



UNIVERSITÀ DEGLI STUDI DI MILANO

Facoltà di Giurisprudenza

Pubblicazioni del Dipartimento di Diritto pubblico italiano e sovranazionale

THE ENFORCEMENT OF THE ESG PRINCIPLES IN A TRANSNATIONAL DIMENSION

L'ATTUAZIONE DEI PRINCIPI ESG NELLA DIMENSIONE TRANSNAZIONALE

edited by/a cura di

STEFANIA BARIATTI, OLIVIA LOPES PEGNA, LORENZO SCHIANO DI PEPE,
LUIGI FUMAGALLI, ZENO CRESPI REGHIZZI



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FOREWORD

This volume presents the proceedings of the conferences on the transnational dimension of the enforcement of Environmental, Social and Governance (“ESG”) principles, held within the framework of a research project carried out by three teams at the Universities of Milan, Genoa and Florence and financed by the Italian Ministry of University and Research (PRIN: Progetto di ricerca di rilevante interesse nazionale – Bando 2022), held between December 2024 and June 2025.

The importance of ESG principles as a means for promoting fair business development has increased in the last few years and is now widely recognised by the legislators, courts, scholars, entrepreneurs, legal practitioners, financial and business milieu. The role of corporations in protecting human rights and the environment and the consequent corporate boards’ duties to establish appropriate processes, as part of their duty of care, are well established.

Nonetheless, when the research project was proposed, significant uncertainties still surrounded the role of, and the interactions between, the different institutional levels (international, regional, and national) involved in the implementation and application of ESG-related standards, as well as the private international law and procedural techniques aimed at ensuring actionability and enforceability of ESG-related rights in the domestic legal systems.

Indeed, for several years, the attention of the international community to corporate social responsibility, i.e. companies’ responsibility for their economic, social, and environmental impact on people and the planet, has prompted the adoption of several measures of soft regulation. These include the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD Guidelines on Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights. Most multinationals have endorsed the standards set by these instruments, by either including specific clauses in their contracts or unilaterally committing to comply with such standards, e.g. through codes of conduct. ESG is reflected in rules of transparency and sustainable finance, notably concerning responsible

investment (UNPRI) and information on non-financial conduct of companies. ESG is also playing an increasing role in international arbitration: in 2019 the Hague Rules on Business and Human Rights Arbitration were adopted and a rising number of investment agreements contain ESG provisions.

Recently, efforts have been deployed at the regional and domestic level to incorporate ESG principles into formally binding rules. In particular, as regards the European Union and its Member States, the Corporate Sustainability Reporting Directive (CSRD, Directive 2022/2464) and the Corporate Sustainability Due Diligence Directive (CSDDD, Directive 2024/1760), the 2017 French Due Diligence Obligation Law (*Loi sur le devoir de vigilance*), the 2019 Dutch Child Labour Due Diligence Law (*Wet zorgplicht kinderarbeid*), and the 2021 German Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettengesetz*).

Considering the above, through a multidisciplinary approach this project aimed at: (i) exploring and critically analysing the (actual and potential) role of EU law in ensuring a higher degree of enforceability of principles, rules, and guidelines relevant to ESG and (ii) assessing the enforceability of ESG standards in a transnational perspective, through private international law and procedural techniques.

As far as the first part of the project is concerned, the role of EU law has been analysed, also with regard to the emerging body of substantive law, original to the EU, specifically addressing ESG principles and standards from the different perspectives of (inter alia) human rights, health, the environment, and innovation. Indeed, the EU's increasing role in the regulation of ESG related issues is part of its long-standing engagement in promoting fundamental rights, a level-playing-field between enterprises, and the harmonization of market rules. The renewed attention of the EU for climate change has enhanced the EU dimension of ESG, as attested, for instance, by the 2019 European Green Deal presented by the Commission and the subsequent normative developments that have in the meantime been adopted, but also by the participation of the EU to international agreements, together with its Member States. Last but not least, EU law is capable of deeply and strongly influencing the activities and conducts of third countries and their nationals through the so-called "Brussels Effect", i.e. the mandatory application of EU law to non-EU entities that enter European markets, as it happens in other areas.

The position of the EU as the current main legislative body in the field of private international law has exercised an obvious impact on the second part of the project, that has addressed the conflict of laws rules and procedural

instruments available to the individuals and stakeholders concerned to enforce their rights in the Member States. This analysis covered the distribution of jurisdiction in respect of claims filed against corporations liable of ESG-related breaches, the recognition and enforcement of decisions adopted by Member States' courts, the role of international arbitration, and the law governing the various aspects of ESG principles actionability and enforcement.

The research required a multidisciplinary approach, reflecting the diverse background of the teams, and including experts in public and private international law, EU law, and company law. The conferences convened also experts from several Member States to contribute to the discussion and share ideas.

The editors are indebted to Michele Grassi, Anna Liebman, Maria Chiara Accardo, Chiara Gambino, and Giovanni Chiapponi for their contribution to the Project and help in the editing of this book.

The Editors

January 2026

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SECTION I
LA DIMENSIONE ESTERNA E INTERNA
DEI CRITERI ESG
NEL DIRITTO DELL'UNIONE EUROPEA

LA CONDIZIONALITÀ AMBIENTALE NEGLI ACCORDI CONCLUSI DALL'UNIONE EUROPEA CON PAESI TERZI

Giulia D'Agnone

SOMMARIO: 1. Introduzione. – 2. La promozione della tutela ambientale nell'ambito della politica di cooperazione allo sviluppo dell'Unione europea. – 3. La promozione dello sviluppo sostenibile attraverso la politica commerciale comune. I capitoli sul commercio e lo sviluppo sostenibile di prima generazione. – 3.1. La nuova generazione di capitoli sul commercio e lo sviluppo sostenibile negli accordi di libero scambio conclusi dall'Unione europea. – 4. Una condizionalità ambientale dell'Unione europea?

1. Introduzione.

Il Trattato di Lisbona indica l'“elevato livello di tutela e di miglioramento della qualità dell'ambiente” tra gli obiettivi dell'Unione europea (art. 3, par. 3, TUE). A tale obiettivo a carattere interno corrisponde, sul piano esterno, l'introduzione di due disposizioni che costituiscono espressione della dimensione internazionale del quadro costituzionale europeo¹: l'art. 3, par. 5, e l'art. 21 TUE. I due articoli fanno riferimento – talvolta in maniera poco chiara – a principi, valori e obiettivi che l'Unione è chiamata a perseguire non solo sul piano interno, bensì anche su quello esterno: tra essi risulta, per l'appunto, lo sviluppo sostenibile (art. 21, par. 2, lett. f)².

¹ Così E. CANNIZZARO, *The Value of the EU International Values*, in W.T. DOUMA-C. ECKES-P. VAN ELSUWEGE-E. KASSOTI-A. OTT-R.A. WESSEL (eds.), *The Evolving Nature of EU External Relations Law*, The Hague, 2022, 4.

² L'art. 21, par. 2, lett. f), TUE stabilisce infatti che “L'Unione definisce e attua politiche comuni e azioni e opera per assicurare un elevato livello di cooperazione in tutti i settori delle relazioni internazionali al fine di: [...] f) contribuire all'elaborazione di misure internazionali volte a preservare e migliorare la qualità dell'ambiente e la gestione sostenibile delle risorse naturali mondiali, al fine di assicurare lo sviluppo sostenibile”.

Se, dunque, la promozione della tutela ambientale costituisce senza dubbio un obiettivo dell'azione esterna dell'Unione europea, si tratta di comprendere le modalità attraverso le quali quest'ultima persegue tale obiettivo e, più precisamente, se tale promozione corrisponda ad una vera e propria politica di condizionalità.

Prima di procedere con l'indagine, è tuttavia necessario precisare che quest'ultima avrà ad oggetto esclusivamente i rapporti bilaterali che l'Unione europea instaura con Stati terzi o organizzazioni internazionali³, così che ne risultano escluse sia le misure a carattere unilaterale adottate dall'UE, sia le relazioni condotte con Paesi terzi nell'ambito di forum multilaterali.

Inoltre, con riguardo agli accordi bilaterali conclusi dall'Unione con Stati terzi, l'ambito di indagine sarà limitato a due politiche: la politica di cooperazione allo sviluppo e la politica commerciale. La selezione si giustifica in ragione della circostanza che proprio nell'ambito di tali settori l'Unione europea ha iniziato, negli anni Novanta, a sviluppare la sua politica c.d. di condizionalità esterna, attraverso la quale ha inteso promuovere il rispetto dei diritti umani, dello stato di diritto e della democrazia negli accordi bilaterali con Paesi terzi.

Pertanto, a questa breve introduzione farà seguito un paragrafo dedicato alla sostenibilità ambientale nell'ambito della politica di cooperazione allo sviluppo (par. 2) e uno avente ad oggetto la politica commerciale comune (par. 3), entrambi volti a verificare gli strumenti utilizzati dall'Unione per promuovere la tutela ambientale. L'analisi sarà funzionale a trarre alcune considerazioni più generali in merito all'esistenza di una politica di condizionalità ambientale negli accordi che l'Unione europea conclude con Paesi terzi o organizzazioni internazionali (par. 4).

2. La promozione della tutela ambientale nell'ambito della politica di cooperazione allo sviluppo dell'Unione europea.

Nel 2016 le istituzioni politiche dell'Unione europea adottavano il Nuovo Consenso europeo in materia di sviluppo, che costituisce il quadro comune generale di riferimento per la cooperazione europea allo sviluppo⁴. In tale

³ Ai fini del presente articolo, il riferimento agli accordi internazionali dell'Unione europea comprende sia gli accordi bilaterali e multilaterali conclusi dall'Unione europea da sola (competenza esclusiva) sia quelli conclusi congiuntamente agli Stati membri (accordi misti).

⁴ Dichiarazione comune del Consiglio e dei rappresentanti dei governi degli Stati membri riuniti in sede di Consiglio, del Parlamento europeo e della Commissione europea (2017/C

strumento, che succede al Consenso europeo del 2006⁵, la dimensione ambientale (che si integra con quella economica e sociale) dello sviluppo sostenibile è stata oggetto di grande enfasi, in quanto si riconosce che “[i]l benessere umano e la resilienza delle società dipendono da un ambiente sano e da ecosistemi funzionanti. Il degrado ambientale, i cambiamenti climatici, le condizioni climatiche estreme e le calamità naturali o provocate dall’uomo possono vanificare i vantaggi in termini di sviluppo e il progresso economico, soprattutto per i poveri, il che può accrescere le vulnerabilità e le esigenze, mettere a repentaglio la pace e la stabilità e provocare migrazioni su vasta scala”, con la conseguenza che “[o]ltre alle azioni specifiche, le considerazioni ambientali [vanno] integrate in tutti i settori della cooperazione allo sviluppo, anche attraverso azioni preventive”⁶.

In tale prospettiva, dunque, già dieci anni fa l’Unione europea e i suoi Stati membri sostenevano la centralità dello sviluppo sostenibile e si impegnavano a promuovere e a facilitare la tutela dell’ambiente negli scambi e negli investimenti nei Paesi in via di sviluppo, favorendo una crescita economica inclusiva e sostenibile e modelli di crescita che tengano conto della scarsità delle risorse e dell’azione in materia di cambiamenti climatici⁷.

Nonostante ciò, se si procede ad una verifica del contenuto degli accordi internazionali di cooperazione allo sviluppo conclusi dall’Unione europea negli ultimi dieci anni, emerge una scarsa incidenza sulle politiche ambientali dei Paesi beneficiari nell’ambito della politica di cooperazione allo sviluppo europea.

È possibile, infatti, individuare (almeno) due diverse categorie di accordi che, pur testimoniando un diverso grado di promozione della tutela ambientale, dimostrano comunque l’incapacità dell’Unione europea di incidere in maniera significativa sulla sfera di sovranità dei Paesi partners in tale ambito.

Una prima categoria raggruppa una serie di accordi che contengono prescrizioni minime in materia ambientale, basate essenzialmente sulla cooperazione tra le parti.

210/01) *Nuovo Consenso europeo in materia di sviluppo. Il nostro mondo, la nostra dignità, il nostro futuro*, in GU C 210 del 30 giugno 2017.

⁵ Dichiarazione comune del Consiglio e dei rappresentanti dei governi degli Stati membri riuniti in sede di Consiglio, del Parlamento europeo e della Commissione sulla politica di sviluppo dell’Unione europea *Il consenso europeo*, in GU C 46 del 24 febbraio 2006.

⁶ V. *Nuovo Consenso europeo in materia di sviluppo*, cit., par. 43.

⁷ *Ivi*, par. 52.

Un esempio è rappresentato dall'accordo di partenariato firmato dall'Unione europea con la Malesia nel 2022⁸. In esso le parti, pur ribadendo "l'impegno a promuovere lo sviluppo sostenibile, a collaborare per affrontare le sfide connesse ai cambiamenti climatici e alla globalizzazione e a contribuire al conseguimento degli obiettivi di sviluppo concordati a livello internazionale, in particolare per rafforzare un partenariato mondiale per lo sviluppo rinnovato nell'agenda 2030 per lo sviluppo sostenibile"⁹, sostanzialmente stabiliscono solo una generica cooperazione per promuovere la salvaguardia e il miglioramento dell'ambiente ai fini dello sviluppo sostenibile¹⁰, "anche nell'ambito di programmi regionali, scambi di buone pratiche, dialoghi politici e normativi, nonché di conferenze e seminari".

Trattasi, evidentemente, di impegni piuttosto vaghi nel loro contenuto e dal carattere essenzialmente programmatico, il cui mancato adempimento ad opera di una delle parti è difficilmente censurabile.

Una seconda tipologia di accordi trova un esempio nell'accordo di partenariato concluso dall'Unione europea con l'Armenia nel 2018¹¹. Si tratta di un accordo che è stato presentato come "un passo importante verso una maggiore partecipazione politica ed economica dell'Unione nel Caucaso meridionale" in quanto, intensificando il dialogo politico e migliorando la cooperazione in un'ampia gamma di settori, si ritiene che getti le basi per una relazione bilaterale più efficace con la Repubblica d'Armenia¹².

L'accordo, oltre a contenere due capi dedicati, rispettivamente, all'ambiente e all'azione per il clima, in forza dei quali le parti s'impegnano a rafforzare la cooperazione e la promozione di misure volte a tal fine, principalmente attraverso lo

⁸ Accordo quadro di partenariato e cooperazione tra l'Unione europea e i suoi Stati membri, da una parte, e il governo della Malaysia, dall'altra, firmato con Decisione (UE) 2022/1987 del Consiglio, del 13 ottobre 2022, relativa alla firma, a nome dell'Unione, dell'accordo quadro di partenariato e cooperazione tra l'Unione europea e i suoi Stati membri, da una parte, e il governo della Malaysia, dall'altra, in GU L 273 del 21 ottobre 2022.

⁹ V. considerando n. 3 del preambolo.

¹⁰ V. art. 39 dell'accordo.

¹¹ Accordo di partenariato globale e rafforzato tra l'Unione europea e la Comunità europea dell'energia atomica e i loro Stati membri, da una parte, e la Repubblica d'Armenia, dall'altra, GU L 23 del 26 gennaio 2018, 4, concluso con Decisione (UE) 2021/270 del Consiglio del 25 gennaio 2021 relativa alla conclusione, a nome dell'Unione europea, dell'accordo di partenariato globale e rafforzato tra l'Unione europea e la Comunità europea dell'energia atomica e i loro Stati membri, da una parte, e la Repubblica d'Armenia, dall'altra, in GU L 61 del 22 febbraio 2021, 1.

¹² Considerando n. 2 della decisione.

scambio di informazioni e di competenze¹³, contiene anche un capo dedicato al commercio e allo sviluppo sostenibile¹⁴. Il contenuto del capo in questione è in larga parte corrispondente a quello dei capitoli sul commercio e lo sviluppo sostenibile (CSS) inseriti negli accordi di libero scambio, in particolare quelli c.d. di prima generazione, sui quali si tornerà meglio in seguito¹⁵. In tale sede è sufficiente sottolineare che, in particolare, vi si ribadisce il diritto di ciascuna delle parti di definire le proprie politiche e priorità in materia di sviluppo sostenibile, disciplinando i propri livelli di protezione interna in materia di ambiente¹⁶; in secondo luogo, si stabilisce l'impegno delle parti a dare effettiva attuazione agli accordi ambientali multilaterali (MEA) di cui sono firmatarie¹⁷. Infine, si rinviene una norma sul mantenimento dei livelli di protezione, in forza della quale le parti si impegnano a non incoraggiare gli scambi o gli investimenti abbassando i livelli di protezione offerti dalle leggi interne in materia di ambiente o di lavoro¹⁸.

A ciò si aggiunga un ulteriore profilo di similitudine con i CSS di prima generazione inseriti negli accordi di libero scambio, ossia l'esclusione delle disposizioni contenute nel capo in questione dallo strumento di risoluzione delle controversie previsto dall'accordo per gli altri obblighi in esso contenuti¹⁹.

È piuttosto evidente che, nonostante l'enfasi e lo spazio dedicato all'aspetto ambientale all'interno dell'accordo, si tratta per lo più di disposizioni a carattere programmatico, il cui contenuto è piuttosto vago, così che ne risulta difficilmente contestabile la violazione ad opera di una delle parti. Inoltre, esse non estendono il novero degli obblighi incombenti sulle parti, ma si limitano per lo più a richiamare impegni già contratti sul piano multilaterale, senza altro aggiungere agli stessi.

¹³ V. capi 3 e 4 dell'accordo tra l'Unione europea e l'Armenia, cit.

¹⁴ *Ivi*, capo 9.

¹⁵ V. *infra*, par. 3.

¹⁶ Art. 273 dell'accordo tra l'Unione europea e l'Armenia, cit.

¹⁷ *Ivi*, art. 275.

¹⁸ Art. 280.

¹⁹ V. art. 285: "Il capo 13, sezione C, sottosezione II, del presente titolo non si applica alle controversie nell'ambito del presente capo. Per eventuali controversie di questo tipo, dopo che il collegio arbitrale ha consegnato la sua relazione finale a norma degli artt. 325 e 326, le parti, tenendo conto della relazione, discutono le misure appropriate da attuare. Il comitato di partenariato sorveglia l'attuazione di tali misure e tiene sotto controllo la questione, anche attraverso il meccanismo di cui all'art. 284, par. 3".

In tale quadro, non sembra distinguersi neanche il più recente Accordo di Samoa²⁰, il nuovo quadro di partenariato tra l'Unione Europea e i Paesi dell'Organizzazione degli Stati dell'Africa, dei Caraibi e del Pacifico (OSACP), firmato ad Apia nel novembre 2023 che sostituisce, dopo circa vent'anni, l'Accordo di Cotonou, istituendo un quadro comune al quale si affiancano tre protocolli regionali distinti, rispettivamente per l'Africa, i Caraibi e il Pacifico, per adattare le strategie di cooperazione alle specificità dei diversi contesti. In tale accordo, e in ciascuno dei tre protocolli regionali, sono state individuate sei priorità, tra le quali anche la sostenibilità ambientale e i cambiamenti climatici²¹. Tuttavia, nonostante siano diverse le disposizioni volte alla tutela dell'ambiente, allo sviluppo sostenibile e a fronteggiare i cambiamenti climatici²², si tratta, ancora una volta, di disposizioni la cui attuazione (e, quindi, eventuale violazione) sono difficili da accertare²³. Non vi è traccia, peraltro, di una clausola che qualifichi la tutela ambientale (o alcuni accordi internazionali con tale obiettivo) quale elemento essenziale dell'accordo²⁴.

Né sembra possibile che la clausola che indica i diritti umani tra gli elementi essenziali sia invocata anche in caso di violazioni di disposizioni in materia di sviluppo sostenibile²⁵, per due ordini di motivazioni. La prima è che, come si

²⁰ Accordo di partenariato tra l'Unione europea e i suoi Stati membri, da una parte, e i membri dell'Organizzazione degli Stati dell'Africa dei Caraibi e del Pacifico, dall'altra, in GU L 2862 del 28 dicembre 2023.

²¹ Le sei priorità strategiche sulle quali si basa l'Accordo sono: diritti umani, democrazia e governance; pace e sicurezza; sviluppo umano e sociale; crescita economica e sviluppo inclusivi e sostenibili; sostenibilità ambientale e cambiamenti climatici; migrazione e mobilità.

²² Si tratta, per lo più, di disposizioni incluse in un apposito titolo (il titolo V) sulla sostenibilità e i cambiamenti climatici.

²³ V. ad es. artt. 57 e 58, rubricati rispettivamente "*climate commitments*" e "*climate action*".

²⁴ L'art. 9 e l'art. 18 indicano come elementi essenziali dell'accordo, infatti, i diritti umani, i principi democratici e dello stato di diritto e la non proliferazione di armi di distruzione di massa.

²⁵ A ciò sembrerebbe alludere L. Bartels con riguardo ad eventuali sovrapposizioni tra sistemi di monitoraggio della compliance in materia di sviluppo sostenibile: "*there is an overlap between human rights and environmental protection, particularly in the context of indigenous rights and transboundary pollution. However, the existence of overlapping monitoring and enforcement structures for these two overlapping sets of obligations is not necessarily a problem. Even if there is some potential duplication in coverage, there is value in being able to enforce core labour standards both under the dedicated mechanisms established for these standards and, where necessary, by adopting 'appropriate measures' on the basis that these standards are also human rights*". L. BARTELS, *Human rights provisions in Economic Partnership Agreements in light of the expiry of the Cotonou Agreement*

avrà modo di vedere nei paragrafi seguenti, anche laddove disposizioni a carattere ambientale sono inserite nella clausola sugli elementi essenziali, non sono violazioni *tout court* a legittimare l'adozione di "misure appropriate", bensì violazioni particolarmente gravi e riguardanti norme ben precise, di solito il rispetto dell'Accordo di Parigi sul clima.

La seconda è che, nonostante la crescente sensibilizzazione in materia ambientale, e alcune recenti pronunce a livello internazionale molto significative, sembra ancora prematuro ricondurre violazioni di norme a carattere ambientale a violazioni di diritti umani, salvo casi particolari.

Emerge dunque chiaramente un limite della più recente politica di cooperazione allo sviluppo europea. Come è stato indicato sopra, infatti, la visione politica in tale ambito si fonda su un documento, il Nuovo Consenso europeo allo sviluppo, ormai datato. Si tratta, evidentemente, di un atto adottato in un contesto geopolitico totalmente diverso, che inevitabilmente non riflette i nuovi interessi e obiettivi strategici dell'Unione. Quest'ultima si trova perciò nella difficile posizione di dover bilanciare le priorità dei paesi partners con obiettivi e interessi strategici vecchi ed emergenti, spesso tra loro non convergenti.

In tale contesto la protezione dell'ambiente, che diversamente dalla promozione dei diritti umani o dello stato di diritto non costituisce un valore dell'Unione (art. 2 TUE), ma un obiettivo generale della sua azione esterna, evidentemente non corrisponde (più) ad un interesse da promuovere in via prioritaria per mezzo della politica di cooperazione allo sviluppo.

3. La promozione dello sviluppo sostenibile attraverso la politica commerciale comune. I capitoli sul commercio e lo sviluppo sostenibile di prima generazione.

La promozione della tutela ambientale per il tramite delle relazioni a carattere commerciale dell'Unione europea è stata, negli ultimi anni, oggetto di grande attenzione in dottrina²⁶.

in 2020, study for The European Parliament, DG for External Policies Policy Department, 2017, 33.

²⁶ Sul tema v. in particolare L. BARTELS, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, in *Legal Issues of Economic Integration*, 2013, 297 ss.; ID., *Human Rights, Labour Standards, and Environmental Standards in CETA*, in S. GRILLER *et al.* (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*, Oxford, 2017, 202 ss.; K. HRADILOVÁ-O. SVOBODA, *Sustainable*

A partire dal 2006, con la Comunicazione *Europa Globale: Competere nel mondo*²⁷, la Direzione Generale Commercio della Commissione europea ha infatti integrato l'agenda interna, delineata dalla rinnovata strategia di Lisbona²⁸, con un'agenda esterna per la creazione di opportunità in un'economia globalizzata da realizzare, in particolare, tramite il potenziamento degli impegni in ambito OMC e la moltiplicazione degli accordi di libero scambio. Quanto a questi ultimi, l'inclusione di capitoli dedicati allo sviluppo sostenibile rappresenta uno dei maggiori profili di novità.

Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness, in *Journal of World Trade*, 2018, 1019 ss.; G. ADINOLFI, *A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development, Further Steps Towards the Attainment of the Sustainable Development Goals?*, in C. BEVERELLI et al. (eds.), *International Trade, Investment, and the Sustainable Development Goals*, Cambridge, 2020, 15 ss.; ID., *Gli obiettivi e la sfera di operatività degli accordi preferenziali dell'Unione europea*, in G. ADINOLFI (a cura di), *Gli Accordi Preferenziali di Nuova Generazione dell'Unione Europea*, Torino, 2021, 3 ss.; I. ESPA-G. MARÍN DURÁN, *Promoting Green Energy Through EU Preferential Trade Agreements: Potential and Limitations*, in *Legal Issues of Economic Integration*, 2020, 115 ss.; G. MARÍN DURÁN, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, in *Common Market Law Review*, 2020, 1031 ss.; ID., *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, UCL Research Paper Series No. 3/2023; M. BRONCKERS-G. GRUNI, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Journal of International Economic Law*, 2021, 25 ss.; I. BORCHERT-P. CONCONI-M. DI UBALDO-C. HERGHELEGIU, *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy*, in *World Trade Review*, 2021, 623 ss.; A. MUCCIONE, *Il rapporto dei capitoli su "commercio e sviluppo sostenibile" con la disciplina in materia commerciale*, in G. ADINOLFI (a cura di), *Gli Accordi Preferenziali di Nuova Generazione dell'Unione Europea*, Torino, 2021, 235 ss.; S. VILLANI, *I Capitoli in Materia di Sviluppo Sostenibile negli Accordi Commerciali dell'Unione Europea: Prove di Rilevanza Sistemica*, in *Diritto del Commercio Internazionale*, 2022, 707 ss.; F. DE ANDRADE CORREA-A. LEHMEN, *Trade, Sustainable Development and Climate Change: How Can Free Trade Agreements Be Leveraged for Increased Climate Action? Perspectives on the EU-MERCOSUR Agreement*, in *Legal Issues of Economic Integration*, 2023, 287 ss.; I. ESPA-M. TOKAS-M.C. CORDONIER SEGGER-M. GEHRING (eds.), *Special Issue: Climate Change and Sustainability Advances in EU Trade Agreements: Policy and Legal Innovations, Interlinkages and Implementation*, in *European Foreign Affairs Review*, 2025.

²⁷ Comunicazione della Commissione al Consiglio, al Parlamento europeo, al Comitato economico e sociale europeo e al Comitato delle regioni *Un'Europa globale – competere nel mondo* COM(2006) 567 def del 4 ottobre 2006.

²⁸ A fronte delle proposte avanzate dalla Commissione (Comunicazione al Consiglio europeo di primavera *Lavorare insieme per la crescita e l'occupazione – Il rilancio della strategia di Lisbona* COM(2005) 24 del 2 febbraio 2005), a seguito del Consiglio europeo del marzo 2005 è stata rinnovata la strategia di Lisbona, l'ambizioso programma di riforme dell'Unione europea avviato con il Consiglio europeo del marzo del 2000.

La promozione dello sviluppo sostenibile attraverso gli accordi di libero scambio è stata realizzata principalmente attraverso tre tipologie di disposizioni che, pur con le dovute variazioni e differenze riscontrabili nei diversi accordi, nondimeno ricorrono nei diversi capitoli sul commercio e lo sviluppo sostenibile ²⁹.

Come già anticipato con riguardo al capitolo inserito nell'accordo di cooperazione con l'Armenia, la prima tipologia di disposizione è la c.d. "contestualizzazione", attraverso la quale le parti riaffermano gli impegni internazionali esistenti, con particolare riguardo agli accordi ambientali multilaterali (MEA), come la Convenzione sulla diversità biologica ³⁰, il Protocollo di Kyoto ³¹, l'Accordo di Parigi ³². Il riferimento è ai MEA già ratificati da ciascuna parte dell'accordo bilaterale: si tratta di impegni già assunti in foro multilaterali da ciascuna delle parti dell'accordo bilaterale, le quali non vedono accrescere il novero degli obblighi su di esse gravanti. Difetta, peraltro, un elenco, riprodotto in tutti gli accordi di libero scambio dell'UE, di trattati multilaterali da ratificare e attuare, a differenza degli impegni in materia di protezione sociale, che sono invece indicati in una lista di convenzioni multilaterali replicata nei diversi accordi di libero scambio.

Una seconda clausola tipica dei CSS è quella del cosiddetto "*level playing field*", contenente l'obbligo delle parti di non abbassare gli standard ambientali per favorire il commercio o attrarre investimenti, e a garantire un'efficace attuazione di tali standard. Queste clausole sono state criticate perché "*do not prohibit any derogation or enforcement failure of domestic environmental standards, but only insofar as actual or intended effects on bilateral trade (or investment) can be shown, making a violation thereof harder to establish*" ³³.

²⁹ Sugli elementi dei capitoli sul commercio e lo sviluppo sostenibile v., per tutti per un maggiore approfondimento, G. MARÍN DURÁN, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, in *Common Market Law Review*, 2020, 1031 ss.

³⁰ Convenzione sulla diversità biologica (CBD) del 5 giugno 1992, in 1760 U.N.T.S. 69.

³¹ Protocollo di Kyoto alla convenzione quadro delle Nazioni Unite sui cambiamenti climatici dell'11 dicembre 1997, in 2303 U.N.T.S. 162.

³² Accordo di Parigi del 12 dicembre 2015, in 3156 U.N.T.S. 79. La lista completa degli accordi multilaterali può essere rinvenuta in G. MARÍN DURÁN, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, *UCL Research Paper Series* n. 3/2023, reperibile online, 3.

³³ G. MARÍN DURÁN, *The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements*, cit., 4.

Una terza categoria di disposizioni generalmente presenti nei CSS riguarda i livelli attuali e futuri di protezione ambientale: ciascuna parte si impegna, in sostanza, a garantire che la propria legislazione interna assicuri elevati livelli di protezione ambientale e che gli stessi siano garantiti nel tempo.

Oltre a queste tipologie di clausole, i primi capitoli sul commercio e lo sviluppo sostenibile contengono anche meccanismi istituzionali predisposti per monitorare l'attuazione di tali capitoli. Tuttavia, proprio il profilo dell'*enforcement* ha sollevato maggiori perplessità in dottrina. Ciò per due principali motivi: che i CSS di prima generazione non prevedono sanzioni o altre misure in caso di violazione degli obblighi in essi contenuti; e che gli stessi non sono soggetti alle procedure di risoluzione delle controversie previste per le violazioni degli altri obblighi degli accordi³⁴.

Quanto a questo secondo aspetto, i CSS sono soggetti a procedure *ad hoc*, ossia procedure specifiche, alternative ai meccanismi di risoluzione delle controversie usati per far rispettare tutti gli altri obblighi degli accordi di libero scambio³⁵. Mentre le violazioni di questi ultimi di solito sono accertate mediante decisioni vincolanti per le parti, emesse da organi indipendenti, i capitoli sul commercio e lo sviluppo sostenibile stabiliscono che se una delle parti sospetta che l'altra stia violando gli impegni in esso contenuti, può avviare consultazioni intergovernative e, in caso di fallimento, può essere convocato un gruppo di esperti per determinare se una parte è inadempiente e suggerire possibili soluzioni. Peraltro, l'attuazione delle misure indicate dal panel di esperti è soggetta alla discrezionalità delle parti.

La riuscita di questo meccanismo, che è non giudiziario e si basa principalmente sul dialogo tra le parti, dipende inevitabilmente dalla cooperazione della parte che non intende o ha difficoltà a rispettare gli impegni³⁶.

È dunque evidente che le disposizioni dei capitoli sul commercio e lo

³⁴ V. A. MARX-F. EBERT-N. HACHEZ-J. WOUTERS, *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements*, Leuven Centre for Global Governance Studies, Leuven, 2017.

³⁵ V. ad esempio l'art. 285, par. 5, dell'accordo tra l'Unione europea e la Comunità andina, secondo il quale "*This Title is not subject to Title XII (Dispute Settlement)*"; v. anche art. 284, par. 4, dell'Accordo tra l'UE e l'America centrale "*The Parties shall not have recourse to dispute settlement procedures under Title X (Dispute Settlement) of Part IV of this Agreement and to the Mediation Mechanism for Non-Tariff Measures under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement for matters arising under this Title*".

³⁶ V., a titolo esemplificativo, M. BRONCKERS-G. GRUNI, *Retooling the Sustainability Standards in EU Free Trade Agreements*, cit., 1 ss.

sviluppo sostenibile che sono stati inclusi negli accordi di libero scambio a partire dal 2006³⁷, in maniera simile a quanto già rilevato con riguardo agli accordi di cooperazione allo sviluppo, si caratterizzino per un contenuto a carattere essenzialmente programmatico o comunque scarsamente precettivo, così che è stato evidenziato come “*the main value added of TSD chapters is to enhance dialogue and cooperation in order to attain sustainable trade objectives*”³⁸.

D'altronde, la stessa Corte di giustizia dell'Unione europea, chiamata ad interpretare le disposizioni del CSS dell'accordo di libero scambio negoziato con Singapore³⁹, il quale include un CSS di prima generazione, ha rilevato che le stesse “hanno per obiettivo non già di regolamentare i livelli di protezione sociale e di tutela ambientale nel rispettivo territorio delle Parti, bensì di disciplinare gli scambi commerciali tra l'Unione e la Repubblica di Singapore subordinando la liberalizzazione degli stessi alla condizione che le Parti rispettino i propri obblighi internazionali in materia di protezione sociale dei lavoratori e di tutela dell'ambiente”⁴⁰, sottolineando quindi come tali disposizioni non siano volte a disciplinare la protezione ambientale *tout court*, bensì solo a garantire che il commercio tra le parti sia condotto in osservanza di alcune regole di natura ambientale.

3.1. *La nuova generazione di capitoli sul commercio e lo sviluppo sostenibile negli accordi di libero scambio conclusi dall'Unione europea.*

Nel giugno 2022 la Commissione europea, attraverso la Comunicazione *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta* ha annunciato ufficialmente un nuovo approccio allo sviluppo sostenibile,

³⁷ Il primo accordo concluso a seguito della Comunicazione del 2006 è stato quello del 2011 con la Corea, v. Accordo di libero scambio tra l'Unione europea e i suoi Stati membri, da una parte, e la Repubblica di Corea, dall'altra, in GU L 127 del 14 maggio 2011, 6 ss., concluso con decisione (UE) 2015/2169 del Consiglio, del 1° ottobre 2015, relativa alla conclusione dell'accordo di libero scambio tra l'Unione europea e i suoi Stati membri, da una parte, e la Repubblica di Corea, dall'altra, in GU L 307 del 25 novembre 2015, 2 ss.

³⁸ I. BORCHERT-P. CONCONI-M. DI UBALDO-C. HERGHELEGIU, *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy*, cit., 631.

³⁹ Accordo di libero scambio tra l'Unione europea e la Repubblica di Singapore, in GU L 294 del 14 novembre 2019, 3 ss., concluso con decisione (UE) 2019/1875 del Consiglio, dell'8 novembre 2019, relativa alla conclusione dell'accordo di libero scambio tra l'Unione europea e la Repubblica di Singapore, in GU L 294 del 14 novembre 2019, 1 ss.

⁴⁰ Corte giust., parere 2/15 del 16 maggio 2017, ECLI:EU:C:2017:376, punto 166.

volto in particolar modo a rafforzare l'attuazione e l'effettività delle disposizioni contenute nei CSS, attraverso l'individuazione di sei priorità politiche: 1) la necessità di una maggiore proazione nella cooperazione con i partner; 2) il rafforzamento dell'approccio specifico per ciascun paese; 3) l'integrazione della sostenibilità al di là del capitolo sul commercio e lo sviluppo sostenibile contenuto negli accordi commerciali; 4) un maggiore monitoraggio dell'attuazione degli impegni in materia di CSS; 5) il rafforzamento del ruolo della società civile; e 6) un'applicazione rafforzata dei CSS tramite l'imposizione di sanzioni commerciali come misura di *extrema ratio* ⁴¹.

Ai nostri fini, sono essenzialmente tre le modifiche ai capitoli sul commercio e lo sviluppo sostenibile di maggiore interesse: i) l'estensione del meccanismo generale di risoluzione delle controversie ai capitoli sul commercio e lo sviluppo sostenibile; ii) la previsione della possibilità di stabilire sanzioni commerciali in caso di mancato rispetto degli obblighi che vanificano l'oggetto e lo scopo dell'Accordo di Parigi sui cambiamenti climatici; iii) l'inserimento del rispetto dello stesso (ed, eventualmente, della convenzione sulla biodiversità) tra gli elementi essenziali degli accordi di libero scambio ⁴².

L'accordo commerciale concluso con la Nuova Zelanda nel 2024 rappresenta il primo accordo di libero scambio contenente un capitolo sul commercio e lo sviluppo sostenibile che sostanzia il nuovo approccio europeo ⁴³, ed è stato per questo salutato come esempio di una nuova generazione di accordi commerciali,

⁴¹ Comunicazione *Il potere dei partenariati commerciali: insieme per una crescita economica verde e giusta*, cit.

⁴² Alla nota 30 della Comunicazione si legge che "Basandosi sull'elaborazione di un futuro e solido quadro globale in materia di biodiversità, in particolare per quanto riguarda la definizione degli obiettivi di biodiversità e di un meccanismo adeguato per la rendicontazione e il monitoraggio internazionali, la Commissione valuterà la possibilità di inserire la convenzione sulla diversità biologica in questo nuovo approccio".

⁴³ In GU L 2024/866 del 25 marzo 2024. L'accordo è stato concluso dall'Unione mediante decisione (UE) 2024/244 del Consiglio ed è entrato in vigore il 1° maggio 2024. Cfr. Decisione (UE) 2024/244 del Consiglio, del 27 novembre 2023, relativa alla conclusione, a nome dell'Unione, dell'accordo di libero scambio tra l'Unione europea e la Nuova Zelanda, in GU L 244 del 28 febbraio 2024. Per dei primi commenti all'accordo v. in particolare G. D'AGNONE, *Sviluppo sostenibile: una condizionalità ambientale ... soft? Alcune brevi osservazioni sull'accordo commerciale negoziato tra l'Unione europea e la Nuova Zelanda*, in *BlogDUE*, 11 settembre 2022, reperibile online; C. CERETELLI, *EU-New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations*, in *EJIL: Talk!*, 28 settembre 2022, reperibile online; S. KELLY-M. DOIDGE, *Beyond Trade: The European Union-New Zealand Free Trade Agreement*, in *Australian and New Zealand Journal of European Studies*, 15, 2023, 23 ss.

contenente “*the most ambitious sustainability commitments in any trade agreement ever*”⁴⁴.

Nonostante ciò, non mancano alcuni elementi di divergenza rispetto a quanto proclamato dalla Commissione. Ci si riferisce, in particolare, all’assenza di una clausola che definisca espressamente la protezione ambientale quale elemento essenziale dell’accordo. Sembrerebbe trattarsi, tuttavia, di un caso isolato. In altri accordi di libero scambio (seppur a carattere non esclusivamente commerciale⁴⁵), di recente negoziazione o conclusione, il rispetto di trattati multilaterali in materia ambientale è indicato tra gli elementi essenziali degli stessi. Ne costituisce un esempio l’accordo commerciale e di cooperazione concluso dall’Unione europea con il Regno Unito⁴⁶, il quale indica tra gli elementi essenziali il rispetto dell’Accordo di Parigi e della convenzione quadro delle Nazioni Unite sui cambiamenti climatici (UNFCCC), e stabilisce l’obbligo di astenersi da atti od omissioni che possano vanificare l’oggetto e la finalità dell’Accordo sul clima del 2016⁴⁷. O anche l’accordo con il MERCOSUR, relativamente al quale nel 2019 si sono concluse le negoziazioni riguardo alla parte commerciale, il quale stabilisce l’obbligo, per ciascuno dei due partners commerciali, di rimanere parte della convenzione quadro delle Nazioni Unite sui cambiamenti climatici e dell’Accordo di Parigi⁴⁸.

⁴⁴ Comunicato stampa del 30 giugno 2022, *EU-New Zealand Trade Agreement: Unlocking Sustainable Economic Growth*, reperibile online.

⁴⁵ Gli accordi di libero scambio costituiscono infatti, talvolta, parte delle relazioni bilaterali globali disciplinate da accordi quadro o da accordi di partenariato e cooperazione.

⁴⁶ Accordo sugli scambi commerciali e la cooperazione tra l’Unione europea e la Comunità europea dell’energia atomica, da una parte, e il Regno Unito di Gran Bretagna e Irlanda del nord, dall’altra, in GU L 149 del 30 aprile 2021. Per dei commenti v. W. GEHRING MARKUS, *Analysis 5 of the Brexit Deal: Environment and Climate Provisions*, in *EU Law Analysis*, 22 gennaio 2021, reperibile online; A. MUCCIONE, *La tutela dell’ambiente e del clima*, in G. ADINOLFI-A.L. MALATESTA-M. VELLANO (a cura di), *L’accordo sugli scambi commerciali e la cooperazione tra l’Unione Europea e il Regno Unito*, Torino, 2022, 149 ss.

⁴⁷ V. art. 771 dell’accordo sugli scambi commerciali e la cooperazione tra l’Unione europea e la Comunità europea dell’energia atomica, da una parte, e il Regno Unito di Gran Bretagna e Irlanda del nord, dall’altra, cit.

⁴⁸ Il par. 3 dell’art. XX stabilisce infatti, al riguardo, che “*The Parties agree that the second sentence of paragraph 2 constitutes an essential element of this Agreement*”. V. i testi relativi alle componenti commerciali dell’accordo di partenariato UE-Mercosur pubblicati dalla Commissione online. Per quanto riguarda altri accordi di libero scambio in corso di negoziazione, non è esclusa la possibilità che sia inserito un riferimento a strumenti di protezione ambientale nella clausola sugli elementi essenziali. V. ad esempio la dichiarazione congiunta sul commercio e lo

La clausola sugli elementi essenziali è inoltre generalmente accompagnata da una clausola di non esecuzione⁴⁹. Le due clausole non sono, tuttavia, sempre compresenti nei capitoli di nuova generazione e comunque, in riferimento agli obblighi contenuti nel CSS, la clausola di non esecuzione si riferisce generalmente solo – per quel che concerne lo sviluppo sostenibile – al caso in cui si assista ad una violazione dell'obbligo di astenersi da qualsiasi azione o omissione che pregiudichi materialmente l'oggetto e lo scopo dell'Accordo di Parigi⁵⁰.

Non sarà, dunque, qualsiasi violazione di tale Accordo a legittimare il ricorso alle sanzioni previste, bensì solo quelle idonee a vanificarne l'oggetto e lo scopo. Addirittura, per quanto riguarda l'accordo con il MERCOSUR, poiché elemento essenziale dello stesso è che ciascun partner rimanga parte dell'Accordo di Parigi, solo in caso di recesso potrà essere invocata la clausola di non esecuzione, la cui attivazione prescinde pertanto da eventuali violazioni degli obblighi a carattere ambientale stabiliti nell'Accordo del 2016.

Accanto a tali notazioni va inoltre sottolineato che l'intenzione della Commissione di estendere il meccanismo generale di risoluzione delle controversie anche ad eventuali violazioni dei CSS è stata concretizzata con riguardo all'accordo di libero scambio con la Nuova Zelanda⁵¹; lo stesso non può dirsi, invece, con riferimento all'accordo con il MERCOSUR, che è dotato di un sistema di risoluzione delle controversie specifico, in linea con il precedente approccio ai CSS⁵².

Nonostante, dunque, si assista ad un chiaro tentativo da parte dell'Unione europea di porre rimedio alle lacune dei precedenti capitoli sul commercio e lo

sviluppo sostenibile dell'Unione europea e del Cile del 2 dicembre 2022: “*Without prejudice to the outcome of the review, the Parties will also consider the possibility of including the Paris Agreement on Climate Change as an essential element of the Agreements*”.

⁴⁹ V. ad esempio l'accordo tra l'Unione europea e il Regno Unito, il cui art. 772, intitolato “Adempimento degli obblighi descritti come elementi essenziali”, prescrive che “Se una delle parti ritiene che vi sia stata una grave e sostanziale inosservanza da parte dell'altra parte di uno degli obblighi descritti come elementi essenziali [...], può decidere di risolvere o sospendere l'applicazione del presente accordo o di qualsiasi accordo complementare in tutto o in parte” e che un atto o un'omissione che sostanzialmente vanifica l'oggetto e lo scopo dell'accordo di Parigi deve sempre essere considerato come grave e sostanziale inadempimento ai fini dello stesso articolo.

⁵⁰ Così l'art. 764, par. 1, dell'accordo UE-Regno Unito e l'art. 27.4, par. 3, dell'accordo UE-Nuova Zelanda.

⁵¹ V. in tema C. CERTELLI, *EU-New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations*, cit.

⁵² V. L. PANTALEO-F. SEATZU, *One Step Forward, Two Steps Back?: The EU-MERCOSUR Dispute Settlement Mechanism in the Light of the EU's Experience with Free Trade Agreements (FTAs)*, in *Il Diritto dell'Unione europea*, 2021, 125 ss.

sviluppo sostenibile inclusi negli accordi di libero scambio, nondimeno permangono alcuni limiti ad un'effettiva promozione della tutela ambientale, non solo perché non tutti i più recenti accordi di libero scambio effettivamente danno attuazione all'insieme degli elementi indicati nella Comunicazione del 2022, ma anche perché, di fatto, violazioni che, pur gravi, non sono idonee a compromettere l'oggetto e lo scopo del Trattato di Parigi, o vanificano norme di altri accordi in materia ambientale, non sono suscettibili di essere sottoposte ad un effettivo sistema di *enforcement*.

Nonostante ciò, il nuovo approccio manifesta la volontà dell'Unione europea di tutelare alcuni obblighi in materia ambientale per mezzo di accordi di libero scambio in modo più incisivo. Parafrasando le parole utilizzate dalla Corte di giustizia nel parere 2/15, le disposizioni (*rectius* alcune disposizioni) di natura ambientale non sono più volte meramente a disciplinare gli scambi commerciali tra le parti⁵³, bensì costituiscono degli obblighi autonomi rispetto a questi ultimi, tanto che una loro violazione è suscettibile *per sé* di comportare delle sanzioni, inclusa la sospensione dell'accordo nel quale sono inserite.

4. Una condizionalità ambientale dell'Unione europea?

Alla luce dell'analisi sopra svolta, è lecito domandarsi se la politica di promozione della tutela ambientale condotta dall'Unione europea nelle sue relazioni esterne corrisponda o meno ad una politica di condizionalità.

Rispondere al quesito è tuttavia reso particolarmente complesso dall'assenza di una definizione condivisa di condizionalità, nonostante la stessa sia da tempo molto studiata nell'ambito tanto del diritto internazionale quanto del diritto dell'Unione europea. La letteratura di riferimento fa infatti talvolta riferimento al ricorso alla previsione di condizioni per la concessione di benefici, altre volte alla funzione promozionale perseguita attraverso detta politica, altre volte ancora allude alla previsione di determinate misure sanzionatorie nel caso in cui non siano rispettate alcune condizioni ritenute essenziali nei rapporti tra organizzazioni internazionali e Stati.

Nella prima prospettiva, che adotta un approccio minimalista, la condizionalità corrisponderebbe alla "*practice of international organizations and States of making aid and co-operation agreements with recipient States conditional upon the observance of various requirements, such as financial stability, good governance,*

⁵³ Corte giust., parere 2/15, cit., punto 166.

respect for human rights, democracy, peace and security"⁵⁴. Si tratta, evidentemente, di una definizione piuttosto generica, che comunque ha il pregio di racchiudere in sé la pluralità di manifestazioni che può assumere la condizionalità, nell'ambito di diversi contesti nei quali può essere attuata.

Così, alla luce di tale definizione, certamente può inquadrarsi l'attività finanziaria delle c.d. istituzioni di Bretton Woods⁵⁵, che ha inaugurato una condizionalità a carattere essenzialmente economico: tali Organizzazioni richiedono infatti agli Stati beneficiari misure di aggiustamento economico come contropartita per la concessione di finanziamenti, misure che spesso si rivelano particolarmente incisive sulla sovranità economica degli Stati beneficiari, come la privatizzazione delle imprese, la liberalizzazione del commercio o del settore finanziario. In tale contesto, la condizionalità ha assunto dunque un duplice scopo: da un lato, assicurarsi che lo Stato che ha ricevuto l'aiuto sia in grado di ripagare i prestiti di cui ha beneficiato; dall'altro, quello di creare le condizioni affinché lo Stato beneficiario possa superare le difficoltà che hanno fatto sì che occorressero aiuti esterni⁵⁶.

In maniera simile, con riferimento specifico al diritto europeo, come già anticipato, a partire dai primi anni Novanta si è affermata l'ormai nota condizionalità politica, formalizzata nella Comunicazione della Commissione sull'inclusione del rispetto dei principi democratici e dei diritti umani negli accordi tra la Comunità e i Paesi terzi, del 1995⁵⁷, attraverso la quale l'Unione europea si

⁵⁴C. PINELLI, *Conditionality*, in *Max Planck Encyclopedias of International Law*, 2013, reperibile online.

⁵⁵Con tale espressione ci si riferisce al Fondo Monetario Internazionale (FMI) e alla Banca Internazionale per la Ricostruzione e lo Sviluppo (BIRS o Banca Mondiale), entrambe istituite nel 1944 durante la Conferenza di Bretton Woods.

⁵⁶In tema v. in particolare M. GUTIÁN, *Fund Conditionality: Evolution of Principles and Practices*, International Monetary Fund, Washington, 1981; E. DENTERS, *Law and Policy of IMF Conditionality*, The Hague, Boston, 1996; R.M. LASTRA, *IMF Conditionality*, in J.J. NORTON-M. ANDENAS (eds.), *International Monetary and Financial Law upon Entering the New Millennium: a Tribute to Sir Joseph and Ruth Gold*, London, 2002, 551 ss.

S. KOEBERLE et al. (eds.), *Conditionality Revisited: Concepts, Experiences, and Lessons*, World Bank, Washington, 2005.

D. AXEL, *The Development of IMF and World Bank Conditionality*, in L. YUEH (ed.), *The Law and Economics of Globalisation: New Challenges for a World in Flux*, London, 2009, 161 ss.; A. VITERBO, *International Monetary Fund*, The Hague, 2019.

