientific conference, the main actors involved in the climate issue were invited to take immediate action. The conclusions, in fact, showed that concerns about climate were already prevalent in the scientific community in the late 1980s. The final declaration, in particular, urged the United Nations to draw up a convention to combat climate change and protect the atmosphere (the 1992 UNFCCC) and to continue to support the work of the IPCC (Greenpeace, Re:Common et al. vs ENI).

In the Greenpeace, Re:Common et al. vs ENI case particularly relevant is the 2018 IPCC Special Report on Global Warming 1.5 on C, as well as the recent AR6 (Sixth Assessment Report) of 2021-2023.

Scientific evidence concerning human-induced climate change (mostly sourced from the IPCC's reports) are used to demonstrate how all countries in the world have awareness that, with each additional degree of global warming, the risks and adverse climatic impacts and the related losses and damages will increase. Therefore the international community is aware that every effort must be made to limit the rise in temperature below 1.5 °C (Greenpeace, Re:Common et al. vs ENI).

Furthermore, claimants point out that since the third evaluation report of 2001 (AR3), the IPCC has divided the most important risks associated with anthropogenic climate change ("key risks") into "five concerns" (Reasons for Concerns - RCF). They are considered key risks by the IPCC because of the great danger they entail, the high degree of vulnerability of societies and/or ecosystems, the large scale of risk, its high probability, the irreversibility of consequences and the limited potential to limit risk through adaptation and mitigation. (Greenpeace, Re:Common et al. vs ENI).

Particularly important, in the Greenpeace, Re:Common et al. vs ENI case is the focus on the Italian situation. Such focus is necessary to highlight the risks of damage (the s.c. "metus") for the claimants, and it is also useful in terms of their legal standing and their claim of non-pecuniary remedies.

The sources quoted are the *pi Analysis report. Climate Change in Italy Euro-Mediterranean Centre on Climate Change* (2020, CMCC, Italian focal point of the IPCC) and the *Greenpeace Italy report "How much does the climate crisis cost Italy"* (2021) (Greenpeace, Re:Common et al. vs ENI).

For NCP's cases (mediation procedures) strict proof of causation is not required, not least because the claims made are aimed at averting future damage (Veronesi, Cremonini, ENI, Pasubio).

With regard to the sources of evidence, for Veronesi and Cremonini cases, the scientific evidence concerning the causes of global warming, its impacts, and the contribution of the private sector has been massively and systematically referred to, even citing reports and data from the companies themselves.

For case Pasubio, NGO reports were used, as well as reports from international bodies and judicial precedents from supranational courts and commissions.

For the Ikebiri case, there was no doubt as to causation, because the counterparties admitted having caused the local damage as an environmental (not climate) damage. As for sources of evidence, reports from international organisations and a legal opinion from a Nigerian law professor were used.

## E. Limitation Periods

The limitation period in the Italian legal system is varied.

The statute of limitations for rights to compensation for damage caused by a tort (non-contractual liability) lasts five years and runs from the time the damage is manifested externally by becoming objectively perceivable and knowable. However, the limitation period may be interrupted by a formal act (e.g. a court application or even a warning or a formal notice) and in such a case the five years run again from the moment the interruptive event occurs.

The limitation period for claims for damages arising from a breach of contract (contractual liability) lasts 10 years. It can be interrupted as well.

Injunctive relief claims (i.e. a request to the court to order the other party "to do something" or "not to do something") are subject to a 5-year limitation period if they relate to conduct potentially linked to non-contractual liability.

However, in the climate context, it can be argued that the corporate conduct giving rise to non-contractual liability is perennial and continuous, in the same way as climate damage caused by corporate emissions of greenhouse gases, or the threat of restriction in the enjoyment of fundamental rights linked to corporate negligence in dealing with the climate emergency.

## 3. Remedies

The term is virtually untranslatable into legal Italian because it has no equivalent in Civil Law (F. De Franchis, *Law Dictionary. 1 English-Italian*, Milan, Giuffrè, 1984, entry: Remedy, p. 1273 ff.).

In Italian law, there are different forms of 'remedy' of various kinds: from the so-called 'inibitoria' (similar to inhibition) to compensation for damages to the condemnation of a private party or public administration to 'do'.

However, in the Italian system, some remedies, present in other legal systems, such as so-called "punitive damages", are not provided for.

These differences are based on the general character of the principle of *neminem laedere*.

The Italian Civil Code provides for numerous forms of protection in the name of the *neminem laedere* principle. These actions protect pecuniary interests, fundamental rights, rights to information, consumer rights, etc.

These actions reinforce the right of access to the courts provided for by the Aarhus Convention and can therefore also be used for future climate litigation against companies (e.g. on defective products, protection of information against greenwashing, protection of private property against dangerous activities, damage from infrastructure guarded by private companies such as gas pipelines, etc.).

Specifically concerning the "climate liability", different remedies are possible in the Italian legal system:

### A. Pecuniary remedies

- it is possible to claim compensation for damages caused by climate impacts;
- it is possible to claim compensation for future damages related to the need to carry out works of adaptation to the impacts of climate change;
- it is possible to claim compensation for moral damages related to 'eco-anxiety' or 'climate-anxiety' (in 2017, the American Psychiatric Association (APA) described eco-anxiety as 'a chronic fear of environmental doom').

### B. Non-pecuniary remedies

- it is possible to seek an order to take mitigation measures (e.g., curbing emission levels) even with negative content (e.g., not to carry out projects that have strong environmental impacts);
- it is possible to seek an order to carry out adaptation measures (e.g., build higher levees to protect banks from rising seas);
- it is possible to seek an order to stop greenwashing (e.g., to change corporate communication about the climate-safe nature of certain products).

In the *Greenpeace, Re:Common et al. vs ENI* case, claimants seek pecuniary and non-pecuniary remedies. According to claimants, in particular, pecuniary remedies are required for both pecuniary and non-pecuniary damage (patrimonial and non-patrimonial damage) suffered by the individuals because of specific events linked to human-induced climate change and determining non-patrimonial damage (the s.c. “moral damage”).

With regard to the *Greenpeace* and *ReCommon*, pecuniary remedies are required for both pecuniary and non-pecuniary damage too. According to claimants, the pecuniary damage is linked to the economic and financial resources deployed to combat the effects of human-induced climate change; the non-pecuniary damage is resulting from the frustration of the respective statutory purposes.

Additionally, the claimants request that ENI limit the aggregate annual volume of all CO<sub>2</sub> emissions into the atmosphere to such an extent that this volume of emissions is reduced by at least 45% at the end of 2030 compared to 2020 levels, or to another extent – to be ascertained in the course of the case – ensuring compliance with the scenarios developed by the international scientific community to keep the temperature rise within 1.5 degrees (Paris Agreement).

Finally, the claimants also ask to condemn the Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A. to adopt an operational policy that defines and monitors the climate goals that ENI S.p.A. should adopt in line with the Paris Agreement and the scenarios developed by the international scientific community to keep the temperature rise within 1,5 degrees, in the terms indicated in the aforementioned point (*Greenpeace, Re:Common et al. vs ENI*).

Charles Clore House  
17 Russell Square  
London WC1B 5JP

T 020 7862 5151  
E [info@biicl.org](mailto:info@biicl.org)

[www.biicl.org](http://www.biicl.org)

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