⁵⁷Comunicazione COM(95)216 def. della Commissione europea, del 23 maggio 1995, sull'inclusione del rispetto dei principi democratici e dei diritti umani negli accordi tra la Comunità e Stati terzi, in GUCE L 143/1995, 37 ss.

è avvalsa della sua capacità negoziale ed economica per promuovere nei Paesi terzi il rispetto dei diritti umani, dello stato di diritto e dei principi democratici. È noto, infatti, che in alcuni atti unilaterali e negli accordi conclusi principalmente con i Paesi in via di sviluppo dall'Unione, sono state e sempre più spesso vengono inserite delle clausole volte a promuovere riforme politiche al fine di garantire l'osservanza dello stato di diritto, dei principi democratici, nonché dei diritti umani nei Paesi terzi ⁵⁸. Nel tempo, peraltro, alle più note si sono affiancate anche altre tipologie di condizionalità ⁵⁹.

Una definizione così ampia di condizionalità ricomprende peraltro non solo la più nota condizionalità dell'Unione europea, quella "esterna" sopra descritta, ma anche la più recente condizionalità esercitata nella dimensione interna europea, inaugurata a seguito della crisi del debito sovrano verificatasi all'inizio del 2010 nell'Eurozona ⁶⁰, ed utilizzata nuovamente in tempi ancora più recenti "in una versione che coniuga la dimensione politica con quella economica o, meglio, finanziaria" ⁶¹. Se dunque una definizione *de minimis* ha il pregio di ricondurre a unità una pluralità di contesti nei quali la condizionalità è utilizzata, al tempo stesso rischia di essere quasi tautologica.

⁵⁸ Tra i numerosi autori che si sono occupati della condizionalità politica v. in particolare, tra le opere monografiche, L. BARTELS, *Human rights conditionality in the EU's international agreements*, Oxford, 2005; A. WILLIAMS, *EU Human Rights Policies. A Study in Irony*, Oxford, 2004; E. FIERRO, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague, 2003; M. BULTERMAN, *Human Rights in the Treaty Relations of the European Community. Real Virtues or Virtual Reality?*, Antwerpen, 2001; P. ALSTON-M.R. BUSTELO-J. HEENAN (eds.), *The EU and Human Rights*, New York, 1999.

⁵⁹ V. ad esempio S. POLI, *The Principle of Conditionality in the EU's Relations with its Neighbours: Its Evolution and Reconciliation with the Principle of Consistency*, in *Il diritto dell'Unione europea*, 2018, 525 ss. e G. D'AGNONE, *La condizionalità economica nell'azione esterna dell'Unione europea*, in *Il diritto dell'Unione europea*, 2016, 653 ss.

⁶⁰ Sul tema v. in particolare, A. VITERBO-F. COSTAMAGNA, *L'impatto sociale della politica di condizionalità nel contesto della crisi nell'area euro: profili giuridici*, in N. NAPOLETANO-A. SACCUCCI (a cura di), *Gestione internazionale delle emergenze globali: regole e valori*, Napoli, 2013, 167 ss.; C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, in *European Constitutional Law Review*, 2014, 393 ss.; A. BARAGGIA, *Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?*, in *Cambridge International Law Journal*, 2015, 268 ss.; W. JACOBY-J. HOPKIN, *From Lever to Club? Conditionality in the European Union during the Financial Crisis*, in *Journal of European Public Policy*, 2020, 1157 ss.

⁶¹ M.R. MAURO, *Le diverse applicazioni del principio di condizionalità nella prassi dell'UE*, in L.F. PACE (a cura di), *Quo vadis Europa? Le sfide dell'Unione europea nel tempo delle crisi. Una riflessione multidisciplinare*, Roma, 2023, 128. In tema v. anche per tutti A. CIRCOLO, *Il valore dello stato di diritto nell'Unione europea. Violazioni sistemiche e strumenti di tutela*, Napoli, 2023.

Altri tentativi definitivi hanno quindi enfatizzato gli obiettivi perseguiti da tale politica, ossia la promozione, l'esportazione di determinati parametri o modelli economici, di protezione dei diritti umani, della democrazia e dello stato di diritto. Senonché, un approccio meramente funzionale alla condizionalità rischia di essere eccessivamente vago. Così, una cosa è la generica promozione di determinati valori o obiettivi nei rapporti con Stati terzi (o anche nella dimensione interna, nei confronti degli Stati membri), altra cosa è invece l'imposizione degli stessi, attraverso la previsione di veri e propri obblighi, in ragione della superiorità economica, politica e commerciale dell'Unione nei confronti dei Paesi partners.

Si rende perciò necessaria anche la considerazione delle modalità attraverso le quali può essere attuata la condizionalità, facendo riferimento alla positività, alla negatività o al cumulo delle due tecniche. Con particolare riguardo al diritto europeo, la condizionalità negativa (nota anche come *stick method*) si avvale infatti di clausole o di disposizioni che prevedono la possibilità di sospendere i benefici nel caso in cui il destinatario degli stessi non si conformi o riduca il suo standard di conformità rispetto a quanto indicato dall'Unione. Nel caso di accordi bilaterali con Stati terzi, di nostro interesse, essa è generalmente realizzata mediante l'inclusione di una clausola che indica l'osservanza di alcune condizioni quali elementi essenziali dell'accordo, abbinata ad una clausola di non esecuzione, che autorizza la parte adempiente a sospendere o a terminare l'accordo in caso di violazione, ad opera del partner, di uno degli elementi essenziali. Diversamente, la condizionalità positiva (o *carrot method*), di gran lunga più utilizzata nelle misure unilaterali dell'Unione, si caratterizza per un progressivo aumento dei benefici economici, commerciali, o finanziari in funzione del maggior grado di conformazione da parte del Paese partner agli standard stabiliti dall'Unione europea.

Ebbene, a seconda dell'accezione utilizzata con riguardo alla condizionalità, muta anche la risposta circa la possibilità di qualificare la promozione della tutela ambientale da parte dell'Unione europea negli accordi con Paesi terzi come una vera e propria politica di condizionalità.

Se infatti si pone enfasi sull'aspetto funzionale della condizionalità, nel senso del generico utilizzo, da parte dell'Unione europea, della sua azione esterna per promuovere i suoi standard negli Stati terzi con i quali intesse relazioni, è indubbio che si possa parlare di una condizionalità ambientale.

Diversa è la prospettiva se la finalità promozionale è perseguita per mezzo di un modello di tipo sanzionatorio: il riferimento è, evidentemente, al carattere negativo della condizionalità. È stato d'altronde evidenziato come costituisca

*“an automatic reflex to identify conditionality with sanctions”*⁶².

In tal caso la prospettiva, chiaramente, muta. I paragrafi che precedono hanno infatti messo in luce come tanto gli accordi conclusi nell’ambito della politica di cooperazione allo sviluppo, quanto i capitoli sul commercio e lo sviluppo sostenibile inseriti negli accordi antecedenti l’inaugurazione del nuovo approccio dell’Unione europea, si caratterizzino per la presenza di norme scarsamente precettive, e soprattutto prive di un sistema di *enforcement* efficace. Soltanto negli accordi di libero scambio che l’Unione ha concluso, o che comunque sono in corso di negoziazione negli ultimi anni, si riscontra infatti la presenza di disposizioni dal carattere maggiormente precettivo, in combinazione con la possibilità di adottare – a determinate condizioni – misure a carattere sanzionatorio, e finanche la sospensione degli accordi stessi, in caso di violazioni di (alcune) disposizioni di natura ambientale, nei limiti sopra evidenziati.

A fianco alle possibili accezioni della condizionalità sopra descritte, potrebbe forse configurarsene una ulteriore, valida soprattutto per quanto riguarda l’azione esterna dell’Unione europea, idonea a comporre gli elementi caratterizzanti le diverse accezioni, ed in grado di delimitare in maniera più chiara i confini tra condizionalità e mera attività di promozione.

La condizionalità sussisterebbe quindi allorché l’Unione europea persegue, per mezzo di politiche materiali della sua azione esterna, obiettivi ulteriori ed autonomi rispetto a quelli che dette politiche sono chiamate, in forza dei Trattati, a perseguire.

A tale ricostruzione potrebbe senza dubbio obiettarsi che, a seguito del Trattato di Lisbona, oltre agli articoli già richiamati che indicano obiettivi generali, non solo l’art. 7 TFUE suggerisce un approccio globale al sistema degli obiettivi dell’Unione, imponendo coerenza tra le diverse politiche; e che anche gli artt. 9-12 TFUE stabiliscono i principi e le esigenze che devono essere integrate in ciascuna politica settoriale⁶³.

Ebbene, in tale quadro si assisterebbe ad una politica di condizionalità allorché obiettivi esterni, ulteriori a quelli definiti dal principio di attribuzione per ciascuna politica siano perseguiti in maniera autonoma.

Così, rimanendo in tema di promozione della tutela ambientale, quest’ultima non assurgerà a una vera e propria politica di condizionalità fintantoché si configuri quale mera modalità operativa degli scambi commerciali tra le parti

⁶² E. FIERRO, *The EU’s Approach to Human Rights Conditionality in Practice*, cit., 99.

⁶³ Per quanto riguarda le esigenze ambientali v., in particolare, F. ROLANDO, *L’integrazione delle esigenze ambientali nelle altre politiche dell’Unione europea*, Napoli, 2020.

di un accordo, secondo il criterio – già richiamato sopra – indicato dalla Corte di giustizia nel parere 2/15.

Diversamente, allorché la tutela ambientale sia perseguita in modo autonomo, per mezzo di misure di politica commerciale comune, o di altre politiche, si tratterebbe di condizionalità. Non è questa la sede per stabilire le possibili ricadute di una simile scelta sul principio di attribuzione ⁶⁴.

Nella prospettiva del presente scritto, alla luce di tutto quanto detto sopra, solo la promozione del rispetto dell'Accordo di Parigi conseguita attraverso la qualificazione dello stesso quale elemento essenziale di un accordo di libero scambio, unitamente alla previsione della possibilità di sospendere o addirittura terminare lo stesso in caso di violazione, pare idonea a configurare la tutela ambientale quale obiettivo autonomo perseguito per mezzo della politica commerciale comune. Solo in tal caso, dunque, si assiste ad una vera e propria politica di condizionalità ambientale.

⁶⁴ Sia consentito rinviare a G. D'AGNONE, *Link, or not to Link, This Is the Question: Environmental Provisions under the New Generation of TSD Chapters in EU FTAs*, in *European Public Law*, 2025, 125 ss.

DUE DILIGENCE, CHAIN OF ACTIVITIES AND PROTECTION OF HUMAN RIGHTS UNDER EU (PRIVATE INTERNATIONAL) LAW

Laura Carpaneto

SUMMARY: 1. Multinational enterprises' role in the transition to sustainability. – 2. The protection of victims of violations of human rights in the chain of activities: which role for EU private international law rules? – 3. Access to justice: the issue of the applicable law under the Rome II Regulation. – 4. The European Corporate Sustainability Due Diligence Directive. – 5. Access to justice: the “smart solution” envisaged by Article 29(7) of the Directive. – 6. The uncertain future and effects of the CSDDD and of its smart solution to grant access to victims. – 7. Conclusions.

1. Multinational enterprises' role in the transition to sustainability.

Multinational enterprises are key actors in the transition to sustainability. Traditionally they operated through an organizational model (with vertical integration) that involved the establishment by the “parent” company (with headquarters in a given State) of “subsidiary” companies, with autonomous legal personality and often also autonomous organizational models, in so-called host States characterized by lower standards of protection of human rights and the environment.

Today they operate also through chain of activities¹, that is by virtue of

¹ The notion “chain of activity” is here used following recital 25 of the Directive (EU) 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024/1760, clarifying that ‘(T)he term ‘chain of activities’ as defined in this Directive is without prejudice to the terms ‘value chain’ or ‘supply chain’ as defined in or within the meaning of other Union legislation’. In this respect, see also the Fundamental Rights Agency’s 2017 Opinion, pointing out that the term “supply chain” is used where one company has the power to influence another’s company behavior due to the contractual links existing among them (for example, the latter company is a supplier, a client

contractual relationships through which the parent company gives rise to a real network functional to its activity². The lead company maintains control, but it externalizes various activities to commercial partners/suppliers.

Multinational enterprises' activities have adverse impacts on people and on the environment and efforts are ongoing to impose due diligence obligations on them as well as to find solutions to hold them responsible for the above adverse impacts.

The tools available are essentially (i) *soft law* principles and (ii) codes of conduct spontaneously adopted by companies, both outlining the virtuous behaviours that companies should follow to ensure respect for human rights in the exercise of their activities.

Among the *soft law* instruments, particularly relevant are the Guidelines for multinational enterprises adopted by the Organisation for Economic Co-operation and Development (OECD) for the first time in 1976 and lastly adjourned in 2023³. The Guidelines focus on the obligations to be respected in order to avoid negative impacts on people and the planet.

A wider perspective has been adopted by the 2011 UN Principles on business and human rights by Prof. Ruggie, which are based on three pillars "protect, respect and remedy"⁴. More precisely, the principles envisage, on the one side, the obligations of States to (respect and) protect human rights and fundamental principles and, on the other side, the obligation of businesses to respect all applicable laws and human rights. The third pillar complements the other two by focusing on the remedies available for the victims in the event of violations.

Efforts are ongoing to transform the *soft law* the 2011 Principles in a binding

or a franchisee). See FRA Opinion 1/2017, 10 April 2017, *Improving access to remedy in the area of business and human rights at the EU level*, 20, available at <https://fra.europa.eu/en/publication/2017/improving-access-remedy-area-business-and-human-rights-eu-level>.

² See C. TUO, *Rimedi per abusi di diritti umani da parte delle imprese: profili di diritto internazionale privato*, in F. MARRELLA-C. MASTELLONE (eds.), *Contratti del commercio internazionale e sostenibilità*, Pisa, 2024, 101-141; U. GRUSIC, *Contractual network in European Private International Law*, in *International and Comparative Law Quarterly*, vol. 6, 2016, 581-614.

³ See the Organization for Economic Cooperation and Development (OECD)'s *Guidelines for multinational enterprises on responsible business conduct* (available at: OECD, 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct', <https://mneguidelines.oecd.org/mneguidelines/>, accessed 28 January 2025).

⁴ Reference is made to the Guiding Principles on business and human rights, implementing the United Nations "Protect, Respect and Remedy" Framework, available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf, accessed 8 June 2025.

international treaty on business and human rights⁵, which given the inherent cross-border dimension of the multinational enterprises' activities, also envisages rules on jurisdiction and applicable law.

However, to date there are no international binding rules regulating the behaviours of multinational enterprises, alarming violations of human rights are reported along the chains of activities of different industries⁶ and the victims of such violations face obstacles in holding the multinational enterprises responsible for them.

A famous case concerning the garment industry clearly shows the ongoing situation⁷: *KiK*, a German retail company, had as a subcontractor Ali Enterprises, which was the (duly certified) company owning a garment factory in Pakistan where, due to a fire on 11 September 2012, more than 250 workers died. Even if an extrajudicial settlement on compensation for victims was reached, a survivor and three relatives of the victims filed judicial proceedings against *KiK* in Germany, where however the proceedings were time-barred due to the limitation period of two years envisaged by the Pakistani law, which applied by virtue of Article 4 of the Rome II Regulation⁸.

⁵ An Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights has been created, which has so far held 11 sessions and drawn up a very detailed draft treaty, which also provides rules on jurisdiction and applicable law for disputes on corporate civil liability. Further information on the Open-ended intergovernmental working group, see <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>, accessed 8 June 2025. The text of the updated draft instrument is available here <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session10/igwg-10th-updated-draft-lbi-with-proposals.pdf>. See, in particular, Article 9 on Jurisdiction, Article 10 on Statute of limitations, Article 11 on Applicable law.

⁶ See FRA Opinion 1/2017, cit., 18-19; see ILO, OECD, IOM and UNICEF, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains*, 12 November 2019, available at https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40ipec/documents/publication/wcms_716930.pdf.

⁷ Reference is made to the *KiK Textilien und Non-Food GmbH* textile discount retailer headquartered in Bönen (Germany). A description of the case can be found here: European Parliament, 'Access to legal remedies for victim of corporate human rights abuses in third countries' (Study requested by the DROI committee, February 2019), 59-65 [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf). See also British Institute of International and Comparative Law and Civic Consulting, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, European Union, 2021 available at <https://op.europa.eu/en/publication-detail/-/publication/11043f63-200c-11ec-bd8e-01aa75ed71a1>, 89.

⁸ See *Muhammad Jabir and others v KiK Textilien und Non-Food GmbH*, Case No. 7 O

2. *The protection of victims of violations of human rights in the chain of activities: which role for EU private international law rules?*

As pointed out by the 2011 Principles, victims should be able to hold those involved in the human rights violations responsible for the losses and damages occurred. Among the different routes should be available for the victims⁹, a civil liability suit against the company is the typical one¹⁰. Given that human rights abuses in chain of activities have frequently a transnational dimension, private international law rules apply.

The question is whether, in such situations, private international law rules may play a role in society's transition to sustainability and responsible business conduct by granting access to an effective remedy in case of violations of human rights¹¹ or even whether should do so taking into account that, to a certain extent, private international law rules have helped to facilitate the creation and the functioning of the instruments on which chain of activities rely (such as

95/15, Landgericht Dortmund, 10 January 2019. On 21 May 2019, the appeal against the latter decision has been dismissed, see https://nrwe.justiz.nrw.de/olgs/hamm/j2019/9_U_44_19_Beschluss_20190521.html.

⁹ Extra-judicial settlement as well as arbitration in corporate civil liability cases are frequent, also due to their confidential character. In this regard, it is relevant the work done by National Contact Points which may help to start a dialogue between victims and multinational enterprises, which may also end up with policy changes by the multinational enterprise (see: OECD, 'What are National Contact Points for RBC?' <https://mneguidelines.oecd.org/ncps/> accessed 28 January 2025). Judicial remedies (through civil, criminal and administrative procedures) are likely to give rise also to reputational risks for corporations. On the role of judicial remedies in general, see V.S. KHANNA, *Corporate criminal liability: what purpose does it serve?*, in *Harvard Law Review*, 1996, 1477. On civil liability claims, see C. VAN DAM, *Tort Law and Human Rights: Brothers in Arms*, cit., 228.

¹⁰ See FRA Opinion 1/2017, cit., 24. On the relevance of civil liability suits in this field, see C. VAN DAM, *Tort Law and Human Rights: Brothers in Arms – On The Role of Tort Law in the Area of Business and Human Rights*, in *Journal of European Tort Law*, 2011, 243; L. SMIT, *The importance of civil liability for a corporate human rights duty*, available at <https://www.biicl.org/blog/21/the-importance-of-civil-liability-for-a-corporate-human-rights-duty>; S.C. SYMEONIDES, *Rome II and Cross-Border Violations of Human Rights, Infringements of Personality Rights and Other Cross-Border Torts*, in *23 Yearbook of Private International Law*, 2020-21, 171-210.

¹¹ See V. VAN DEN ECKOUT, *Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor?*, November 25, 2011, Available at SSRN: <https://ssrn.com/abstract=1964441> or <http://dx.doi.org/10.2139/ssrn.1964441>.

delocalisation of enterprises, fragmentation of the regimes)¹².

EU private international law rules have been traditionally aimed at granting certainty and predictability on the competent court and applicable law, with a view to make it easier for the EU citizens to benefit from the fundamental freedoms. After the Lisbon Treaty, it has become clear that EU private international law rules shall be a vehicle for the promotion of principle of non-discrimination as well as for the protection of fundamental rights¹³, which is one of the values on which the EU is founded¹⁴.

Furthermore, access to justice is surely one of the goals of the EU's action in the field at stake: both the legal basis for the creation of the area of freedom, security and justice (Article 67(4) TFEU) and the legal basis for the EU's action in the field of civil judicial cooperation (Article 81(2)(e) TFEU), expressly mention access to justice as a specific goal to be achieved¹⁵.

In addition, it shall be considered that EU is committed to work for sustainable development as well as to uphold and promote values and interests also “*in its relations with the wider world*” (art. 3.2 and art. 3.5 TEU). More precisely,

¹² With specific reference to the EU context, see U. GRUSIC, *Contractual Networks in European Private International Law*, cit., 589; V. VAN DEN EECHKHOUT, *The Private International Law Dimension of the Principles in Europe*, in F.J. ZAMORA CABOT-L. HECKENDORN URSCHER-S. DE DYCKER (eds.), *Implementing the U.N. Guiding Principles on Business and Human Rights. Private International Law Perspectives*, Cham, 2017, 35-62.

¹³ An example of the above change of perspective is the trend towards the creation of conflict of law rules with a “substantive” flavour, such as, for example, Article 10 of the Rome III Regulation. See B. HEIRDERHOFF, *Article 10 – Application of the law of the forum*, in S. CORNELOUP (ed.), *The Rome III Regulation. A Commentary on the Law Applicable to Divorce and Legal Separation*, Cheltenham, 2020, 125-138, 136.

¹⁴ The recent proposal in the field of parenthood seems to make a further step in this direction: the Commission has expressly declared that the main goal of the instrument is “to strengthen the protection of fundamental rights of children in cross-border situations”, whilst the classic private international law goals of legal certainty and predictability on international jurisdiction, applicable law and recognition are qualified as ‘additional’. See European Commission, ‘*Proposal for a Council regulation on jurisdiction, applicable law, recognition of decision and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*’, COM (2022) 695 final https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF.

¹⁵ Article 67(1) TFEU states that “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States” and Article 67(4) TFEU expressly states that “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”.

the EU is under a duty to contribute to “*sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*”¹⁶.

EU (private international) law has therefore the potential to be an instrument of governance of the chain of activities¹⁷ as well as to develop a system of remedies capable of granting effective protection to the victims of business-related human rights violations in cases as the *KiK* one¹⁸.

In the last years, the problem of access to justice in corporate social responsibility cases under EU law has been considered by many studies¹⁹.

¹⁶ See Treaty on European Union (TEU), art. 3.5.

¹⁷ See G. CARELLA, *Articolo 19 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: attuazione della responsabilità sociale d'impresa e diritto internazionale privato*, in *Diritti umani e diritto internazionale*, 2023, 169, 172.

¹⁸ Reference is made to the situation where a non-European subsidiary of a European parent company violates human rights outside Europe (in a conflict area or otherwise) and the European parent company is involved/‘implicated’ in that violation (for example: the company, its executives and/or staff are accused to be directly responsible for HR abuses; the companies are providing goods, technology, services or other resources to governments or State authorities which are reported to be used in abusive or repressive ways; the companies are accused of having provided information, assurance, logistical support or financial support to other companies which are causing HR abuses; the company is sourcing products from suppliers which are committing HR abuses. See European Parliament ‘Access to legal victims of corporate human rights abuses in third countries’(n3) 11-12.

¹⁹ See (i) A. MARX-C. BRIGHT-N. PINEAU-J. WOUTERS, *Corporate Accountability Mechanisms in EU Member States for Human Rights Abuses in Third Countries*, Working Paper No. 212, March 2019, available at https://ghum.kuleuven.be/ggs/publications/working_papers/2018/wp212-marx-bright-pineau-woutersdocxxx.pdf; (ii) A. MARX-C. BRIGHT-J. WOUTERS, in collaboration with other authors, Study requested by the DROI committee of the European Parliament, “*Access to legal remedies for victims of corporate human rights abuses in third country*”, 2019, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf); (iii) A. PETERS-S. GLESS-C. THOMALE-M.P. WELLER, *Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law*, in *MPIL Research Paper*, Series No. 2020-06; (iv) E. LEIN-S. MIGLIORINI-C. BONZÉ-S. O’KEEFFE, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, 2021, JUST/2019/JCOO_FW_CIVI_0167 <https://op.europa.eu/en/publication-detail/-/publication/11043f63-200c-11ec-bd8e-01aa75ed71a1> accessed 17 January 2025; (v) J. GRIMHEDEN-D. WALLIS AND OTHERS, *Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA), Report of the European Law Institute*, 2022, available at <https://www.europeanlawinstitute.eu/>

A 2019 Study, expressly dedicated to the problem of access to justice for victims of corporate human rights abuses in third countries, points out that access to justice for victims is frequently denied and it therefore recommends, on the one side, the adoption of mandatory due diligence obligations on corporations and, on the other side, to strengthen jurisdiction over extraterritorial cases and access to Member States' law as applicable law.

As regards jurisdiction, a revision of the rules of the Brussels Ia Regulation is proposed with regard to the extension of the scope of application of the Regulation also to defendant not domiciled in the EU, introduction of an *ad hoc* jurisdictional rule for business-related human rights claims as well as a *forum necessitatis*²⁰.

As regards the applicable law, it results from the 2019 Study as well as from other sources that one of the main problems arising in litigations concerning liability for human rights abuses is that, due to the existing choice of law rules under the Rome II Regulation, the law of a third country applies (the so-called "host country law") being the *lex loci damni* applicable under the general rule of Article 4.

It is possible that that law is grounded on principles and values which are different from those of forum (or "home country law")²¹ and that, consequently, victims are deprived of access to substantive justice and legal remedies²².

The *KiK* case is a good example: Article 4 of the Rome II Regulation called for the application of Pakistani law which provides for a (very short) two-year limitation period, which made the claim failing due to substantive Pakistani law.

fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf; (vi), G. SKINNER-R. MCCORQUODALE-O. DE SHUTTER, *The Third Pillar, Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 2022, available at the_third_pillar-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf. All studies mentioned accessed 8 June 2025.

²⁰ See the 2019 Study on access to justice, 111-112; F. MARONGIU BUONAIUTI, *L'incidenza della disciplina della giurisdizione nelle azioni nei confronti delle società multinazionali per danni all'ambiente sul diritto di accesso alla giustizia*, in *Ordine internazionale e diritti umani*, 2023, 634-653, available at <https://www.rivistaoidu.net/wp-content/uploads/2023/07/12-MARONGIU-Buonaiuti.pdf>; A. MILLS, *Sustainability and Jurisdiction in the International Civil Litigation Market*, in *JPIL*, 2024 1.

²¹ The content of the foreign law applicable can be less protective as regards human and labour rights or environmental protection standards, but also as regards enforcement mechanisms, for example with reference to the amount of damages available to victims, the rules on limitation to bring a claim. See E. LEIN-S. MIGLIORINI-C. BONCÉ-S. O'KEEFE, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, cit., 89.

²² See 2019 Study, 113.

3. *Access to justice: the issue of the applicable law under the Rome II Regulation.*

The Rome II Regulation is the oldest of the EU private international law instruments in force: it was adopted before the entrance into force of the Lisbon Treaty, in a legal context where the EU values and mission were not clearly identified as they are now.

The problems encountered by victims of human rights abuses in accessing justice opened a discussion on its possible revision²³, whilst an EU instrument aimed at hardening the due diligence obligations on multinational enterprises was to be adopted (see *infra*, para. 4).

However, as confirmed in the first report on its application adopted at the end of January 2025, no immediate recast of the Rome II Regulation is foreseen: the Commission concluded that the Regulation works well and that further analysis is needed in view of a potential recast²⁴.

As regard civil liability claims deriving from human rights violations, the only relevant statement of the Commission's report is the one concerning the application of Article 4, which proved to be "largely unproblematic", except for indirect victims or multi-party torts.

Whilst waiting for further analysis on both these respects, it shall be considered how to enhance access to justice and protection of victims of business-related human rights abuses through the existing rules of the Rome II Regulation.

As mentioned, as far as applicable law is concerned, the choice of law rules of the Rome II Regulation offer little room to avoid application of the host State law, this being one of the main hurdles encountered in practice.

The general rule of Article 4(1), recalling the application of the *lex loci damni*, has been frequently criticized to be a too rigid one, since it relies just on geographic connections²⁵ and, differently from Article 7, it does not envisage

²³ On this topic see G. RUHL, *Human rights in global supply chain. Do we need to amend the Rome II Regulation?*, available at <https://eapil.org/2020/10/09/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>.

²⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), 31 January 2025, COM (2025) 20 final available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2025:20:FIN&qid=1738342646388>.

²⁵ The only margin of flexibility, allowing consideration of elements different from the geographic ones, are those envisaged by recital 14, stating that "The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. (...)

any possibility for the damaged party to opt for another law²⁶.

Article 7 (and the *optio legis* envisaged by it) may be applied in the event of a business-related environmental abuse, which causes “also” human rights violations²⁷. In the absence of a revision of the Rome II Regulation, it is not likely that Article 7’s application may be extended to business-related human rights abuses by virtue of interpretation.

Apart from the possibility to rely on Article 7, when environmental abuses are also at stake, as for human rights abuses escaping from the *lex loci damni* is very complex.

Excluding the possibility to make use of a common habitual residence criterion under Article 4(2) which cannot apply in the cases here considered, it is not simple to make use of the connection element of the most significant relationship under Article 4(3), since the two relevant (geographic) elements (i.e. the place of the tort and the victims’ habitual residence) would call for the application of the host State law²⁸.

It has been considered the application of Article 4(3) in favour of the home State law whenever it can be proved that the host State law (*lex loci damni*) is less significantly connected than the home State law, which is the place where the conduct of the parent company (domiciled in the home State) caused the

This set of rules creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner”. On the rigid character of the Rome II Regulation, see S.C. SYMEONIDES, *Rome II and Tort Conflict: A Missed Opportunity*, in *American Journal of Comparative Law*, 2008, 45, where the Author appreciates the rules allowing the victims or the court to choose between the laws of the state of conduct and the laws of the state of injury in cases of cross-border torts and considers regrettable that the drafters of Rome II have chosen not to adopt a similar rule as they did with regard to environmental torts. See also S.C. SYMEONIDES, *Rome II and Cross-Border Violations of Human Rights, Infringements of Personality Rights and Other Cross-Border Torts*, in *23 Yearbook of Private International Law*, 2021-22, 171-210.

²⁶ The Rome II’s Explanatory report clarifies that reason for not envisaging an *optio legis* is that such a solution “would go beyond the victim’s legitimate expectations” (11-12). However, in considering a possible revision of the Rome II Regulation, given the emerging duty of multinational enterprises to respect human rights, it could be in the legitimate expectations of victims of business-related abuses by subsidiaries and suppliers of a specific multinational enterprise to have the parent company’s home State law to be applied.

²⁷ See recital 89 of the CSDDD.

²⁸ In the *KiK* case, the claimant asked for the application of German law under the escape clause of Article 4(3) of the Rome II Regulation, but the competent court did not find a closer connection of the case to German law, since the place of the tort and the claimants’ habitual residence were located in Pakistan.

injury²⁹. As a further argument in favour of the application of the escape clause Article 4(3) is the extreme situation where the application of the *lex loci damni* give rise to a violation of fundamental rights. To date, there is no case-law (at national or European level) providing such a human rights-oriented interpretation of the escape clause.

It shall be seen whether the ongoing efforts of hardening the soft law instruments on corporate social responsibility may have some effects on the interpretation of Article 4(3) of the Rome II Regulation as to allowing the application of the home State law.

On the contrary, it is not feasible for the corporations and neither for the victims to reach an *ex post* agreement on the applicable law under Article 14: corporations, being in the position of benefiting of the application of the host State as a default rule, would not easily accept different solutions and victims, on the other hand, need to accept the same applicable law which corporations are prepared to accept and also need to be aware of the implications of their choice.

Apart from the very uncertain possibilities to make recourse to Article 7 in case of violations of human rights connected to environmental damages and to propose a very innovative interpretation of Article 4(3) in light of the adoption of binding rules on corporate social responsibility, the protection of victims of business related abuses shall be considered in light of the exceptions of the Rome II Regulation: the overriding mandatory provisions (Article 16), rules of safety and conduct (Article 17) and the public policy (Article 27).

Overriding mandatory provisions and public policy are nothing but two side of the same coin. Under EU law, both the overriding mandatory provisions and the public policy (as a limit to the applicable law and to the circulation of decisions in the EU judicial area), are instruments of positive integration, meaning that can be used as vehicles for introducing the protection of human rights as well as the transition to sustainability as goals which private international law rules may contribute to pursue.

On the other side, it does not mean that the EU legal order has not taken

²⁹ See J. GRIMHEDEN-D. WALLIS AND OTHERS, *Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA)*, in *Report of the European Law Institute*, 2022, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf, 55-56 where the Authors explain that such a solution would need to be confirmed by practice or by a Commission interpretative communication (on the lines of Commission interpretative communication (2000/C 43/03) on Freedom to provide services and the general good in the insurance sector, OJ, 2000, C 43), if not by adding a recital in the preamble or modifying the wording of Article 4 of the Rome II Regulation.

away the power of the Member States to make use of both expressions of public policy for the protection of their own interests: the Court of Justice has made it clear that Member States are entitled to invoke the overriding character of domestic rules as well as the limit of public policy only in exceptional circumstances, but also that both limits are in fact subject to the respect of EU law³⁰.

In the course of the legislative procedure for the adoption of the Rome II Regulation, a debate arose with regard to the possibility to make reference (not just to the public policy of the forum, but also) to the public policy of the EU. The final version of Article 26 only refers to the public policy of the forum.

The whole debate surrounding the problems of access to justice for victims of business-related violations of human rights confirm that the Member States consider that the victims should be granted a “*de minimis*” level of protection in terms of human rights to be respected as well as in terms of access to justice. In the case of specific rules concerning conditions of work adopted at national level (by the home State law) considered as overriding mandatory provisions by the forum State, there is little doubt that such rules shall apply in claims based on the allegation of human rights violations for bad working conditions, even if it is the host State law of a third country to be applied to the case.

As regard rules concerning limitation, damages, costs of litigation, representative actions, the situation is still uncertain³¹. Access to justice is one of the goals of the action of the EU in the field of civil judicial cooperation and access to justice for victims of business-related abuses is also an EU goal. When substantial rules, such the one on limitation, are at stake and effectively make it impossible for a victim to have access to justice, it seems therefore possible to try to stop their application by invoking Article 26.

In this scenario, the outcome of the litigations will be uncertain. But, if the

³⁰ See P. BERTOLI, *Norme di applicazione necessaria e ordine pubblico sotto la lente del consolidamento dello spazio europeo di giustizia*, in P. IVALDI-F. MUNARI-I. QUEIROLO-L. SCHIANO DI PEPE-C. TUO (eds.), *Verso il completamento dello spazio giudiziario europeo in materia civile e commerciale*, 2024, 119-137.

³¹ The decisions adopted at national level on limitation in the claims here considered are a confirmation of this: whilst in the *KiK* case (both in the first and in the second instance), the German courts did not accept the victims’ argument that the short limitation period envisaged by Pakistani law was contrary to the public policy (also considering that under German law as well as there are short limitations). In the decision rendered in the case *Hamad Begun v. Maran*, a progress in that direction has been made. More precisely, even if in the end the public policy exception has not been applied, the one-year limitation period envisaged by the Bangladeshi law, has been considered as capable of causing undue hardship vis-à-vis the claimant. See *Hamad Begum v. Maran* (UK) Limited, 2021, EWCA Civ 326.

public policy exception is successfully invoked in a case before the courts of the Member State, it seems very difficult to criticize the decision excluding the application of the host State on the ground of public policy and applying a law which opens to the victims of business-related human rights abuses the possibility to activate a judicial remedy. While waiting to see whether access to justice is considered also as falling within the European notion of public policy, the role of Article 17 on the rules of safety and conduct shall be considered.

Article 17 does not establish a connection with the place where the event giving rise to the damage happened in cases of business-related human rights abuses³², it just asks “to take into account” the rules of safety and conduct of that law³³. It is not clear whether the rules of due diligence can be considered as such. On the one side, recital 34 clarifies that such rules should be interpreted as referring to all regulations having “any relation” to safety and conduct. In this respect, the due diligence should be considered as rules having relation to safety and conduct. On the other side, with regard to an hypothetical situation where the perpetrator complied with lower environmental standards of the State of conduct, but not with the higher standard of the State of injury, the Explanatory report clarifies that “*under art. 17, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which is he in business*”³⁴. Article 17 seems a rule envisaged to protect the tortfeasor³⁵, not the victims. It has also been authoritatively pointed out that the due diligence obligations should not be considered as rules of safety and conduct within the meaning of Article 17³⁶ and it has been proposed a

³² *Study on the Rome II Regulation (EC) 864 on the law applicable to non-contractual obligation*, cit., 95.

³³ In the Explanatory Report is further clarified that “taking into account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author’s good or bad faith for the purposes of the measure of damages”. Recital 34 clarifies that “In order to strike a reasonable balance between the parties, account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country”.

³⁴ See Explanatory report, 25.

³⁵ See S.C. SYMEONIDES, *Rome II and Tort Conflict: A Missed Opportunity*, cit., where the Author considers that “This restrictive formulation reduces Article 17 to a mere evidentiary instruction of how to assess the tortfeasor’s culpability. Unfortunately, this minimalist conception prevents Article 17 from becoming the useful corrective tool that Rome II sorely needs”.

³⁶ See GEDIP – subgroup “Corporations and human rights/environmental law – private

change in the text of Article 17 of the Rome II Regulation, with a view to strengthen the ethical and environmental clauses which are contained in international clauses³⁷.

At the present moment, however, Article 17 does not seem to be a possible vehicle for the protection of victims.

The European Parliament, however, has proposed two different solutions. Firstly, it has indicated that the claimant should be able to choose not only between the *lex loci damni* (the host State law) and the *lex loci commissi delicti* (the home State law), but also the law of the place where the defendant company is domiciled or operates³⁸.

international law aspects”, *Working paper for the 2021 Virtual Meeting*, 30 June 2021, Draft Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning – I. Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability], and II. Amendments to the Brussels I Recast, Rome I, and Rome II Regulations [and to the 2016 GEDIP draft Rules on the law applicable to companies and other bodies], available at <https://gedip-egpil.eu/wp-content/uploads/2021/02/GEDIPRECRBC280621-2.pdf>, 12.

³⁷ See O. BOSKOVIC, *Update on PIL Aspects of Environmental Damage and Human Rights Violations in Supply Chains*, 21 December 2021, at <https://eapil.org/2021/12/21/update-on-pil-aspects-of-environmental-damage-and-human-rights-violations-in-supply-chains/>. More precisely, the Author proposes to include in Article 17 the following sentence: “Account shall be also taken of the ethical clauses contained in contracts whose breach has caused the damage”.

³⁸ The following *ad hoc* conflict of law rule with the title “Business-related human rights claims” has been proposed: “(I)n the context of business-related civil claims for human rights violations within the value chain of an undertaking domiciled in a Member State of the Union or operating in the Union within the scope of Directive XXX/XXXX on Corporate Due Diligence and Corporate Accountability, the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates”. See European Parliament Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) available at [https://www.europarl.europa.eu/RegData/commissions/juri/pr_ojet_rapport/2020/657191/JURI_PR\(2020\)657191_EN.pdf](https://www.europarl.europa.eu/RegData/commissions/juri/pr_ojet_rapport/2020/657191/JURI_PR(2020)657191_EN.pdf). On this topic see A. BONFANTI, *Corporate due diligence and private international law: some remarks on the proposed amendments to Rome II Regulation and the applicable law to the business-related human rights claims*, in *Nova Centre on Business, Human Rights and the Environment Blog*, 5 March 2021, <https://novabhre.novalaw.unl.pt/corporate-due-diligence-and-private-international-law-some-remarks-on-the-proposed-amendments-to-rome-ii-regulation-and-the-applicable-law-to-the-business-related-human-rights-claims/>; G. RÜHL, ‘Human rights in global supply chains: Do we need to amend the Rome II-Regulation?’, *conflictoflaws.net*, 20 October 2020, <https://conflictoflaws.net/2020/>

The proposed solution would have had three advantages: it would take into consideration the specific nature of the claims at stake and reduce the imbalances between the parties (being the victims in a situation of a significant vulnerability in respect of the multinational enterprises). Furthermore, this solution would be coherent with the goal to promote and uphold higher human rights standards in the EU and would give to the victims of business-related human rights resulting from companies based in the EU a level of protection which is not “fundamentally different” from the one granted to persons living in the EU³⁹. On the other hand, this solution potentially exposes companies to four different applicable laws and, in doing so, it impairs the deterrence function of tort law and increases the costs for companies⁴⁰.

Whilst the EU was working on the text of the Directive on corporate social responsibility (see *infra*, the following paragraph), the European Parliament also proposed the different solution of classifying the whole content Directive as overriding mandatory provisions within the meaning of Article 16 of the Rome II Regulation⁴¹. The main advantage of such a solution would have been for the companies to share a common (even if not uniform) legal framework of reference, providing certainty and a level-playing field⁴².

human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/; C. THOMALE, ‘Chris Thomale on the EP Draft Report on Corporate Due Diligence’, in *Conflict of Laws*, 27 October 2020, <https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/>.

³⁹ See L. ENNEKING, *Judicial remedies: The issue of applicable law*, in J. JOSÉ ALVAREZ RUBIO-K. YIANNIBAS (eds.), *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*, London, 2017, 38-77.

⁴⁰ See G. RUHL, *Human Rights in Supply Chains: Do We Need to Amend the Rome II Regulation?*, available at <https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>.

⁴¹ See European Parliament Resolution of 10 March 2021, with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 (INL)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-073_EN.html#title2. In the annex, a draft text of the Directive is provided and under Article 20, entitled “Private international law”, the following rule is provided: “Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007 of the European Parliament and of the Council”.

⁴² It is worth mentioning the fact that, in 2020, during the consultations which anticipated the adoption of the Directive, companies were in favour of the adoption of general standards at EU level. See L. SMIT-C. BRIGHT-R. MCCORQUYODALE-M. BAUER-H. DERINGER-D. BAEZA-BREINBAUER-F. TORRES-CORTÉS-F. ALLEWELDT-S. KARA-C. SALINIER-H. TEJERO TOBET,

4. *The European Corporate Sustainability Due Diligence Directive.*

The European Corporate Sustainability Due Diligence Directive (hereinafter CSDDD)⁴³ is the most important achievement in the direction of imposing due diligence obligations to corporations as well as of granting access to victims of business-related human rights (and environmental) violations.

The CSDDD is a ‘market instrument’, based on the rules on freedom of establishment and on Article 114 TFEU, conceived as an instrument to pursue the goal of creating a level-playing field⁴⁴, but also of corporate transition to a sustainable economy⁴⁵.

The Directive (i) aims at ensuring that companies ‘active’ in the internal market bring to an end actual or potential adverse human rights and environmental impacts connected with their operation, the one of their subsidiaries and of their business partners in the chains of activities and (ii) seeks to ensure that those affected by adverse impacts resulting from non-compliance of the due diligence obligations established by the Directive itself have access to justice

Study on due diligence requirements through the supply chain, Part I: Synthesis report, available at <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>, accessed 8 June 2025.

⁴³ On the Directive, see A. BONFANTI-M. FASCIGLIONE, *La futura direttiva europea sulla corporate sustainability due diligence: un'introduzione*, in *Diritti umani e diritto internazionale*, 2023, 655; R. GRECO, *Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection?*, in *Diritti umani e diritto internazionale*, 2024, 5; A. BONFANTI, *Corporate sustainability due diligence directive: a human rights-based assessment*, in *Rivista del commercio internazionale*, 2024, 857-893; N. BUENO-N. BERNAZ-G. HOLLY-OLGA MARTIN-ORTEGA, *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, in *Business and Human Rights Journal*, 2024, 294-300; E. KOJO NARTEY, *Addressing Corporate Human Rights Violations and Environmental Harms: Advancing a Holistic Remedial Framework through Tort Law and the EU Corporate Sustainability Due Diligence Directive (CSDDD)*, in *Athens Journal of Law*, 2024, 345-372; C. MAK, *Corporate sustainability due diligence: More than ticking the boxes?*, in *Maastricht Journal of European and Comparative Law*, 2022, 301-303; V. MCCULLAGH, *The EU Corporate Sustainability Due Diligence Directive: Real Change or More of the Same?*, in *European Business Law Review*, 2024, 603-626; A. SHALL, *The CSDDD: Good Law or Bad Law?*, in *European Company Law*, 2024, 56; M. THORENS-N. BERNAZ-O. HOSPES, *Advocating for the EU Corporate Sustainability Due Diligence Directive Against the Odds: Strategies and Legitimation*, in *Journal of Common Market Studies*, 2025, 606-623.

⁴⁴ See C. VAN DAM, *Tort Law and Human Rights: Brothers in Arms*, cit., 227.

⁴⁵ Directive (EU) 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024/1760 (CSDDD). See recital 73.

and legal remedies, without prejudice to the responsibility of Member States to respect and protect human rights and the environment under international law.

As stated in Article 4⁴⁶ it sets out the *de minimis* regime and level of protection, which Member States may enhance⁴⁷. On the other hand, Member States may not derogate from the duty to ensure that companies take the appropriate measures (i) to identify and assess actual and potential adverse impacts⁴⁸, (ii) to prevent potential adverse impact⁴⁹ and (iii) to bring actual adverse impacts to an end⁵⁰.

In relation to other EU sources, the Directive sees itself as a general regime, over which EU acts in specific areas (such as human rights, labour and social rights, environmental protection, climate change) or specific sector⁵¹ prevail⁵². In relation to international law, the Directive clarifies that it shall not prejudice

⁴⁶ See TFEU, art. 4 and recital 31.

⁴⁷ See *ibid* recital 16. In the different context of consumer rights, Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304, art. 4 entitled 'Level of harmonization', states that: 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive'.

⁴⁸ More precisely, under CSDDD, art. 8.1 and 2, Member States are under an obligation to ensure that companies take appropriate measures to identify and assess actual and potential adverse impacts arising from their own operations or those of their subsidiaries and, where related to their chains of activities, those of their business partners. The article goes on specifying that the companies, taking into account relevant risk factors, shall take appropriate measures to (i) map the operations to identify the areas where adverse impacts are most likely to occur and to be most severe and (i) based on the results, carry out an in-depth assessment of the operation in the areas where adverse impacts were identified to be most likely to occur and most severe.

⁴⁹ According to CSDDD, art. 10(1), Member States are under an obligation to ensure that companies take appropriate measures to prevent or, where it is not immediately possible, adequately mitigate potential adverse impacts that have been, or should have been, identified.

⁵⁰ According to CSDDD art. 11(1), Member States shall ensure that companies take appropriate measures to bring actual adverse impacts that have been identified to an end.

⁵¹ Due diligence measures have been adopted, for example in the sector of mining (Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19 maggio 2017, 1) and timber harvesting (Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L295, 12 November 2010, 23).

⁵² See CSDDD, recital 17.

the Member States' obligations under international law⁵³.

A very debated aspect of the Directive has been its scope of application *ratione personae*, which has been limited to the big companies "active" in the EU market and, therefore, also to non-EU companies. More precisely, the Directive is addressed to (i) companies formed in accordance with the law of a Member State (having a net worldwide turnover exceeding € 450.000.00 in the last financial year while at the same time having more than 1000 employees⁵⁴ in the last two financial years)⁵⁵; (ii) companies entered into franchising or licensing agreements in the EU in return for royalties with independent third-party companies⁵⁶ and also (iii) non-EU companies, formed in accordance with the law of a third State 'with significant operations in the Union'⁵⁷.

A parent company, formed under a third State law, active in the EU, is therefore subject to the due diligence obligations envisaged by the Directive as well as to its mechanisms of enforcement.

As for the scope of application *ratione materiae* two concepts are of crucial importance to understanding the relevance of this instrument: (i) the due diligence obligations and (ii) the adverse human rights impact.

⁵³ See CSDDD, recital 16, which expressly states that "The Directive is without prejudice to the responsibility of Member States to respect and protect human rights and the environmental under international law". The relationship between the Directive and the convention enlisted in the Annex shall be further explored (see para. 5).

⁵⁴ It shall be noted that the notion of worker includes temporary agency workers, workers posted under art. 1(3) of the Directive 96/71 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1, excluding other workers in non-standard forms of employment, seasonal workers included proportionally.

⁵⁵ CSDDD, art. 2(1)(a).

⁵⁶ These companies fall within the scope of application of the Directive provided that those agreements ensure common identity and business concept and the application of uniform business methods and that royalties amount to more than € 22.500.000 and the company had a net worldwide turnover of more than € 80.000.000). See CSDDD, art. 2(1)(c).

⁵⁷ See CSDDD, recital 29 and art. 2.2. They have to comply with the Directive's obligation if they fulfil the turnover criterion set out in Article 2(1)(a) for each of the last two financial years, which is the element creating a sufficient connection between the third-country company and the Union territory. According to recital 30 turnover 'is a proxy for the effects that the activities of those companies could have on the internal market' and which justify the application of Union law to third-country companies under international law. The 'employee threshold' to be found in CSDDD, art. 2(1), in contrast, is not applied to determine the third-country companies falling under the Directive, since the notion of employees retained for the purpose of this Directive is based on Union law and could not be easily transposed outside the Union (see recital 30).

The due diligence obligations are modelled on the OECD Due Diligence Guidance for Responsible Conduct⁵⁸ and require companies covered by the Directive to follow a six-step process⁵⁹ designed to avoid adverse human rights (as well as environmental) impacts.

What is new is that in order to give to due diligence a meaningful impact⁶⁰, the companies falling within the scope of the Directive are required to take appropriate steps to set up and carry out mentioned measures not only in their own operations, but also in the operations of their upstream and downstream business partners (i.e. throughout the chain of activities). Companies are under obligations of means: they do not have to guarantee that adverse impacts will never occur or that they will always be stopped⁶¹. In addition, they may avoid responsibility by proving that they adopted due diligence measure in the chain of activities.

With regard to the concept of human rights impact, Article 2 makes clear that it covers any adverse effect on individuals resulting from violations of the human rights set out in Annex I, part I⁶².

In envisaging the human rights protected, Annex I adopts a mixed approach: section 1 provides a limited list of sixteen rights and prohibitions including references to the human rights conventions in which the rights and prohibitions are expressly provided for and regulated⁶³.

⁵⁸ The ‘*OECD Due Diligence Guidance for Responsible Business Conduct*’ is available at <https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm> accessed 17 January 2025.

⁵⁹ In satisfying such obligations, companies are, on the one side, allowed to share resources and information within their groups as well with other legal entities for due diligence purposes and, on the other, shall keep documentation demonstrating compliance with the Directive for five years.

⁶⁰ This goal is expressly mentioned under CSDDD, recital 24, whilst recital 25 provides for the relevant definition of chain of value.

⁶¹ See CSDDD, recital 19.

⁶² More precisely, CSDDD, art. 2 refers to (i) the violation of any human rights *delineated* in Annex I, part I, section I, as *outlined* in the international agreements referenced in Annex I, part I, section II; (ii) the infringement of a human right *not specified* in Annex I, part I, section 1, but *covered* by the human rights agreements listed in Annex I, part I, section 2, provided that some criteria are met (emphasis added).

⁶³ As an example of right, see CSDDD, Part 1 of Annex I, point 1: ‘The right to life, interpreted in line with Article 6(1) of the International Covenant on Civil and Political Rights. The abuse of that right includes, but is not restricted to, private or public security guards protecting the company’s resources, facilities or personnel causing the death of a person due to a lack of instruction or control by the company’. As an example of prohibition, see *ibid*, point 9:

A company may also be responsible for violations of human rights (not listed in section 1, but) ‘enshrined’ in one of the eleven international instruments listed in section 2⁶⁴. All the instruments listed in the Annex are certainly relevant for the purposes of the Directive, not only because they aim to protect the rights of workers and also of children, but also because their territorial scope of application is not limited to the EU and is deliberately wider. It would have been unreasonable to adopt a ‘regional’ human rights-oriented perspective to abuses that may take place far away from the EU area and to companies that are established under the law of a third State.

In addition, when implementing the Directive Member States may build up a civil liability mechanism which makes direct reference to sources of law which are not listed in the Annex, but which are binding and relevant for the country at stake⁶⁵.

‘The prohibition of the employment of a child under the age at which compulsory schooling is completed and, in any case, is not less than 15 years, except where the law of the place of employment so provides in line with Article 2(4) of the International Labour Organization Minimum Age Convention, 1974 (No 138), interpreted in line with Articles 4 to 8 of the International Labour Organization Minimum Age Convention, 1973 (No 138)’.

⁶⁴ The international instruments originally conceived as relevant treaties for the adoption of the Directive were more than the ones now included, the missing instruments being (i) the Universal Declaration of Human Rights, (ii) the Convention on the prevention and punishment of the crime of genocide; (iii) the convention against torture and other cruel, inhuman or degrading treatment or punishment; (iv) International Convention on the elimination of all forms of racial discrimination; (v) the Convention on the elimination of all forms of discrimination against women (CEDAW); (vi) the convention on the rights of persons with disabilities; (vii) the UN declaration on the rights of indigenous peoples, (viii) The declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities.

⁶⁵ In this context the German Supply Chain Act (Act on Corporate Due Diligence obligations for the prevention of human rights violations in supply chains, 16 July 2021, available in English language at www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile accessed 17 January 2025), which is the one inspiring the method of the list of instruments included in the Annex adopted by the Directive at stake. The Committee on the application of CEDAW has recommended the express inclusion of the convention in the list of instruments enclosed to the German law. See: UN Committee on the Elimination of Discrimination against Women’s ‘*Concluding observations on the ninth periodic report of Germany*’, (85th session, 31 May 2023), 5 <https://digitallibrary.un.org/record/4013941?v=pdf>. Similarly, during the legislative procedure for the adoption of the Directive, Unicef pointed out that further instruments should have been considered and, in particular, made reference to the protocols to the Convention on the rights of the child, see UNICEF ‘*An EU Corporate Sustainability Due Diligence Directive that Works for Children. UNICEF comments on the Commission’s proposal*’ www.unicef.org/eu/documents/eu-

The Directive applies to all EU Member States, Denmark included (which, on the contrary, is not bound by the Rome II Regulation), which were originally required to transpose the Directive by 26 July 2026⁶⁶, but the above term has been recently postponed of one year.

The respect of the Directive is granted by virtue of the combination of a public and a private enforcement mechanism, which shall not interfere with each other.

According to Article 24 each Member State shall designate one or more authorities to supervise compliance with the obligations laid down in the national rules implementing the Directive⁶⁷. Beside powers of investigation and of adoption of interim and provisional measures⁶⁸, the supervisory authorities are allowed to impose significant penalties, based on the worldwide turnover of the company in the financial year preceding that of the decision to impose the fine⁶⁹.

By virtue of the private enforcement mechanism envisaged in the civil liability scheme under Article 29, victims of human rights violations can take legal action against the companies to which the Directive is addressed for damages that they have suffered.

Companies can be held liable for damages if (i) they intentionally or negligently failed to comply with the due diligence obligations envisaged and (ii) as a result, damage to the person's legal interests protected under national law was caused⁷⁰.

The Directive, thus, establishes a traditional liability scheme consisting of an objective element, i.e. the failure to comply with the obligations under the Directive (which are obligations of means, not of result) and a subjective

corporate-sustainability-due-diligence-directive-works-children. It will be for the Member States bound by the Protocols consider whether it is opportune to make reference to them in the international legislation implementing the Directive.

⁶⁶ However, the national rules implementing the Directive shall be effectively applied by the Member States progressively in the following years. See CSDDD, art. 37.

⁶⁷ The authorities designated in the Member States may also coincide with (or be coordinated with) the National Contact Points for Responsible Business Conduct which nearly all the European Union Member States (with the exception of the Republic of Cyprus and Malta) have already created with a view to implement the OECD Guidelines for Multinational Enterprises. As for the list of the existing National Contact Points: OECD, '*What are National Contact Points for RBC*' <https://mneguidelines.oecd.org/ncps/>.

⁶⁸ See CSDDD, art. 25.

⁶⁹ See CSDDD, art. 27.

⁷⁰ CSDDD, art. 29(1).

element, which excludes the objective liability and asks for an intentional conduct or (more likely) a negligent conduct. As for the causal link Article 29(1)(b) CSDDD requires the conduct to give rise to a damage to a person's legal interests protected under national law.

Reference to national law implies that it is for each Member State to define the specific interests they want to protect⁷¹. Similarly, it is for national law to determine the burden of proof and the conditions for initiating⁷².

On the contrary, it is the Directive that regulates the exclusion of liability and the limits to compensation. More precisely, liability is excluded if the damage was caused 'only' by its business partners in its chain of activities⁷³.

As regards damages, the Directive envisages that the natural or legal persons damaged shall be entitled to full compensation in accordance with the rules of national law⁷⁴, with the exclusion of any overcompensation. Punitive damages are, hence, excluded. This solution is in line with the Rome II Regulation's approach to punitive damages⁷⁵.

5. Access to justice: the "smart solution" envisaged by Article 29(7) of the Directive.

In order to overcome obstacles encountered by victims of human rights violations in practice and to grant them effective access to justice, Article 29 of the CSDDD envisages a very pragmatic and smart solution based on a list of safeguards and the qualification of the national implementing rules as overriding mandatory provisions⁷⁶.

⁷¹ See CSDDD, recital 79. As an example, in the Netherlands, the relevant due diligence legislation's aim is eradicating child labour in the chain of activities. See L. ENNEKING, *Putting the Dutch Child Labour Due Diligence Act into Perspective*, in *Erasmus Law Review*, 4, 2019, <http://www.erasmuslawreview.nl/tijdschrift/ELR/2019/4/ELR-D-21-00013>).

⁷² See CSDDD, recital 81.

⁷³ See CSDDD, art. 29(1).

⁷⁴ See CSDDD, art. 29(2).

⁷⁵ See Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, 2007, OJ L 199 (Rome II Regulation), recital 32.

⁷⁶ A similar (even if not identical) solution has been already envisaged in another market instrument: Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Given that workers who temporarily work in another Member State are frequently subject to the law

For each obstacle encountered in practice (limitation, costs, absence of injunctive measures, problems in the disclosure of evidence), a specific safeguard is provided.

Article 29 starts with the need of a *de minimis* standard of a 'reasonable' limitation period, which should be at least 5 years and, however, not be hampered by national rules (on beginning, duration, suspension or interruption of limitation).

A similar statement is also envisaged with reference to costs of proceedings, which should not be 'prohibitively expensive' for claimants.

Article 29 also requires Member States to allow the claimants to seek injunctive measures and to authorise certain organisations to bring actions for them.

Directive further clarifies that reference is made to measures in the form of a definitive or provisional measure to cease infringements of the provisions of national law adopted pursuant to the Directive itself and, on the other hand, that legitimate representative could be civil society organisations and human rights defenders, trade unions and other workers' representatives as well as civil society organisations active and experienced in the areas related to the environment.

Courts are also allowed to order disclosure of evidence by companies, when this is necessary for a claim, with a view to ensure proportionality and protection of confidential information.

The safeguards – *per se* considered – facilitate access to justice to victims of violations of human rights in chain of activities but it is Article 29(7) which makes it possible to effectively overcome the problems experienced due to the application of the host State law.

Under this rule, Member States shall ensure that the provisions of national law transposing Article 29 are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.

In other words, the provisions of national law transposing Article 29 must be characterised as overriding mandatory rules whenever the law applicable to the claims is not that of a Member State.

of their home Member State, the Directive provides core terms and conditions of employment, which are applied in accordance with the rules in place in the host Member States in so far as they are more favourable to those of the home State law or, in any case, of the law applicable to the employment contract. The nucleus of mandatory rights deals with issues such as minimum rates of pay, including overtime pay, paid annual holidays, maximum work periods, and health, safety and hygiene at work. See Article 4 of Directive 96/71. On this topic, see P. VAN NIFFEL-S. AFANASJEVA, *The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provisions of Services*, in *European Papers*, vol. 3, 2018, 1401-1427.

The protection of the victims is granted *ex ante*: the mechanism of the overriding mandatory provisions (ie the “sword”, as opposed to the public policy exception, ie the “shield”) has been considered the most adequate to protect access to justice, by stopping *a priori* the application of the conflict of law rules of the Rome II Regulation.

The choice of qualifying as overriding mandatory provisions the national rules implementing the rules of the Directive, whilst increasing the harmonisation of the safeguards in the European civil judicial area and granting a certain level of certainty and predictability, also allows Member States to have different appreciation of the safeguards.

In implementing the provision, the Member States may adopt different solutions (giving rise to different “swords” which will apply depending on the court of the Member State before which the civil liability claim has been introduced). The practical effect is to confirm the relevance of access to justice as for the victims of violation of human rights in the chain of activities a value of ‘European’ dimension that all Member States must protect.

It might be questionable whether the victims may directly rely on Article 29 in the case of lack of implementation or not adequate implementation by the Member States. Even if the safeguards are worded in a way which implies a margin of appreciation and of choice by the Member States, in some cases, very clear and precise rules can be inferred by Article 29. As an example, limitation cannot be shorter than 5 years. In case of lack of implementation of such a rule, victims may possibly find problems (perhaps not with regard to the clear and precise content of the rules of the Directive, but) with the need to invoke the “horizontal” direct effect vis-à-vis the corporations.

Coherently with the *de minimis* character of the Directive, Member States are allowed to extend the liability regime to situations not covered by the Directive and, as an example, extend the due diligence obligations also to companies smaller than the ones envisaged by the Directive as well to further point out the content of the due diligence obligations.

Although the requirements for reducing environmental impacts are slightly different, the Directive treats adverse impacts on human rights and adverse impacts on environment in the same way when it comes to civil liability. Moreover, given that in many situations, it is very difficult to distinguish the adverse impact of a conduct on environment from the adverse impact of the same conduct on people, recital 89 suggests that ‘*persons who suffer damage can claim compensation under this Directive even where such claims overlap with human rights claims*’⁷⁷.

⁷⁷ With regard to the possible overlap between human rights and environmental impacts,

When transposing the civil liability regime provided by the Directive, Member States are allowed to choose the methods to achieve the results and, in this respect, they enjoy margins of discretion. Yet, they must take account of all related national rules to the extent that they are (a) necessary to ensure the protection of victims and (b) ‘crucial for safeguarding the Member States’ public interests, such as its political, social or economic organization’⁷⁸. Clearly the system of law shall be considered under both perspectives, with a view to build an efficient system of protection of victims, but also to achieve the public interests’ goals of each Member State.

6. *The uncertain future and effects of the CSDDD and of its smart solution to grant access to victims.*

In the present moment, the CSDDD is subject to a revision procedure (which is unprecedented for an EU act): just few months after its adoption, at the end of February 2025, the Commission has adopted two proposals aimed at amending it (together with other relevant instruments in the field of corporate sustainability)⁷⁹, having regard to (i) the ongoing geopolitical situation and (ii) the need for the EU companies (falling within the scope of application of the Directive) to be competitive in the market.

The first of the two proposals (the so called “Omnibus package” no 1)⁸⁰ has

see E. ÁLVAREZ-ARMAS, ‘Álvarez-Armas, on potential human-rights-related amendments to the Rome II Regulation (II): the proposed Art. 6a; Art. 7 is dead, long live Article 7?’, in *Conflict of Laws*, 27 January 2021, <https://conflictoflaws.net/2021/alvarez-armas-on-potential-human-rights-related-amendments-to-the-rome-ii-regulation-ii-the-proposed-art-6a-art-7-is-dead-long-live-article-7/>.

⁷⁸ See CSDDD, recital 90.

⁷⁹ See E. CORCIONE, *Meno diritti umani, più competitività? Alcune considerazioni sul pacchetto Omnibus proposto dalla Commissione europea*, in <http://www.sidiblog.org/2025/03/17/meno-diritti-umani-piu-competitivita-alcune-considerazioni-sul-pacchetto-omnibus-proposto-dalla-commissione-europea/>; A. BONFANTI, *EU Corporate Sustainability at a Crossroads: The Omnibus Proposal to Amend the EU Directive on Corporate Sustainability Due Diligence and Its Ongoing Negotiation*, in *Diritti umani e diritto internazionale*, 2025, 532-541.

⁸⁰ See Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, COM (2025) 80 final available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2025:80:FIN>.

completed the legislative procedure and Directive 2025/794⁸¹ has been adopted, with the consequence that the CSDDD's entrance into force has been postponed.

The second proposal (the so-called "Omnibus package" no 2)⁸² is aimed at limiting due diligence obligations to the "first tier" (i.e. to the direct value chain partners) and at eliminating the uniform civil liability regime, including the smart solution under Article 29(7). On the contrary, the requirements for effective access to justice as well as the right to full compensation when a company is held liable for a failure to comply with the due diligence requirements are maintained⁸³.

The exit of the legislative proceeding is still uncertain.

If the Omnibus Package II will be rejected, Member States have to implement the CSDDD within the 26 July 2027. By that time, a harmonized due diligence and civil liability system should be available in the EU and victims of business-related human rights abuses – thanks to the smart solution envisaged by art. 29.7 – should be able to start an action for civil liability against companies active in the EU market which have not respected the due diligence obligations.

If the Omnibus Package II will be approved, the harmonized civil liability regime as well as the characterization of the rules implementing the safeguards as overriding mandatory provisions will be suppressed. Member States will still be required to ensure that victims of adverse impacts have effective access to justice and effective remedy and, in this respect, nothing prevent the Member States to make use of the smart solution envisaged by the EU lawmaker and classify the liability rules transposing the new Article 29 as rules of overriding mandatory application, when the law applicable to claims to that effect is not

⁸¹ Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, in OJ L, 2025/794, 16 April 2025.

⁸² Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM (2025) 81 final available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025PC0081>.

⁸³ Criticisms on the Omnibus packages have been expressed by A. Bonfanti and M. Fasciglione – during an online debate on 14 aprile 2025, on the topic "Omnibus: simplification or deregulation? Surely many concerns" organized by Human Rights International Corner <https://it.humanrightsic.com/news> and by E. CORCIONE, *Meno diritti umani, più competitività? Alcune considerazioni sul pacchetto Omnibus proposto dalla Commissione europea*, <http://www.sidiblog.org/2025/03/17/meno-diritti-umani-piu-competitivita-alcune-considerazioni-sul-pacchetto-omnibus-proposto-dalla-commissione-europea/>.

the national law of the Member States⁸⁴. Whether this will happen, it shall be seen⁸⁵. In the negative, the last resort will be a human-rights oriented interpretation of the existing legal framework of reference and, in particular, of the Rome II Regulation regime, with a view to grant access to justice for victims of business-related human rights abuses.

Also the (extraterritorial) effects of the CSDDD are, to a certain extent, uncertain with regard to its application vis-à-vis corporation in the US: on the 12 of March 2025, the “Protect USA Act” has been presented⁸⁶. It is a bill aimed at prohibiting entities “integral to the national interests of the United States” from participating in any foreign sustainability due diligence regulation, including the CSDDD, “any successor directive adopted by the EU or any member country of the EU” as well as “any precursor directive by any Member country of the EU”. If an entity violates the prohibition, it can be subject to a civil penalty of a maximum amount of 1 million dollars and, at the discretion of the President, it can be deemed ineligible up to three years to submit a bid for any Federal award or contract. Entities, which present a petition for relief, may be exempted from the above prohibition at the discretion of the US President. On the other hand, judgments from foreign courts against an “entity integral to the national interests of the United States” in relation to any foreign sustainability due diligence regulation shall not be recognized (unless otherwise provided by an Act of Congress).

The Protect USA Act has found a source of inspiration in the European “blocking statute”, i.e. Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country⁸⁷. The

⁸⁴ See recital 28 of the proposed Directive, COM (2025) 81.

⁸⁵ The first reading by the EU Parliament dates 16 December 2025. It is possible to follow the legislative procedure at the following link https://law-tracker.europa.eu/procedure/2025_45?lang=it.

⁸⁶ The proposed text of the Protect USA Act is available at [https://www.congress.gov/bill/119th-congress/senate-bill/985/text#:~:text=Introduced%20in%20Senate%20\(03%2F12%2F2025\)&text=To%20prohibit%20entities%20integral%20to,Union%2C%20and%20for%20other%20purposes](https://www.congress.gov/bill/119th-congress/senate-bill/985/text#:~:text=Introduced%20in%20Senate%20(03%2F12%2F2025)&text=To%20prohibit%20entities%20integral%20to,Union%2C%20and%20for%20other%20purposes), accessed 8 June 2025.

⁸⁷ See Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom OJ L 309, 29 November 1996, 1-6. On the similarity between the USA Protect act and the Regulation 2271/96 see Marco Pasqua, Protect USA Act of 2025 vs. Corporate Sustainability Due Diligence Directive, available at <https://eapil.org/2025/05/14/protect-usa-act-of-2025-vs-corporate-sustainability-due-diligence-directive/>. On the application of the Regulation, see Report from the Commission to the European Parliament

blocking statute was aimed at neutralizing the effects of the extraterritorial application of sanctions, which the EU considered contrary to international law. Originally adopted to face the negative effects that the USA's sanctions against Iran and Cuba, the Regulation has been adjourned in 2018, in order to take into consideration, the new provisions adopted by the US. The Regulation 2271/96 was and is therefore aimed at protecting the EU citizens as well as companies against those effects, by allowing them not to comply with the foreign rules affecting them as well as by not recognizing sentences. Although the US Protect Act relies on the same instruments to neutralize the effect of EU rules on corporate social responsibility (as well as other non-US rules on the same topic) vis-a-vis US companies, it shall be pointed out that the EU rules promoting corporate social responsibility and transition to sustainability are in compliance with the UN 2050 Agenda and with the Prof. Ruggie's principles and, therefore, with globally agreed standards and goals.

7. Conclusions.

In the present moment, it is difficult for the EU to be a standard setter and to shape new rules or re-shape the existing ones towards an integration of the human rights protection and of transition to sustainability goals in the private international law instruments. In this respect, the adoption of the CSDDD is *per se* a great achievement: it has succeeded in imposing due diligence standards to multinational enterprises and in making them responsible for their conducts.

If the Omnibus Package II will not be approved, the CSDDD may also succeed as regards the adoption of a smart solution to the problem of access to justice for the victims of human rights violation in the chain of activities.

The safeguards envisaged combined with the need to consider the national provisions implementing the whole Article 29' civil liability system as having an overriding mandatory character anytime the law of a non-EU State applies, is a solution which can make access to justice effective. And this is the reason why it has been perceived as disruptive.

and the Council relating to Article 7(a) of Council Regulation (EC) No 2271/96 ('Blocking Statute') COM/2021/535 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0535>,. On this topic, see C. CELLERINO, *L'effettività del cd. "regolamento di blocco" tra coercizione straniera e libertà di impresa: la Corte di Giustizia si pronuncia nel caso Bank Mellì Iran*, in *European Papers*, 2022, 561-572, available at <https://www.europeanpapers.eu/europeanforum/effettivita-regolamento-di-blocco-bank-melli-iran>.

Under the (EU) private international law perspective, art. 29 is a very important novelty. On the one side, it contributes to shape a positive definition of the public policy, which includes access to an effective judicial remedy for the victims of business-related human rights abuses. On the other side, in setting a *de minimis* standard of access to justice, it avoids a race to the bottom. Furthermore, in granting overriding mandatory character (not to the rules of the Directive itself, but) to the national rules implementing the Directive, it respects the differences existing among the Member States.

Such a solution is now challenged by the need to balance access to justice with other interests, such as competitiveness.

However, even if the EU will prioritize competitiveness and eliminate Article 29(7), the smart solution there envisaged may still be applied by the Member States, which are not at all restricted (i) from implementing the safeguards making access to justice effective by virtue of national rules and (ii) from classifying them as overriding mandatory provisions in their domestic laws⁸⁸.

In case this does not happen, as *extrema ratio*, it will be for the courts of the Member States to apply the relevant rules of the Rome II Regulation with a view to balance the goals of competitiveness and of protection of the victims of business-related abuses and to ask to the Court of Justice to clarify how the above rules shall be applied.

However, given their relevance and the debate surrounding the adoption of the CSDDD and the safeguards enlisted in its art. 29, it will be difficult for the national courts as well as for the Court of Justice not to take into account of such relevant developments.

⁸⁸ For an analysis of the existing situation of the domestic laws on due diligence obligations, see European Commission, *Study on due diligence requirements through the supply chain*, 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>, accessed 8 June 2025.

DIRITTO UE E SOSTENIBILITÀ DELLE CATENE GLOBALI DEL VALORE: TRA EXTRATERRITORIALITÀ E *BRUSSELS EFFECT*

Chiara Gambino

SOMMARIO: 1. Premessa. – 2. L’approccio dell’Unione alle catene globali del valore attraverso strumenti tesi a responsabilizzare specifici soggetti ... – 3. ... e misure *product-based*. – 4. La capacità del diritto UE di applicarsi oltre i confini dell’Unione. – 5. Le catene globali del valore nel diritto UE tra estensione territoriale dell’ambito applicativo degli strumenti adottati e c.d. *Brussels effect*.

1. Premessa.

Negli ultimi anni l’Unione europea si è dotata di numerosi strumenti volti a regolare l’attività delle imprese nella direzione di una maggiore sostenibilità.

In tempi recenti tale azione si è caratterizzata, tra l’altro, per l’adozione di una serie di misure che si propongono – a vario titolo ed in maniera diversa – di influire anche sui processi produttivi che si svolgono al di fuori del territorio UE.

Tale fenomeno è ravvisabile, segnatamente, non solo (a) nella sempre più frequente inclusione di impegni sulla sostenibilità dei processi produttivi delle imprese all’interno degli accordi preferenziali di libero scambio conclusi dall’Unione¹, ma anche (b) nella unilaterale previsione, all’interno di atti normativi

¹ Sul tema cfr., *ex plurimis*, Y. CHEN-B. SHEEHY, *Exporting Corporate Social Responsibility through Free Trade Agreements: improving coherence in the EU’s New-Generation Trade and Sustainable Development FTAs*, in *Texas International Law Journal*, 2023, 175 ss.; J.B. VELUT-D. BAEZA-BREINBAUER-M. DE BRUIJNE-E. GARNIZOVA-M. JONES-K. KOLBEN-L. OULES-V. ROUAS-F. TIGERE PITTET-T. ZAMPARUTTI, *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, 2022, relazione commissionata dalla London School of Economics, reperibile *online*; F.R. JACUR, *Corporate Social Responsibility in recent bilateral and regional free trade agreements: an early assessment*, in *European Foreign Affairs Review*, 2018, 463 ss.; J. WALESON, *Corporate Social Responsibility in EU Comprehensive Free Trade*

UE, (b1) di doveri di *due diligence* e di rendicontazione che riguardano anche imprese costituite secondo la normativa di uno Stato terzo e/o attività svolte oltre confine, ovvero (b2) di limiti e condizionamenti all'importazione di prodotti realizzati "all'estero".

L'ambizione del diritto UE ad applicarsi anche al di fuori del territorio dell'Unione non rappresenta, di per sé, una novità. L'aspetto interessante del *trend* che si vuole analizzare attiene, tuttavia, all'impostazione sottesa agli strumenti in discorso, in quanto riconducibile al deliberato intento di incidere, attraverso di essi, su attività che si svolgono oltre i confini UE in considerazione della dimensione globale dei fenomeni disciplinati. La frammentazione della produzione in più fasi, ciascuna delle quali si svolge in diverse parti del mondo, e l'esternalizzazione, attraverso le catene globali del valore, dei rischi e dei costi a ciò correlati impone, infatti, di affrontare la tematica della responsabilizzazione delle imprese attraverso norme a portata necessariamente extraterritoriale.

Proprio in quanto tese ad influire (anche) su soggetti ed attività collocati al di fuori dell'Unione, misure di questo genere si espongono, tuttavia, allorché di natura unilaterale anziché pattizia, a potenziali contestazioni e criticità.

Sulla scorta di queste premesse, ci si propone di fornire, di seguito, (a) una breve descrizione di alcuni atti UE esemplificativi del trend in parola, con l'intento, innanzi tutto, di illustrare in che modo e attraverso quali tecniche normative essi mirano a realizzare il sopra accennato effetto extraterritoriale, nonché (b) di valutarne la compatibilità con i limiti imposti al riguardo dalla sovranità territoriale degli Stati terzi interessati e (c) di vagliarne, infine, la concreta idoneità a generare il c.d. *Brussels effect*².

2. *L'approccio dell'Unione alle catene globali del valore attraverso strumenti tesi a responsabilizzare specifici soggetti ...*

Come si è accennato, l'Unione ha adottato, negli ultimi anni, diverse misure di natura unilaterale atte ad incidere sui processi produttivi (anche) di imprese

Agreements: Towards Sustainable Trade and Investment, in *Legal Issues of Economic Integration*, 2015, 143 ss.

² La nozione di *Brussels Effect* è stata coniata dalla Prof.ssa A. BRADFORD nel lavoro *The Brussels Effect*, in *Northwestern University Law Review*, 2012, 1 ss. e successivamente sviluppata nella monografia *The Brussels Effect – How the European Union rules the World*, Oxford, 2020. In argomento, v. anche, M. BERNAT-F. SPERA, *The De Jure "Brussels Effect": Current Legal Trends in the EU's Unilateral Regulatory Globalisation*, in *Studies in European Affairs*, 2024, 77 ss. In merito al significato di tale espressione, si rinvia al par. 4.

e soggetti collocati al di fuori del suo territorio al fine di assicurare una maggiore sostenibilità lungo tutta la catena globale del valore. Tali strumenti sono accomunati, quindi, dalla dichiarata ambizione a generare effetti a portata extraterritoriale.

Tali atti – pur fondandosi sull’impiego di strategie e meccanismi diversi – possono distinguersi, per comodità della presente trattazione, a seconda che (a) facciano perno sull’imposizione di determinati obblighi a carico di taluni soggetti; ovvero (b) si focalizzino sulle caratteristiche che specifici prodotti devono presentare per poter essere importati nel mercato UE³.

Più nel dettaglio, una significativa porzione delle misure attraverso le quali il diritto UE affronta le tematiche in discorso si incentra, anzitutto, sulla responsabilizzazione di talune imprese – identificate quali *lead firms* in virtù delle loro dimensioni – rispetto alla condotta di tutti i soggetti ricompresi nelle rispettive catene del valore.

Viene in rilievo, in questa prospettiva, la direttiva (UE) 2024/1760, nota anche come *CSDDD* o *CS3D* (*Corporate Sustainability Due Diligence Directive*)⁴, la quale, in particolare, pone una serie di obblighi di c.d. *risk-based*

³ Per un’analisi in questi termini, tesa, in particolare, ad individuare le diverse modalità attraverso le quali il diritto UE si propone di responsabilizzare le catene del valore, cfr. A. BECKERS, *Global value chains in EU law*, in *Yearbook of European Law*, 2023, 322 ss. In argomento v. anche E. CORCIONE, *La tutela dei diritti umani nelle catene globali del valore*, Torino, 2024.

⁴ Direttiva (UE) 2024/1760 del Parlamento europeo e del Consiglio, del 13 giugno 2024, relativa al dovere di diligenza delle imprese ai fini della sostenibilità e che modifica la direttiva (UE) 2019/1937 e il regolamento (UE) 2023/2859. In argomento, cfr., *ex plurimis*, O. BOSKOVIC, *Extraterritoriality and the proposed directive on corporate sustainability due diligence: a recap*, in *Journal of Private International law*, 2024, 117 ss.; N. BUENO-N. BERNAZ-G. HOLLYO. MARTIN-ORTEGA, *The EU Directive in Corporate Sustainability Due Diligence (CSDDD): the final political compromise*, in *Business and Human Rights Journal*, 2024, 294 ss.; R. GRECO, *La direttiva sul dovere di diligenza delle imprese ai fini della sostenibilità: quale portata extra UE?*, in *SIDIBlog*, 20 settembre 2024, reperibile online; S.K. PARK, *Untangling the Extraterritoriality of ESG Regulation*, in *North Carolina Journal of International Law*, 2024, 399 ss.; T.J. PETROVIC, *Extraterritoriality Effect of the CSDDD on Non-EU Companies*, in *Intereulaweast*, 2024, 195 ss.; N. BOSCHIERO, *L’extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *Diritti umani e diritto internazionale*, 2023, 661 ss.; L. VENTURA, *Corporate Sustainability Due Diligence and the New Boundaries of the Firms in the European Union*, in *European Business Law Review*, 2023, 239 ss.; R.R. ALAMILLOS-F. DE MARIZ, *How can European Regulation on ESG impact Business globally?*, in *Journal of Risk and Financial Management*, 2022, reperibile online; A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull’obbligo di diligenza delle imprese in materia di sostenibilità*,

governance a carico, non solo di società *i*) costituite in conformità alla normativa di uno Stato membro, identificate sulla base del criterio del fatturato e del numero di dipendenti ⁵, ma anche di società *ii*) incorporate secondo la normativa di Stati terzi, a condizione che abbiano prodotto nell'Unione un certo ammontare di fatturato ⁶.

Dette imprese sono soggette, in particolare, agli obblighi imposti dalla *CS3D* di *i*) identificare i rischi e mettere in atto tutti gli accorgimenti necessari per mitigare l'impatto delle attività considerate sull'ambiente e/o sui diritti umani dei soggetti coinvolti, nonché *ii*) adottare e attuare un piano di transizione volto a garantire, con il massimo impegno possibile, la compatibilità del modello e della strategia aziendali con la transizione verso un'economia sostenibile e con la limitazione del riscaldamento globale a 1,5° C in linea con l'accordo di Parigi.

È interessante osservare che i predetti obblighi si estendono all'attività dei soggetti considerati nella sua interezza, senza distinzione in base al luogo in cui essa viene posta in essere. In quest'ottica, l'art. 7 della direttiva enfatizza espressamente, peraltro, l'esigenza che il dovere di diligenza venga integrato da ciascuna impresa "in tutte le sue pertinenti politiche e i suoi pertinenti sistemi di

in *Jus*, 2022, 295 ss.; L. ENRIQUES-M. GATTI, *The extraterritorial impact of the proposed EU directive on corporate sustainability due diligence: why corporate America should pay attention*, in *Oxford Business Law Blog*, 21 aprile 2022, reperibile online.

⁵ In base all'art. 2, par. 1, della direttiva, essa si applica alle società che sono costituite in conformità alla normativa di uno Stato membro e abbiano avuto, in media, nell'ultimo esercizio per il quale è stato o avrebbe dovuto essere adottato il bilancio di esercizio, *i*) più di mille dipendenti e *ii*) un fatturato netto a livello mondiale superiore a quattrocentocinquanta milioni di euro.

⁶ Ai sensi dell'art. 2, par. 2, la direttiva si applica, nello specifico, anche alle società costituite in conformità alla normativa di un Paese terzo che, alternativamente, *(a)* abbiano generato nell'Unione, nell'esercizio precedente all'ultimo, un fatturato netto superiore a quattrocentocinquanta milioni di euro; *(b)* siano a capo di un gruppo che, su base consolidata, soddisfi tale requisito; *(c)* abbiano concluso accordi di *franchising* o di licenza nell'Unione in cambio di diritti di licenza con società terze indipendenti che garantiscano un'identità comune, un concetto aziendale comune e l'applicazione di metodi aziendali uniformi, sempreché detti diritti di licenza ammontassero, nell'esercizio precedente l'ultimo, a più di ventidue milioni di euro e abbiano generato, nel citato esercizio, un fatturato netto superiore a ottanta milioni di euro nell'Unione. La direttiva (UE) 2025/794 del Parlamento europeo e del Consiglio, del 14 aprile 2025, che modifica le direttive (UE) 2022/2464 e (UE) 2024/1760 per quanto riguarda le date a decorrere dalle quali gli Stati membri devono applicare taluni obblighi relativi alla rendicontazione societaria di sostenibilità e al dovere di diligenza delle imprese ai fini della sostenibilità (nota anche come *Stop the Clock*) ha rinviato di un anno i termini per il recepimento, da parte degli Stati membri, della disciplina in oggetto stabiliti dal relativo art. 37.

gestione dei rischi”. Così congegnata, la disciplina in oggetto si rivela, quindi, in grado di attrarre entro la sua sfera operativa anche le attività ed i processi produttivi dei soggetti ricompresi nel suo campo di applicazione che si svolgano al di fuori del territorio dell’Unione.

Quale conseguenza della prescrizione del dovere di adoperarsi per prevenire, limitare e porre termine agli impatti negativi sui diritti umani e l’ambiente causati lungo l’intera catena del valore, la disciplina dettata dalla direttiva in esame riguarda, ancorché indirettamente, anche i *partner* commerciali dei predetti soggetti, a prescindere dalla loro nazionalità e dalla collocazione delle relative sedi e attività⁷. Pare, quindi, ragionevole ipotizzare che, al fine di adempiere agli obblighi su di esse incombenti, le imprese che ne sono destinatarie possano risultare indotte ad inserire negli accordi di fornitura apposite clausole tese ad imporre alle proprie controparti contrattuali il rispetto di determinati standard di sostenibilità⁸.

Sulla base della medesima impostazione, la direttiva (UE) 2013/34 (c.d. direttiva contabile)⁹, come modificata dalla direttiva (UE) 2014/95 (c.d. *NFRD* – *Non Financial Reporting Directive*)¹⁰ pone l’obbligo di rendere una dichiarazione di carattere non finanziario, ai sensi dell’art. 19-*bis*, a carico delle imprese di grandi dimensioni che, durante l’esercizio e alla data di chiusura del bilancio, presentino in media un numero di 500 dipendenti¹¹.

⁷ Art. 8, par. 1, della direttiva.

⁸ N. BOSCHIERO, *L’extraterritorialità*, cit., 671.

⁹ direttiva (UE) 2013/34 del Parlamento europeo e del Consiglio, del 26 giugno 2013, relativa ai bilanci d’esercizio, ai bilanci consolidati e alle relative relazioni di talune tipologie di imprese, recante modifica della direttiva 2006/43/CE del Parlamento europeo e del Consiglio e abrogazione delle direttive 78/660/CEE e 83/349/CEE del Consiglio.

¹⁰ Direttiva (UE) 2014/95 del Parlamento europeo e del Consiglio, del 22 ottobre 2014, recante modifica della direttiva (UE) 2013/34 per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni.

¹¹ In base all’art. 19-*bis* della direttiva (UE) 2013/34, la dichiarazione deve contenere “informazioni ambientali, sociali, attinenti al personale, al rispetto dei diritti umani, alla lotta contro la corruzione attiva e passiva in misura necessaria alla comprensione dell’andamento dell’impresa, dei suoi risultati, della sua situazione e dell’impatto della sua attività, tra cui: a) una breve descrizione del modello aziendale dell’impresa; b) una descrizione delle politiche applicate dall’impresa in merito ai predetti aspetti, comprese le procedure di dovuta diligenza applicate; c) il risultato di tali politiche; d) i principali rischi connessi a tali aspetti legati alle attività dell’impresa anche in riferimento, ove opportuno e proporzionato, ai suoi rapporti, prodotti e servizi commerciali che possono avere ripercussioni negative in tali ambiti, nonché le relative modalità

La direttiva (UE) 2022/2464 (nota anche come *CSRD – Corporate Sustainability Reporting Directive*)¹² ha significativamente esteso la portata di detti obblighi, includendovi, con le modalità che si illustreranno in appresso, anche le attività poste in essere da società costituite secondo la normativa di Paesi terzi.

Nello specifico, innanzi tutto, a norma dell'art. 40-*bis* della direttiva contabile, come modificata dalla *CSRD*, talune imprese presenti sul territorio di uno Stato membro che siano figlie o succursali di una impresa soggetta al diritto di un Paese terzo sono tenute a pubblicare e rendere accessibile la relazione di sostenibilità a livello di gruppo o consolidato. Destinatari delle prescrizioni in oggetto sono, in particolare, (a) le imprese figlie che rientrino tra quelle soggette agli obblighi di rendicontazione stabiliti dalla direttiva in oggetto e (b) le succursali che abbiano generato nell'Unione, nell'esercizio precedente, ricavi netti superiori a quaranta milioni di euro. Detti obblighi si applicano, inoltre, a condizione che l'impresa del Paese terzo abbia generato nell'Unione, negli ultimi due esercizi consecutivi, ricavi netti superiori a 150 milioni di euro.

Benché formalmente rivolte a imprese che operano sul territorio dell'Unione, in quanto ivi “stabilite” (le società figlie) o “situate” (le succursali), è indubbio che queste disposizioni – richiedendo di predisporre la citata relazione a livello di gruppo o consolidato – finiscano per imporre, ancorché indirettamente, l'obbligo di rendere conto delle proprie modalità di gestione dei profili di cui trattasi anche a carico delle imprese di Paesi terzi. Tali obblighi di *disclosure* si estendono, peraltro, indifferentemente a tutte le attività rese da dette imprese, indipendentemente dal luogo di svolgimento. Il summenzionato criterio imperniato sulla realizzazione nell'Unione di determinati importi di fatturato è funzionale, infatti, alla mera individuazione dei soggetti tenuti agli incombeni di cui si tratta, e non anche a circoscriverne la portata ai soli processi produttivi che abbiano luogo sul territorio di detto ordinamento.

Pur senza generare obblighi di carattere sostanziale in termini di adeguamento della *governance* societaria nella direzione di una maggiore sostenibilità, la necessità di redigere e pubblicare rapporti allo scopo di dare conto all'esterno

di gestione adottate dall'impresa; e) gli indicatori fondamentali di prestazione di carattere non finanziario pertinenti per l'attività specifica dell'impresa”.

¹² Direttiva (UE) 2022/2464 del Parlamento europeo e del Consiglio del 14 dicembre 2022 che modifica il regolamento (UE) 2014/537, la direttiva 2004/109/CE, la direttiva 2006/43/CE e la direttiva (UE) 2013/34 per quanto riguarda la rendicontazione societaria di sostenibilità.

di come vengono affrontati gli aspetti non economico-finanziari dell'attività d'impresa appare suscettibile di costituire, quantomeno, un incentivo, in via mediata, a prodigarsi in tal senso per tutti i soggetti coinvolti secondo le modalità appena descritte ¹³.

La direttiva *CSRD* sostituisce, inoltre, gli artt. 19-*bis* e 29-*bis* della predetta direttiva (UE) 2013/34 al fine di chiarire la portata degli obblighi informativi di cui trattasi, specificando, tra l'altro, che le informazioni da fornire in sede di rendicontazione devono riguardare l'intera catena del valore. Tra di esse rientrano, infatti, anche *i*) quelle correlate ai principali impatti negativi, effettivi o potenziali, legati alle attività dell'impresa e alla sua catena del valore, compresi i suoi prodotti e servizi, i suoi rapporti commerciali e la sua catena di fornitura, nonché *ii*) quelle concernenti eventuali azioni intraprese per prevenire o attenuare impatti negativi, effettivi o potenziali, o per porvi rimedio o fine, e dei risultati di tali azioni ¹⁴. Il paragrafo 3 di ciascuna delle norme in esame, inoltre, puntualizza espressamente che “se del caso, le informazioni di cui ai paragrafi 1 e 2 includono informazioni sulle attività dell'impresa e sulla sua catena del valore, comprese informazioni concernenti i suoi prodotti e servizi, i suoi rapporti commerciali e la sua catena di fornitura”.

L'attività di rendicontazione può, quindi, avere ad oggetto anche informazioni relative a soggetti diversi ed ulteriori rispetto a quelli formalmente ricompresi nel suo campo di applicazione. Non può escludersi, pertanto, che – a fronte delle ripercussioni da ciò potenzialmente derivanti sull'immagine e sulla reputazione delle imprese tenute ai menzionati adempimenti – queste prescrizioni finiscano per influire anche sulla selezione dei *partner* commerciali e/o per incoraggiare l'inserimento nei contratti di fornitura di apposite clausole tese ad assicurare il rispetto di determinati parametri di sostenibilità, così stimolando, in entrambi i casi, l'adeguamento agli standard UE anche da parte di soggetti, potenzialmente operativi al di fuori dell'Unione, estranei all'ambito di applicazione dello strumento in questione.

Simile impostazione è rinvenibile, invero, anche alla base di strumenti normativi più risalenti e a portata settoriale, come il regolamento (UE) 2010/995 in materia di commercializzazione del legno e prodotti derivati ¹⁵, noto come

¹³ E. CORCIONE, *La tutela dei diritti umani*, cit., 167.

¹⁴ Cfr. i parr. 1 e 2 degli artt. 19-*bis* e 29-*bis* della direttiva (UE) 2013/34.

¹⁵ Regolamento (UE) 2010/995 del Parlamento europeo e del Consiglio, del 20 ottobre 2010, che stabilisce gli obblighi degli operatori che commercializzano legno e prodotti da esso derivati.

Timber Regulation, e il regolamento (UE) 2017/821 sui materiali provenienti da zone di conflitto ¹⁶.

A loro volta, infatti, tali atti si fondano sull'imposizione a carico di determinati soggetti – identificati negli importatori dei prodotti considerati, a prescindere dalla loro nazionalità e dalla collocazione della relativa attività ¹⁷ – di specifici obblighi di diligenza e di rendicontazione in merito ai profili in esame.

Più precisamente, il *Timber Regulation* vieta l'accesso nel mercato dell'Unione di legno e prodotti derivati raccolti illegalmente e, a tal fine, prescrive agli importatori puntuali obblighi di *due diligence* consistenti nella raccolta di una serie di informazioni riguardanti le caratteristiche e la provenienza delle merci considerate, nonché nella predisposizione di apposite procedure di valutazione e di minimizzazione del rischio ¹⁸.

Allo stesso modo, al fine di interrompere il nesso esistente tra conflitti e sfruttamento illegale dei minerali, il regolamento (UE) 2017/821 stabilisce a carico degli importatori nell'Unione di determinati metalli e materiali – indipendentemente dalla loro nazionalità e dal luogo di stabilimento – appositi doveri di diligenza aventi ad oggetto la catena di approvvigionamento ¹⁹. Ai sensi del regolamento, nello specifico, gli importatori sono tenuti *i*) ad adottare un sistema di gestione della propria catena di approvvigionamento che garantisca la tracciabilità dei fornitori, *ii*) ad identificare i relativi rischi di effetti negativi e *iii*) a dotarsi di una strategia per prevenirli o ridurli, nonché *iv*) a sottoporsi ad *audit* condotti da soggetti terzi indipendenti e *v*) a comunicare alle autorità competenti e ai propri acquirenti le informazioni raccolte ²⁰.

È interessante sottolineare che, al pari delle disposizioni contenute nelle summenzionate Direttive, gli obblighi dettati dai predetti regolamenti *i*) sono posti a carico dei soggetti considerati senza distinzione in base alla nazionalità, né alla collocazione della loro sede o luogo di operatività, e *ii*) producono (sempur in via mediata) effetti anche su soggetti diversi ed ulteriori, all'impatto ambientale e sociale delle cui attività finiscono, di fatto, per estendersi. Gli strumenti in discorso sono, dunque, suscettibili di incidere – con le medesime

¹⁶ Regolamento (UE) 2017/821 del Parlamento europeo e del Consiglio, del 17 maggio 2017, che stabilisce obblighi in materia di dovere di diligenza nella catena di approvvigionamento per gli importatori dell'Unione di stagno, tantalio e tungsteno, dei loro minerali, e di oro, originari di zone di conflitto o ad alto rischio.

¹⁷ Cfr. l'art. 2 di ciascuno degli strumenti in esame.

¹⁸ Cfr. gli artt. 4 e 6 del regolamento.

¹⁹ Cfr. l'art. 1 del regolamento.

²⁰ Cfr. gli artt. 4 ss. del regolamento.

modalità dianzi descritte – non solo sulle imprese formalmente ed effettivamente ricomprese nel loro campo di applicazione, ma anche (indirettamente) su quelle integrate nella catena del valore di queste ultime, indipendentemente dalla collocazione delle rispettive sede o attività.

3. ... e misure product-based.

Come si è accennato, l'azione condotta dall'Unione in relazione ai profili di cui si discute si estrinseca, altresì, in misure di natura commerciale c.d. *product-based* in quanto focalizzate sulla definizione di sostenibilità che determinati prodotti devono soddisfare per poter essere importati nel mercato interno ²¹.

Rientra in questa categoria di strumenti, innanzi tutto, il regolamento (UE) 2023/1115 relativo ai prodotti associati alla deforestazione ²², destinato ad abrogare il summenzionato *Timber Regulation* in materia di commercializzazione del legno e prodotti derivati. Esso subordina, segnatamente, l'importazione, l'esportazione o l'immissione sul mercato UE di prodotti "che contengono o che sono stati nutriti o fabbricati usando materie prime [quali] bovini, cacao, caffè, palma da olio, gomma, soia e legno" ²³ alla condizione che essi siano, cumulativamente, (a) a deforestazione zero ²⁴, (b) realizzati nel rispetto della legislazione pertinente del Paese d'origine, e (c) corredati da una dichiarazione di dovuta diligenza ²⁵.

²¹ E. CORCIONE, *La tutela dei diritti umani*, cit., 171.

²² Regolamento (UE) 2023/1115 del Parlamento europeo e del Consiglio, del 31 maggio 2023, relativo alla messa a disposizione sul mercato dell'Unione e all'esportazione dall'Unione di determinate materie prime e determinati prodotti associati alla deforestazione e al degrado forestale e che abroga il regolamento (UE) 2010/995. Per un commento cfr. L. BERNING-M. SOTIROV, *Hardening Corporate Accountability in Commodity Supply Chains Under the European Union Deforestation Regulation*, in *Regulation & Governance*, 2023, 870 ss.; E. HENN, *Protecting forests or saving trees? The EU's regulatory approach to global deforestation*, in *Review of European, Comparative & International Environmental Law*, 2020, 336 ss.

²³ Art. 1 del regolamento.

²⁴ Secondo la definizione di cui all'art. 2, n. 13 del regolamento, sono "a deforestazione zero" (a) i prodotti interessati contengono o sono stati nutriti o fabbricati usando materie prime interessate prodotte su terreni che non sono stati oggetto di deforestazione dopo il 31 dicembre 2020; e (b) nel caso di prodotti interessati che contengono o sono stati fabbricati usando legno, il legno è stato raccolto senza causare il degrado della foresta di origine dopo il 31 dicembre 2020.

²⁵ Art. 3 del regolamento.

Come esplicitato nel preambolo, precipuo scopo del regolamento è il contrasto alle pratiche di deforestazione condotte al di fuori dell'Unione²⁶. Anche questo regolamento contiene, quindi – alla stessa stregua delle misure dianzi analizzate – disposizioni tese ad imporre obblighi di *due diligence* a carico degli operatori, ovunque stabiliti, che si estendono a tutta la catena del valore²⁷. Diversamente dal previgente *Timber Regulation*, tali adempimenti – lungi dal rappresentare il fulcro della disciplina considerata – sono configurati, tuttavia, come funzionali alla dimostrazione della ricorrenza delle condizioni cui è subordinato l'accesso delle merci in questione al mercato UE²⁸.

Prescrizioni di questo genere paiono suscettibili di impattare non solo, direttamente, *i*) sui soggetti destinatari dei predetti incombeni, in termini di accresciuta attenzione e consapevolezza quanto alla gestione dei profili in oggetto lungo tutta la filiera, ma anche, indirettamente, *ii*) sui relativi *partner* commerciali, i quali, nello specifico, potrebbero reputarsi costretti a conformare i propri processi produttivi agli standard UE – prima ancora che per effetto di apposite pattuizioni contrattuali in tal senso – al fine di salvaguardare, a monte, la stessa possibilità di essere presi in considerazione quali potenziali fornitori.

Un ulteriore esempio dell'approccio in esame è rappresentato dal regolamento (UE) 2023/1542 sulle batterie²⁹.

Anch'esso, infatti, combina la prescrizione di regole aventi ad oggetto le caratteristiche e le modalità di realizzazione dei prodotti considerati con l'imposizione, a carico di determinati soggetti, di obblighi di *due diligence*³⁰. Esso, inoltre, ambisce ad applicarsi a tutte le categorie di batterie immesse sul mercato

²⁶ Il considerando n. 18 precisa che “il consumo dell'Unione è responsabile di una quota sproporzionata di deforestazione. L'Unione dovrebbe quindi adottare misure per ridurre al minimo la deforestazione e il degrado forestale nel mondo causati dal consumo di determinate materie prime e determinati prodotti, cercando di ridurre il proprio contributo alle emissioni di gas a effetto serra e alla perdita di biodiversità a livello mondiale, nonché di promuovere modelli di produzione e consumo sostenibili nel proprio interno e nel mondo” e che “per ottenere il massimo risultato, la politica dell'Unione dovrebbe puntare a influenzare il mercato globale, non solo le catene di approvvigionamento dell'Unione”.

²⁷ Art. 8 del regolamento.

²⁸ A. BECKERS, *Global value chains*, cit., 343.

²⁹ Regolamento (UE) 2023/1542 del Parlamento europeo e del Consiglio, del 12 luglio 2023, relativo alle batterie e ai rifiuti di batterie, che modifica la direttiva 2008/98/CE e il regolamento (UE) 2019/1020 e abroga la direttiva 2006/66/CE.

³⁰ Capo VII del regolamento.

o messe in servizio all'interno dell'Unione, a prescindere dal luogo di produzione, e, in quest'ottica, coinvolge tutti gli operatori economici della filiera (distinguendo, segnatamente, tra fabbricanti, fornitori, rappresentanti autorizzati, importatori, distributori e fornitori dei servizi di logistica)³¹, indipendentemente dal luogo di stabilimento, attribuendo loro specifici obblighi e responsabilità in funzione del ruolo ricoperto nel ciclo di vita del prodotto³².

In questa medesima prospettiva si pone, altresì, il recente regolamento (UE) 2024/3015³³, recante il divieto di immissione e di messa a disposizione sul mercato UE di prodotti per i quali è stato fatto ricorso al lavoro forzato, come definito dall'art. 2 della convenzione sul lavoro forzato del 1930 (n. 29) dell'OIL, in qualsiasi fase della produzione, fabbricazione, raccolta o estrazione di tali prodotti, comprese le lavorazioni o trasformazioni ad essi connesse.

Tale strumento presenta, del pari, una innegabile ambizione ad applicarsi (anche) ai processi produttivi che si svolgono al di fuori del territorio dell'Unione, come attestato dal riferimento, al considerando n. 13, all'esigenza di "contribuire ulteriormente alla lotta contro il lavoro forzato in tutto il mondo" e dalla puntualizzazione, al considerando n. 18, secondo cui "il divieto di prodotti ottenuti con il lavoro forzato dovrebbe applicarsi a tutti i prodotti di qualsiasi tipo, compresi i loro componenti, indipendentemente dal settore e dall'origine, siano essi interni o importati, ovvero immessi o messi a disposizione sul mercato dell'Unione o esportati". In quest'ottica, il divieto di immissione e di messa a disposizione sul mercato UE di questi prodotti si applica agli "operatori economici" genericamente intesi, senza alcuna ulteriore specificazione in merito alla collocazione della loro nazionalità e/o produzione³⁴.

Pur non imponendo – per lo meno in termini espliciti, diversamente dagli strumenti analizzati finora – obblighi di *due diligence*³⁵, è ragionevole ritenere che i predetti condizionamenti all'importazione possano costituire un incentivo, per i soggetti ricompresi nell'ambito operativo del regolamento, ad

³¹ Artt. 38 ss. del regolamento.

³² Considerando n. 11.

³³ Regolamento (UE) 2024/3015 del Parlamento europeo e del Consiglio, del 27 novembre 2024, che vieta i prodotti ottenuti con il lavoro forzato sul mercato dell'Unione e che modifica la direttiva (UE) 2019/1937. Per un commento, cfr., *ex plurimis*, S. CANTONI, *Il nuovo regolamento (UE) 2024/3015 tra i più recenti strumenti della comunità internazionale contro il lavoro forzato; vecchie soluzioni per vecchi problemi*, in *Freedom, Security & Justice: European Legal Studies*, 2025, 45 ss.

³⁴ Art. 3 del regolamento.

³⁵ L'art. 1, par. 3, del regolamento lo esclude espressamente.

attivarsi in tal senso³⁶. Simili preclusioni rappresentano, in ogni caso, un meccanismo di per sé indubbiamente idoneo a generare, nei rapporti tra i soggetti che ne sono destinatari ed i loro aventi causa, dinamiche analoghe a quelle descritte con riguardo agli strumenti *product-based* appena analizzati e a stimolare, pertanto, l'allineamento agli standard UE dei processi produttivi anche da parte di imprese diverse ed ulteriori rispetto a quelle formalmente ricomprese nel campo di applicazione del regolamento.

A questa categoria di misure pare, infine, riconducibile anche il regolamento (UE) 2023/956³⁷, istitutivo del meccanismo di adeguamento del carbonio alle frontiere (c.d. *CBAM – Carbon Border Adjustment Mechanism*). In maniera analoga agli strumenti dianzi richiamati, anch'esso si propone, infatti, di incidere sui processi produttivi che si svolgono all'estero valorizzando le caratteristiche – in termini di emissioni incorporate – dei prodotti oggetto di importazione nel mercato UE³⁸. Il considerando n. 14 esplicita, in particolare, che “sebbene l'obiettivo del CBAM sia prevenire il rischio di rilocalizzazione delle emissioni di carbonio, il presente regolamento incoraggia anche il ricorso a tecnologie più efficienti in termini di emissioni di gas a effetto serra da parte dei produttori di paesi terzi, in modo da generare meno emissioni” e che “per tale motivo il CBAM dovrebbe sostenere efficacemente la riduzione delle emissioni di gas a effetto serra nei paesi terzi”.

³⁶ E. CORCIONE, *La tutela dei diritti umani*, cit., 177.

³⁷ Regolamento (UE) 2023/956 del Parlamento europeo e del Consiglio del 10 maggio 2023 che istituisce un meccanismo di adeguamento del carbonio alle frontiere. In argomento, cfr., *ex plurimis*, M. MONTINI, *Le principali implicazioni giuridiche del regolamento CBAM nel contesto dell'azione esterna dell'Unione europea*, in *Quaderni AISDUE*, 2025, reperibile online; F. ZORZI GIUSTINIANI, *Il meccanismo UE di adeguamento del carbonio alle frontiere: punto di svolta o occasione mancata?*, in *Studi sull'integrazione europea*, 2024, 129 ss.; J. BEDNAREK, *Is the EU realizing an externally just green transition? A short analysis of the Carbon Border Adjustment Mechanism from the perspective of the CBDR principle and the right to development of LDCs*, 2023, reperibile online; N.L. DOBSON, *(Re)framing Responsibility? Assessing the Division of Burdens Under the EU Carbon Border Adjustment Mechanism*, in *Utrecht Law Review*, 2022, 162 ss.; E.P. MAAT, *Leading by Example, Ideas or Coercion? The Carbon Border Adjustment Mechanism as a Case of Hybrid EU Climate Leadership*, in *European Papers*, 2022, 55 ss.; N. ZUGLIANI, *La proposta di un Meccanismo europeo di adeguamento del carbonio alle frontiere (CBAM). Tra il raggiungimento degli obiettivi prefigurati nell'accordo di Parigi e presunte violazioni degli obblighi OMC*, in *Diritto del commercio internazionale*, 2022, 165 ss.

³⁸ Il Considerando n. 16 esplicita che “il presente regolamento dovrebbe applicarsi alle merci importate nell'Unione da paesi terzi, tranne quando la loro produzione è già soggetta all'EU ETS attraverso la sua applicazione a paesi terzi o territori o a un sistema di fissazione del prezzo del carbonio pienamente collegato all'EU ETS”.

In questa prospettiva, il regolamento si applica precipuamente alle merci originarie di Paesi terzi³⁹, ponendo a carico degli importatori – indipendentemente dal fatto che siano stabiliti in uno Stato membro – specifici obblighi in termini di *i*) acquisizione di una apposita autorizzazione⁴⁰, *ii*) periodica rendicontazione delle emissioni incorporate nelle merci importate⁴¹, nonché *iii*) restituzione – secondo logiche analoghe a quelle sottese al sistema UE di scambio di quote di emissione⁴² – di un ammontare di c.d. certificati *CBAM* equivalente alle emissioni rilasciate ai fini della loro produzione⁴³. Ciascun operatore può, tuttavia, ottenere l'esenzione dai predetti incombeni dimostrando che le merci importate nel territorio doganale UE sono già state assoggettate a sistemi di controllo e scambio delle quote di emissione comparabili al sistema EU *ETS*, oppure che in relazione ad esse è già stato corrisposto un prezzo per il carbonio equivalente o simile a quello applicato all'interno dell'Unione⁴⁴. Il meccanismo in discorso non opera, inoltre, in relazione ai Paesi terzi cui si applica il sistema EU *ETS*⁴⁵.

In questo modo, ci si propone di conseguire, in prima battuta, l'allineamento dei costi della produzione cui sono soggette le imprese con sede in Stati terzi rispetto a quelli che si vedono costrette a sopportare le concorrenti imprese UE in quanto ricomprese nell'ambito operativo del sistema *ETS*, allo scopo di contrastare il fenomeno del c.d. *carbon leakage* e di assicurare il *level playing field*. Al contempo, tali meccanismi possono rivelarsi funzionali ad incentivare non solo

³⁹ Art. 1 del regolamento.

⁴⁰ Art. 5 del regolamento.

⁴¹ Artt. 6 ss. del regolamento.

⁴² In argomento, cfr., *ex plurimis*, A. DECHEZLEPRETRE-D. NACHTIGALL-F. VENMANS, *The joint impact of the European Union emissions trading system on carbon emissions and economic performance*, in *Journal of Environmental Economics and Management*, 2023, 1 ss.; S.F. VERDE-S. BORGHESI, *The International Dimension of the EU Emission Trading System: Bringing the Pieces Together*, in *Environmental and Resource Economics*, 2022, 23 ss.; M.G. POLLITT, *A global carbon market?*, in *Front. Eng. Manag.*, 2019, 5 ss.; A. VERBRUGGEN-E. LAES-E. WOEDERMAN, *Anatomy of Emission Trading Systems: What is the EU ETS?*, in *Environmental Science & Policy*, 2019, 11 ss.; S. DE CLARA, *The EU ETS phase IV reform: implications for system functioning and for the carbon price signal*, 2018, reperibile online; L. BARTELS, *The Inclusion of Aviation in the EU ETS*, 2012, reperibile online; M. PEETERS-M.G. FAURE, *Climate Change and European Emissions Trading: Lessons from Theory and Practice*, Cheltenham, 2008.

⁴³ Artt. 22 ss. del regolamento.

⁴⁴ Art. 9 del regolamento.

⁴⁵ Art. 3, par. 4 e 6 del regolamento.

i) tali soggetti ad attivarsi nella direzione della riduzione delle emissioni rilasciate nel contesto delle loro attività, ma anche *ii)* gli ordinamenti terzi presso i quali essi hanno sede ad adottare meccanismi analoghi al sistema *EU ETS*.

4. *La capacità del diritto UE di applicarsi oltre i confini dell'Unione.*

Dalla disamina appena svolta emerge in maniera inequivocabile l'ambizione e la potenziale idoneità degli strumenti considerati ad incidere anche su soggetti ed attività collocati al di fuori del territorio UE.

Nell'ottica di indagare con maggiore analiticità le caratteristiche di questa incidenza, pare, dunque, opportuno verificare se la portata extraterritoriale di tali strumenti sia da ricondursi (*a*) alla tecnica normativa consistente nella formale estensione del loro ambito operativo a fattispecie localizzate all'interno di territori extra-UE, ovvero (*b*) al diverso – ancorché correlato – intento di generare, attraverso appositi meccanismi di “pressione”, il fenomeno noto come *Brussels effect*.

Allorché, come nel primo caso ipotizzato, un ordinamento – nello svolgere le proprie funzioni – faccia riferimento a fatti e situazioni che si verificano nel territorio di un altro Stato, possono emergere, infatti, criticità in termini di esercizio extraterritoriale della giurisdizione⁴⁶.

Nella seconda ipotesi, di converso – non ravvisandosi criticità nei termini anzidetti – si pone l'interrogativo se le misure in discorso siano concretamente in grado, in linea con gli obiettivi ad essi sottesi, di influire, in via mediata, su soggetti ed attività collocati al di fuori dell'Unione.

Senza addentrarsi in un'analisi dettagliata, vale la pena rammentare che, in base al diritto internazionale, la “sovranità territoriale” o, secondo l'omologa nozione in uso nei Paesi anglosassoni, *jurisdiction* comprende il diritto, per ciascuno Stato, di svolgere le proprie funzioni e di esercitare i propri poteri nell'ambito del suo territorio, escludendone qualsiasi altro soggetto internazionale⁴⁷. Essa si

⁴⁶ R. LUZZATTO-I. QUEIROLO, *Sovranità territoriale, “jurisdiction” e regole di immunità*, in A.A.V.V., *Istituzioni di diritto internazionale*, VI ed., Torino, 2021, 186. Per una ricostruzione del concetto di extraterritorialità cfr., *ex plurimis*, A. MANN, *The Doctrine of Jurisdiction in International Law*, in *Collected Courses of the Hague Academy of International Law*, Leida, 1964, vol. 111, 1 ss.; M. AKEHURST, *Jurisdiction in International Law*, in *British Yearbook of International Law*, vol. 46, Oxford, 1972-73, 145 ss.; C. RYNGAERT, *Jurisdiction in International Law*, Oxford, 2015.

⁴⁷ V. ancora, per tutti, R. LUZZATTO-I. QUEIROLO, *Sovranità territoriale*, cit., 184.

articola, in particolare, (a) nella *jurisdiction to prescribe*, avente ad oggetto il potere di ciascuno Stato di regolare, attraverso le proprie norme, determinate attività e/o condotte, (b) nella *jurisdiction to adjudicate*, consistente nel potere di assoggettare persone o cose al vaglio delle corti dell'ordinamento, e (c) nella *jurisdiction to enforce*, corrispondente al potere di imporre il rispetto delle sue regole e punirne la violazione.

Da tali principi discende il dovere di astensione, in capo agli altri soggetti della Comunità internazionale, rispetto all'esercizio delle medesime prerogative con riferimento al territorio ricompreso nell'altrui giurisdizione⁴⁸. In mancanza di interferenze particolarmente qualificate, il diritto internazionale non pone, tuttavia, stringenti limitazioni all'applicazione, in via amministrativa o giurisdizionale, di norme interne in relazione a fattispecie localizzate al di fuori del territorio dell'ordinamento dal quale esse norme promanano⁴⁹.

Con specifico riferimento al diritto UE è emersa in dottrina, in ogni caso, la distinzione tra i concetti di extraterritorialità in senso stretto, da una parte, e di estensione territoriale, dall'altra parte⁵⁰. La differenza tra tali nozioni fa perno,

⁴⁸ In base alla nota sentenza della Corte internazionale di giustizia riferita al caso *Lotus* (CPGI, 7 settembre 1927, caso *The S.S. Lotus, Francia c. Turchia*, in *C.P.J.I. Recueil*, Série A, n. 10, 18), “la limitazione primordiale imposta dal diritto internazionale allo Stato è quella di escludere – a meno che non ci sia una norma permissiva in contrario – ogni esercizio della sua autorità nel territorio di un altro Stato. In questo senso la giurisdizione è senza dubbio territoriale; essa non può essere esercitata da uno Stato al di fuori del suo territorio se non in forza di una norma permissiva derivante dalla consuetudine internazionale o da una convenzione”.

⁴⁹ Nella citata sentenza *Lotus* si precisa, segnatamente, che dal summenzionato principio della territorialità della giurisdizione “non ne consegue però che il diritto internazionale vieti a uno Stato di esercitare, nel proprio territorio, la propria giurisdizione in ogni questione in cui si tratta di fatti avvenuti all'estero ed in cui essa non possa fondarsi su di una regola permissiva di diritto internazionale” e che “lungi dal proibire in modo generale agli Stati di estendere le proprie leggi e la propria giurisdizione a persone, beni ed atti al di fuori del territorio, esso lascia loro, a tale riguardo, un'ampia libertà, che non è limitata che in qualche caso da regole proibitive: per gli altri casi, ciascuno Stato rimane libero di adottare i principi che giudica migliori ed i più convenienti”.

⁵⁰ Tale contrapposizione si deve, in particolare, all'elaborazione della Prof.ssa J. SCOTT delineata nel lavoro *Extraterritoriality and territorial extension in EU law*, in *The American Journal of Comparative Law*, 2014, 87 ss. In argomento, v. anche, *ex plurimis*, M. MONTINI, *Le principali implicazioni giuridiche del regolamento CBAM nel contesto dell'azione esterna dell'Unione europea*, in *Quaderni AISDUE*, 2024, 1 ss.; F. CASOLARI-M. GATTI, *The application of EU law beyond its borders*, L'Aja, 2022; L. HORNKOHL, *The Extraterritorial Application of Statutes and Regulations in EU Law*, in *Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, 2022, reperibile online; M. CREMONA-J. SCOTT, *EU law beyond its borders. The*

segnatamente, sull'esistenza o meno di un elemento di connessione tra la fattispecie oggetto di regolazione ed il territorio dell'Unione⁵¹.

Non è, tuttavia, sempre agevole stabilire se il *trigger*⁵² alla base di una determinata norma possa qualificarsi come "territoriale" e idoneo a giustificare l'applicazione anche nei confronti di soggetti e/o attività che si trovano oltre i confini dell'ordinamento di origine della norma⁵³.

Tradizionalmente, si considerano validi, in questa prospettiva, criteri di collegamento incentrati (a) sulla presenza fisica, nel territorio dell'ordinamento, del soggetto destinatario delle prescrizioni considerate, ovvero (b) sullo svolgimento, ivi, della condotta oggetto di regolazione⁵⁴. Maggiormente controversa è, invece, la c.d. *effects doctrine*, in virtù della quale l'esercizio della *jurisdiction to prescribe* dovrebbe reputarsi consentito anche in relazione alle attività, come quelle rilevanti sotto il profilo della concorrenza, suscettibili di produrre effetti entro i confini dell'ordinamento, indipendentemente dalla collocazione al suo interno del soggetto e/o della condotta considerati⁵⁵.

La Corte di giustizia ha avuto modo di pronunciarsi in ordine a questi profili nel contesto del noto caso *Air Transport Association of America*⁵⁶, avente ad

extraterritorial reach of EU law, Oxford, 2019; E. FAHEY, *The Global Reach of EU Law*, Londra, 2017.

⁵¹ Secondo J. SCOTT, *Extraterritoriality*, cit., 89 ss., "a measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state. By contrast, a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad".

⁵² J. SCOTT, *The New EU extraterritoriality*, cit., 1344, definisce quale *trigger* "a mechanism that launches the application of EU law and delimits its personal and territorial scope of application".

⁵³ J. SCOTT, *The Global Reach of EU Law*, cit., 38.

⁵⁴ J. SCOTT, *Extraterritoriality*, cit., 90 ss.

⁵⁵ J. SCOTT, *The New EU "extraterritoriality"*, cit., rileva che ai tradizionali *triggers* fondati sulla nazionalità, la condotta e la presenza si affiancano, recentemente, criteri diversi ed ulteriori che determinano l'applicazione del diritto UE anche con riferimento a condotte che si verificano al di fuori del territorio dell'Unione, la cui conformità al principio di territorialità appare dubbia e controversa.

⁵⁶ Sentenza della Corte giust., 21 dicembre 2011, causa C-366/10, *Air Transport Association of America*. Per un commento, cfr., *ex plurimis*, G. DE BAERE-C. RYNGAERT, *The ECJ's judgment in Air Transport Association of America and the international legal context of the EU's climate change policy*, in *European Foreign Affairs Review*, 2013, 389 ss.; J. ODERMATT, *Case C-366/10*

oggetto l'impugnazione dell'estensione, per effetto della direttiva 2008/101/CE, del sistema di scambio di emissioni di gas ad effetto serra al settore del trasporto aereo per supposto contrasto, tra l'altro, con il divieto di extraterritorialità sancito dal diritto internazionale. In tale occasione, la Corte ha fatto salva l'applicazione della disciplina UE nei confronti degli aeromobili battenti bandiera di uno Stato terzo sul presupposto dell'esistenza di un elemento di connessione con il territorio dell'Unione rappresentato dallo svolgimento, ivi, delle operazioni di atterraggio e decollo. Decisiva, ai fini della soluzione del quesito, si è rivelata, pertanto, la presenza, ancorché temporanea, sul territorio dell'Unione dei soggetti ricompresi nell'ambito operativo della disciplina considerata.

Il c.d. *Brussels effect* rappresenta, invece, un fenomeno del tutto diverso. Esso consiste, infatti, nella capacità del diritto UE di influire su condotte che si tengono al di fuori del territorio dell'Unione attraverso meccanismi imperniati sul comportamento fattivo e spontaneo degli operatori economici⁵⁷.

Secondo quanto sottolineato dalla Prof.ssa Bradford, cui si deve l'elaborazione di tale espressione, l'Unione non necessita di imporre i propri standard in maniera sempre coercitiva, potendo contare, a determinate condizioni, sulla capacità delle forze del mercato di farli assurgere a parametro globale di riferimento in modo del tutto autonomo e spontaneo, quale conseguenza del progressivo e volontario adeguamento ad essi, da parte degli operatori economici, sul presupposto che si tratti di adempimento necessario per assicurarsi la possibilità di continuare ad intrattenere relazioni con il mercato interno⁵⁸.

Tale fenomeno può verificarsi (a) *de facto*, allorché le normative e gli standard UE inizialmente concepiti per il mercato interno si evolvano in norme e parametri di riferimento pure altrove, in quanto osservati, in maniera volontaria e spontanea, anche dalle imprese extra-UE; ovvero (b) *de jure*, qualora detti standard vengano recepiti all'interno delle normative nazionali di Stati terzi in virtù della loro riconosciuta autorevolezza e qualità.

La produzione di tale effetto è subordinata alla sussistenza, cumulativa, di cinque condizioni, consistenti i) nella dimensione del mercato, ii) nella capacità

Air Transport Association of America and others v. Secretary of State for energy and climate change, in *Columbia Journal of European Law*, 2013, 143 ss.; B. MAYER, *Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011*, in *Common Market Law Review*, 2012, 1113 ss.

⁵⁷ A. BRADFORD, *The Brussels Effect*, cit., XIV.

⁵⁸ *Ibidem*.

regolatoria dell'Unione, *iii*) nell'adozione di standard rigorosi, *iv*) nell'individuazione di *target* inelastici e *v*) nella non divisibilità degli standard medesimi ⁵⁹.

Il primo dei citati presupposti si fonda (1) sulla maggiore attrattività del mercato UE – in virtù delle proprie dimensioni – rispetto ad eventuali sbocchi commerciali alternativi, cui consegue una maggiore propensione, da parte delle imprese, ad adeguarsi agli standard prescritti per potervi accedere.

L'idoneità del diritto UE a imporsi in maniera unilaterale anche al di fuori del proprio campo di applicazione dipende, altresì, (2) dalla capacità regolatoria dell'ordinamento in discorso, consistente nell'abilità non solo di promulgare regole in un determinato settore attraverso istituzioni dotate delle competenze e delle risorse a tal fine necessarie, ma anche di farle rispettare in virtù di adeguati meccanismi sanzionatori.

In aggiunta a quanto precede, occorre altresì (3) che le norme considerate stabiliscano standard rigorosi, in quanto maggiormente suscettibili, come tali, di assurgere ad autorevole parametro di riferimento anche al di là del loro ambito operativo.

Ai fini della produzione del *Brussels Effect* è, poi, necessario (4) che l'oggetto della normativa UE abbia natura "inelastica", in quanto identificato in maniera tale da rendere irrilevanti, ai fini dell'individuazione della disciplina applicabile, circostanze come il luogo di provenienza o la nazionalità dei soggetti coinvolti. Tipico esempio di tale tecnica normativa sono le, sopra ricordate, disposizioni UE volte a regolare le caratteristiche che un determinato prodotto deve presentare per poter essere importato nel mercato interno, in quanto applicabili a tutte le merci che ambiscano ad accedervi indipendentemente dalla nazionalità del produttore e dal luogo in cui questi è stabilito e/o operativo.

Affinché gli standard UE assumano portata globale non può prescindersi, infine, (5) dalla loro non divisibilità. Il *Brussels Effect* si verifica, infatti, solo allorché – per ragioni legali, tecniche o economiche – risulti maggiormente conveniente, nella prospettiva delle imprese la cui attività sia dislocata in diversi sistemi giuridici, adeguare al diritto UE la propria produzione nella sua interezza, in maniera uniforme ed omogenea.

Seppur sovrapponibili sotto il profilo della pari idoneità ad assicurare la possibilità, per il diritto UE, di operare anche al di fuori dei propri confini territoriali, non possono trascurarsi le profonde differenze ravvisabili tra i fenomeni testé richiamati ⁶⁰. Diversamente dall'estensione territoriale dell'ambito applicativo di

⁵⁹ *Ibidem*, 25 ss.

⁶⁰ Sul punto, J. SCOTT, *The Global Reach of EU Law*, cit., 32, sottolinea che "some measures

una determinata regola, il c.d. *Brussels effect* non è, infatti, direttamente riconducibile – almeno sulla carta – alle norme di diritto UE, in quanto consistente, come si è detto, nell’adeguamento agli standard di detto ordinamento anche al di fuori del loro formale campo di applicazione, quale conseguenza di comportamenti adottati dagli operatori del mercato (*de facto*) e/o di ordinamenti terzi (*de jure*) su base strettamente volontaria e spontanea.

In questi termini, tale fenomeno non assurge, in sé, a vera e propria tecnica normativa. Esso, nondimeno, può rappresentare, come si cercherà di illustrare meglio in appresso, l’obiettivo perseguito dall’Unione attraverso l’impiego di meccanismi e strategie precipuamente tesi ad esercitare una “pressione” in tal senso sugli operatori economici a vario titolo interessati dagli strumenti considerati.

5. *Le catene globali del valore nel diritto UE tra estensione territoriale dell’ambito applicativo degli strumenti adottati e c.d. Brussels effect.*

Come si è rilevato *supra*, non vi è dubbio che gli strumenti normativi analizzati siano suscettibili di generare un impatto sui processi produttivi che si svolgono al di fuori del territorio UE ⁶¹.

Pare, tuttavia, opportuno distinguere, nella prospettiva dianzi evidenziata, a seconda che detto impatto sia (a) ad essi riconducibile in maniera diretta, quale effetto derivante dall’esplicita inclusione di tali attività entro l’alveo operativo di disposizioni recanti puntuali obblighi in tal senso, ovvero (b) in via puramente indiretta, in quanto attribuibile ad adeguamenti imposti dalle forze del mercato alla luce dei meccanismi di pressione a tal fine previsti dagli strumenti in discorso.

Un conto, dunque, sono gli obblighi imposti, attraverso le disposizioni richiamate, in termini di *due diligence* e, in particolare, di adozione di apposite misure tese a prevenire e a mitigare l’impatto negativo, dal punto di vista sociale ed ambientale, delle attività dei soggetti formalmente ricompresi nel loro campo di applicazione, ovunque poste in essere.

that generate the Brussels Effect may be imbued with territorial extension, but many others will not. And similarly not all measures that give rise to territorial extension will give rise to the Brussels effect” e che “nonetheless ... it does appear that territorial extension is a phenomenon that can sometimes serve to promote the emergence of the Brussels effect”, precisando che “that is because for the BE to occur standards must be non-divisible and certain types of territorial extension create legal non-divisibility of standards”.

⁶¹ V. *supra*, parr. 2 e 3.

Tutt'altro discorso meritano, invece, le modifiche ai processi produttivi che gli operatori economici possono reputare necessario apprestare alla luce *i)* degli obblighi di rendicontazione di cui alla direttiva *CSRD*, nella prospettiva di salvaguardare la propria immagine e reputazione, ovvero *ii)* dei condizionamenti all'importazione derivanti dalle summenzionate misure *product-based*, al fine di assicurarsi l'accesso al mercato UE e, nel caso del regolamento *CBAM*, per preservare la remuneratività delle proprie attività. In questo secondo caso, l'allineamento agli standard UE delle condotte realizzate all'estero non trae origine direttamente dalla forza imperativa delle norme di cui si discute, dacché oggettivamente estraneo al loro campo di applicazione, bensì da scelte poste in essere su base strettamente volontaria dagli operatori economici a vario titolo interessati da siffatta disciplina (ancorché indirettamente stimulate da quest'ultima).

Lo stesso dicasi con riguardo agli obblighi di adeguamento dei processi produttivi che possono discendere in capo ai *partner* commerciali dei predetti soggetti per effetto delle pattuizioni contrattuali da questi ultimi appositamente inserite negli accordi di riferimento al fine di adempiere ai doveri di *due diligence* su di essi incombenti e/o di preservare la propria reputazione a fronte dei citati adempimenti contabili. Trattasi, anche in questo caso, di effetti riconducibili alle regole dianzi esaminate in via meramente mediata, quale riflesso di puntuali obblighi normativi in realtà gravanti su soggetti diversi (*i.e.*, per l'appunto, le imprese formalmente ricomprese nel loro ambito di applicazione).

La distinzione appena tracciata appare di cruciale importanza ai presenti fini. È, infatti, con specifico ed esclusivo riferimento alle norme che stabiliscono direttamente obblighi di carattere normativo in capo a soggetti costituiti secondo la normativa di un Paese terzo e/o in relazione a processi produttivi che si svolgono al di fuori dell'Unione che si rende necessario verificare se siffatta configurazione del loro ambito applicativo possa reputarsi correlata alla – e, quindi, giustificata dalla – presenza di un adeguato collegamento tra le fattispecie considerate ed il territorio UE.

Scendendo nel dettaglio, l'operatività degli obblighi di *due diligence* prescritti dalla direttiva *CS3D* nei confronti delle società che sono costituite in conformità alla normativa di un Paese terzo risulta improntata, come si è visto, al criterio del fatturato⁶². Non tutte le imprese “terze” sono tenute, quindi, a detti adempimenti, bensì solo quelle che producano nell'Unione un fatturato superiore a determinate soglie (c.d. criterio del *doing business*).

⁶²V. *supra*, par. 2.

Simile impostazione è indubbiamente funzionale a correlare l'applicazione delle regole in questione alla "presenza", nel mercato interno, delle imprese extra-UE considerate, circoscrivendola a quelle che, in forza del citato criterio, possano reputarsi ivi attive ed operanti. Tale approccio, peraltro, può reputarsi ispirato anche alla summenzionata *effects doctrine* e, nello specifico, all'intento di contrastare le ricadute sul funzionamento del mercato interno, in termini di potenziale distorsione della concorrenza, astrattamente derivanti dall'attività di questi soggetti allorché liberi – diversamente dalle imprese UE – dai vincoli di sostenibilità in oggetto.

Questa lettura trova esplicito conforto nel considerando n. 30 della direttiva CS3D, nell'ambito del quale si sottolinea che "al fine di definire l'ambito d'applicazione della presente direttiva in relazione alle società di paesi terzi, è opportuno optare per il criterio del fatturato descritto, in quanto crea un collegamento territoriale tra la società di paese terzo e il territorio dell'Unione" e che "il fatturato è un indicatore degli effetti che le attività di tali società potrebbero avere sul mercato interno".

Non pare, quindi, potersi revocare in dubbio, alla luce delle considerazioni in precedenza svolte, l'idoneità del criterio in esame ad attestare l'esistenza di un collegamento tra il territorio dell'Unione e le predette società di Paesi terzi sufficiente a giustificare l'applicazione delle disposizioni in questione anche nei loro confronti ⁶³.

A diversa conclusione, naturalmente, dovrebbe giungersi ove con tale fattore di collegamento si volesse giustificare l'operatività degli obblighi in esame con riguardo alle attività svolte da imprese non-UE all'estero, tanto più allorché destinate a sbocchi commerciali diversi dal mercato interno e, come tali, insuscettabili di contribuire alla produzione nell'Unione del fatturato richiesto ai fini dell'applicazione della direttiva né di interferire con il funzionamento del mercato interno.

Nessuna criticità sembrerebbe emergere, parimenti, in relazione agli obblighi di *due diligence* ed ai divieti di importazione sanciti dalle misure *product-based* dianzi analizzate.

Vero è, infatti, che il campo di applicazione di tali strumenti comprende, in maniera incondizionata ed indiscriminata, anche soggetti che non presentano alcun collegamento con il territorio dell'Unione e prodotti realizzati al di fuori dei suoi confini. Né, peraltro, pare ravvisabile – con l'eccezione del regolamento CBAM – alcuna puntuale correlazione tra queste misure, da una parte, e la

⁶³ In questi termini si esprime, per esempio, N. BOSCHIERO, *L'extraterritorialità*, cit., 669.

tutela dell'ambiente e/o della competitività all'interno dell'Unione, dall'altra parte. Solo il regolamento (UE) 2023/956 risulta ispirato, infatti, all'esigenza di contrastare gli effetti negativi, per l'Unione, in termini di *carbon leakage* e di distorsione della concorrenza derivanti dall'assenza, all'estero, di meccanismi analoghi all'EU ETS.

Ciò nondimeno, l'operatività delle disposizioni di cui trattasi anche nei confronti di soggetti costituiti secondo la normativa di uno Stato terzo ed ivi operanti può reputarsi senz'altro giustificata dalla collocazione nel territorio dell'Unione della condotta consistente nell'accesso al mercato interno e/o di tutti i passaggi a ciò preliminari e funzionali ⁶⁴.

Diverso discorso meritano, invece, come si è accennato, le implicazioni sui processi produttivi che si svolgono al di fuori dell'Unione derivanti *i)* dai meri stimoli in tal senso ricavabili dalle regole in materia di rendicontazione e da quelle recanti limiti e condizionamenti all'importazione di determinati prodotti, nonché *ii)* per quel che concerne i *partner* commerciali dei soggetti ricompresi nell'ambito operativo degli strumenti considerati, dalle clausole all'uopo inserite nei contratti di riferimento. Come si è già avuto occasione di osservare, la percezione della necessità di attivarsi in questa direzione – pur rappresentando l'obiettivo perseguito – non ha origine normativa, essendo riconducibile, a ben vedere, a mere dinamiche di carattere commerciale ed economico che le misure in esame si propongono precipuamente di innescare. In quanto ad esse riconducibili in via meramente indiretta, non sembrerebbe, dunque, ravvisabile, in relazione a questi effetti, alcuna ipotetica criticità in termini di estensione extraterritoriale del campo di applicazione delle disposizioni in esame.

A questo proposito, pare, di converso, opportuno interrogarsi, come si è accennato, in merito alla concreta idoneità di tali regole ad incidere sui processi produttivi che si svolgono all'estero alla stregua dei criteri e dei paradigmi del summenzionato *Brussels Effect*. Trattandosi, tuttavia, di considerazioni di carattere perlopiù economico, ci si limita, per il momento e nella presente sede, alle brevi riflessioni che seguono.

È innegabile che le misure in discorso siano astrattamente suscettibili di incentivare, attraverso i meccanismi dianzi descritti, l'adeguamento dei processi produttivi che si svolgono al di fuori dell'Unione.

⁶⁴ In questi termini cfr. J. SCOTT, *The Global Reach of EU Law*, cit., 45. La medesima Autrice, nel contributo *The new EU extraterritoriality*, cit., 1348, sottolinea che il *market access* costituisce, probabilmente, il principale fattore rappresentativo – in linea con il principio di territorialità – dello svolgimento, all'interno dell'Unione, della condotta rilevante ai fini dell'operatività della norma considerata.

Né, del resto, è revocabile in dubbio la ricorrenza almeno di talune delle sopra viste condizioni necessarie per la produzione degli effetti in discorso⁶⁵, quali, in particolare, la capacità regolatoria dell'ordinamento UE ed il carattere rigoroso degli standard da questo imposti in materia di sostenibilità.

Analoghe considerazioni sembrerebbero potersi svolgere, poi, in ordine alla natura inelastica dell'oggetto delle misure *product-based* dianzi analizzate. In quanto applicabili a tutte le merci che ambiscono ad accedere al mercato interno, indipendentemente dalla loro provenienza, le imprese multinazionali si vedono, infatti, impossibilitate ad eludere l'applicazione di tali regole mediante la rilocalizzazione della produzione presso ordinamenti che presentino standard ambientali meno stringenti. Il che, peraltro, rende le regole di cui trattasi suscettibili di incidere anche sulla selezione dei *partner* di tali soggetti e di venire, pertanto, in rilievo lungo tutta la filiera della produzione.

A conclusioni parzialmente diverse parrebbe doversi pervenire, invece, con riferimento agli incentivi ad intervenire sui processi produttivi nella direzione di una maggiore sostenibilità derivanti, in via mediata, dalle regole in materia di *due diligence* e di rendicontazione, essendo l'operatività di tali norme condizionata, come si è visto, al raggiungimento di determinate soglie di fatturato all'interno dell'Unione. Non può escludersi, in particolare, che le imprese interessate si sottraggano alla applicazione di tali prescrizioni – e, per l'effetto, anche gli stimoli che ne conseguirebbero nei termini anzidetti – suddividendo la propria attività in entità giuridiche separate al precipuo scopo di mantenere il fatturato al di sotto di dette soglie.

Curiosamente, risulta, invero, più difficile per i *partner* commerciali delle imprese destinatarie degli obblighi in discorso eludere i vincoli in tal senso derivanti in via mediata dalla direttiva *CSRD*, in quanto conseguenti alla loro semplice inclusione nella filiera di tali soggetti.

A favore della ricorrenza dei presupposti del *Brussels Effect* milita, altresì, la circostanza che gli standard UE in materia ambientale presentano, almeno tendenzialmente, il carattere della non divisibilità, in quanto osservati, spesso, per ragioni di efficienza, con riguardo a tutti i processi produttivi di ciascuna impresa, nella loro globalità, anziché con specifico ed esclusivo riferimento ai singoli segmenti della produzione ad essi formalmente soggetti⁶⁶. La ricorrenza di tale requisito è strettamente correlata, tuttavia, all'(in)esistenza di sbocchi commerciali alternativi, per i prodotti considerati, rispetto al mercato UE. Tale

⁶⁵ V. *supra*, par. 4.

⁶⁶ A. BRADFORD, *The Brussels Effect*, cit., 214.

eventualità potrebbe, infatti, disincentivare la standardizzazione della produzione in senso conforme al diritto UE e favorire, al contrario, la predisposizione di prassi e processi distinti a seconda del mercato di riferimento.

Non può, quindi, farsi a meno di considerare – trattandosi di aspetto rilevante anche in relazione al presupposto della *market size* – che, nell’attuale panorama del commercio internazionale, l’attrattività del mercato UE costituisce un assunto tutt’altro che scontato. Non può escludersi, pertanto, che le imprese a vario titolo interessate dalle regole in questione, tanto più se di piccole o medie dimensioni e/o appartenenti a Paesi in via di sviluppo, reputino più conveniente dirottare, in tutto o in parte, le proprie relazioni commerciali a favore di mercati diversi da quello dell’Unione anziché conformarsi agli standard UE.

Sono, dunque, molteplici ed imprevedibili le variabili suscettibili di venire in gioco nella prospettiva in esame. Ai fini di una più compiuta valutazione sul punto non resta, pertanto, che attendere le reazioni delle forze del mercato rispetto alle misure analizzate.

IL PRINCIPIO DI *FAIR PRESENTATION* NELLA PROPOSTA PER I NUOVI STANDARD DI RENDICONTAZIONE EUROPEI (ESRS)

Michele Siri

SOMMARIO: 1. Introduzione: la revisione degli ESRS e l'introduzione del principio di *fair presentation*. – 2. Contenuto ed effetti del principio di *fair presentation* negli ESRS. – 3. La *ratio* del principio di *fair presentation* negli ESRS. – 4. Il principio di *fair presentation* nella rendicontazione finanziaria tradizionale. – 5. I dubbi dell'EFRAG sull'introduzione del principio di *fair presentation*. – 6. Alcuni risultati della consultazione pubblica: accoglimenti “condizionati” e rifiuti “incondizionati”. – 7. Considerazioni conclusive.

1. *Introduzione: la revisione degli ESRS e l'introduzione del principio di fair presentation.*

La semplificazione degli *European Sustainability Reporting Standard* (ESRS) nell'ambito della direttiva (UE) 2022/2464 (*Corporate Sustainability Reporting Directive* – CSRD) costituisce uno degli interventi principali auspicati dal c.d. “Pacchetto *Omnibus*”. A tale fine, la Commissione europea ha chiesto all'*European Financial Reporting Advisory Group* (EFRAG) di fornire una consulenza tecnica sulla revisione degli ESRS entro il 30 novembre 2025¹.

Dopo aver delineato le direzioni strategiche per la semplificazione degli ESRS, l'EFRAG ha aperto una prima consultazione pubblica, cominciata l'8 aprile 2025 e terminata il 7 maggio 2025². In seguito, l'EFRAG ha predisposto la proposta di revisione degli ESRS³ e ha indetto una seconda consultazione

¹ European Commission, *Letter to EFRAG*, 27 marzo 2025, Ref. Ares (2025) 2489 773, 2.

² Per una panoramica delle risposte alla consultazione pubblica, si veda EFRAG, *Consolidated Feedback. Summary of stakeholder inputs*, 2025.

³ La proposta di modifica degli ESRS è disponibile su <https://www.efrag.org/en/amended-esrs>.

pubblica dal 31 luglio 2025 al 29 settembre 2025⁴. Infine, l'EFRAG ha approvato definitivamente i nuovi standard il 28 novembre 2025, per poi pubblicarli il 3 dicembre 2025⁵. Una delle novità principali della proposta, e quindi di particolare attenzione anche in sede di consultazione, è il principio c.d. di *fair presentation* (d'ora in avanti: "FP") nella rendicontazione europea di sostenibilità⁶.

2. *Contenuto ed effetti del principio di fair presentation negli ESRS.*

Nei nuovi ESRS 1 ("*General Requirements*")⁷, il nuovo principio FP viene introdotto già nella parte dedicata agli obiettivi della rendicontazione di sostenibilità. Infatti, si dichiara che l'obiettivo della rendicontazione di sostenibilità è quello di presentare fedelmente ("*fairly*") gli impatti, i rischi e le opportunità materiali delle imprese in relazione alle questioni ambientali, sociali e di *governance*⁸.

In particolare, il principio impone sia che siano divulgate le informazioni rilevanti sugli impatti, rischi e opportunità materiali, così come selezionate sulla base del principio di doppia materialità, sia che esse siano correttamente rappresentate in conformità agli standard stessi⁹. Il principio FP richiede, pertanto, alle imprese di applicare le caratteristiche qualitative dell'informazione: rilevanza e rappresentazione fedele da un lato (c.d. "*fundamental characteristics*") e comparabilità, verificabilità e comprensibilità dall'altro (c.d. "*enhancing characteristics*")¹⁰. Infine, il principio FP viene soddisfatto se sono comunicate le informazioni necessarie per una descrizione

⁴ EFRAG, *Press release – EFRAG Shares Revised ESRS Exposure Drafts and Launches 60-Day Public Consultation*, 31 luglio 2025, disponibile su www.efrag.org. Per il testo della consultazione si veda EFRAG, *Public Consultation Survey. Draft Amended ESRS*, 2025.

⁵ Si veda il sito ufficiale dell'EFRAG su <https://www.efrag.org/en/draft-simplified-esrs> e EFRAG, *EFRAG's technical advice to the European Commission regarding Amended European Sustainability Reporting Standards (Amended ESRS)*, 2025.

⁶ Gli ESRS, così come attualmente in vigore, sono tutti disponibili sul sito ufficiale dell'EFRAG su <https://www.efrag.org/en/sustainability-reporting/esrs-workstreams>.

⁷ EFRAG, *ESRS S1. General Requirements*, 2025, disponibile su <https://www.efrag.org/en/draft-simplified-esrs>.

⁸ *Ivi*, par. 3.

⁹ *Ivi*, par. 19.

¹⁰ *Ivi*, parr. 19-20.

completa, neutrale ed accurata degli impatti, dei rischi e delle opportunità materiali¹¹.

L'Appendice B della proposta per i nuovi ESRS ("*Qualitative characteristics of information*") definisce ulteriormente i requisiti che le imprese devono rispettare per conformarsi al principio FP¹².

In primo luogo, è rilevante l'informazione che potrebbe fare la differenza nel processo decisionale degli utenti secondo l'approccio di doppia materialità¹³.

In secondo luogo, l'informazione deve essere rappresentata fedelmente, nel senso, cioè, che deve essere (i) completa, (ii) neutrale e, infine, (iii) accurata¹⁴.

Il criterio della completezza impone di comunicare tutte le informazioni necessarie perché gli utenti comprendano gli impatti, i rischi e le opportunità materiali, le strategie dell'impresa in risposta agli impatti, ai rischi e alle opportunità materiali e, infine, le metriche e gli obiettivi¹⁵. La neutralità esige, da un lato, che la rappresentazione delle informazioni non sconti alcun pregiudizio cognitivo (*bias*) nella selezione o nella comunicazione delle informazioni stesse (per es., la rilevanza di un'informazione non deve essere enfatizzata o, al contrario, sminuita)¹⁶; dall'altro, essa impone l'esercizio della prudenza nella formulazione di giudizi in condizioni di incertezza (per es., non devono essere sovrastimate le opportunità né sottostimati i rischi, e viceversa)¹⁷. L'accuratezza, infine, richiede che le imprese implementino processi e controlli interni adeguati ad evitare errori o inesattezze materiali¹⁸. Si tratta, questo, di un requisito suscettibile di subire applicazioni differenti a seconda del tipo di informazione di volta in volta rilevante¹⁹.

¹¹ *Ivi*, par. 19.

¹² Come ricordato all'inizio dell'Appendice B, quest'ultima costituisce parte integrante della proposta per i nuovi ESRS e le viene attribuita la stessa autorità delle altre parti degli ESRS.

¹³ EFRAG, *ESRS 1. General Requirements*, cit., QC2, là dove si specifica ulteriormente che l'informazione sulla sostenibilità può influenzare le decisioni degli utenti se ha un contenuto predittivo, confermativo o entrambi.

¹⁴ *Ivi*, QC5.

¹⁵ *Ivi*, QC6.

¹⁶ *Ivi*, QC7: "[i]nformation is neutral if it is not slanted, weighted, emphasised, de-emphasised or otherwise manipulated to make it more likely that the users will receive that information favourably or unfavourably".

¹⁷ *Ivi*, QC8.

¹⁸ *Ivi*, QC9.

¹⁹ *Ivi*, QC9. In particolare, si dice che (a) le informazioni sui fatti non devono riportare

In terzo luogo, l'informazione deve essere comparabile sia con le informazioni rilasciate precedentemente dalla impresa rendicontante sia con quelle comunicate da altre imprese che operino, per esempio, nello stesso settore industriale²⁰.

In quarto luogo, l'informazione è verificabile quando diversi osservatori, esperti e indipendenti ("*various knowledgeable and independent observers*"), possono raggiungere un consenso (anche se non un accordo completo) sul fatto che una specifica informazione sia rispettosa del principio di fedele rappresentazione²¹. Poiché la verificabilità risulta particolarmente complessa nel caso di informazioni prospettiche (*forward-looking information*), è necessario che in questo caso l'impresa descriva le ipotesi e i metodi utilizzati per produrre l'informazione, insieme con altri fattori che dimostrino la coerenza dell'informazione con i piani e le decisioni dell'impresa²².

Infine, l'informazione è comprensibile se è, al contempo, chiara, concisa e presentata in modo coerente²³. Il criterio della concisione impone di evitare, da un lato, il c.d. *boilerplate language* e, dall'altro, le duplicazioni non necessarie di informazioni, nonché di utilizzare un linguaggio e delle costruzioni grammaticali chiare²⁴. La chiarezza richiede alle imprese, tra l'altro, di distinguere espressamente le informazioni c.d. "*standing*", che rimangono, cioè, relativamente invariate tra i diversi periodi di rendicontazione²⁵. Infine, il requisito della coerente presentazione esige che le imprese valorizzino le connessioni tra le informazioni, in particolare tra le informazioni relative alla sostenibilità e quelle finanziarie in senso tradizionale²⁶.

errori materiali, (b) le descrizioni devono essere precise, (c) le stime, le approssimazioni e le previsioni devono essere chiaramente identificati come tali, (d) non devono esserci stati errori materiali nella selezione e applicazione del metodo di sviluppo di una stima, approssimazione o previsione, in modo da garantire, così, che i dati di base siano ragionevoli, (e) le asserzioni devono essere ragionevoli e basate su una quantità e qualità sufficiente di informazioni, (f) le informazioni sui giudizi relativi al futuro devono riportare fedelmente sia i giudizi stessi sia i dati su cui essi si basano.

²⁰ *Ivi*, QC10-QC12. Si precisa anche che il requisito della comparabilità non va interpretato come uniformità (QC12).

²¹ *Ivi*, QC14.

²² *Ivi*, QC15.

²³ *Ivi*, QC16.

²⁴ *Ivi*, QC17.

²⁵ *Ivi*, QC18.

²⁶ *Ivi*, QC19-QC20.

L'introduzione del principio FP, così come appena illustrato, consentirebbe di trasformare il modello di rendicontazione di sostenibilità della CSRD da un *compliance framework* ad un *fair presentation framework*²⁷. Se tradotto in una disciplina che impone la comunicazione delle informazioni, il primo esige che i destinatari si limitino a pubblicare solo le informazioni specificamente previste dalla normativa²⁸. Il secondo, invece, prescrive (anche) di fornire informazioni ulteriori a quelle richieste – ovvero di derogare a specifiche disposizioni vigenti – se necessario per fornire una *fair presentation*²⁹.

Con riferimento alla rendicontazione europea di sostenibilità, l'attuale disciplina normativa, costituita in particolare dalla CSRD e dagli ESRS, non solo non esplicita quale sia il modello tra i due da seguire ma sembra anche mandare segnali contraddittori sul punto. Da un lato, gli ESRS S1 e S2 introducono alcuni oneri informativi obbligatori – propendendo, pertanto, verso un *compliance framework*. Dall'altro, le imprese sono tenute a riportare informazioni c.d. *entity-specific*, se materiali, nel rispetto di alcune caratteristiche qualitative quali rilevanza, rappresentazione fedele, comprensibilità e verificabilità – tradendo, in questo modo, alcuni caratteri tipici di un *fair presentation framework*.

La stessa ambiguità emerge anche con riferimento al modello di revisione legale di sostenibilità. Se la direttiva (UE) 2013/34 (c.d. “direttiva *Accounting*”) pare, pur se non esplicitamente né in modo del tutto univoco³⁰, confermare un modello basato sulla mera *compliance* (in particolare, art. 34, par. 1,

²⁷ ACCOUNTANCY EUROPE, *Sustainability Statements Based on ESRS: “Compliance” or “Fair Presentation”?*, 2025, 1.

²⁸ *Ibidem*.

²⁹ *Ibidem*. Per l'attività dei revisori con riferimento alle informazioni finanziarie in senso tradizionale, si veda W. SMIELIAUSKAS-M. YE, *Do Auditors Use a Compliance or Fair Presentation Approach to Evaluate Financial Statements? Evidence from Audited Discretionary Accruals*, 2024, disponibile su www.ssrn.com.

³⁰ Per esempio, la direttiva (UE) 2013/34, come modificata dalla CSRD, prevede una regola particolare nel suo art. 19-*bis*, par. 3. Infatti, gli Stati membri possono permettere l'omissione di “informazioni concernenti gli sviluppi imminenti o le questioni oggetto di negoziazione in casi eccezionali”, purché tale omissione “non pregiudichi la comprensione corretta ed equilibrata dell'andamento dell'impresa, dei suoi risultati e della sua situazione nonché dell'impatto della sua attività”. Analoga disposizione è contenuta nell'art. 29-*bis*, par. 3, con riferimento alla rendicontazione consolidata di sostenibilità. Nell'ambito dell'ordinamento italiano, si veda l'art. 3, comma 5, d.lgs. n. 125/2024 per la rendicontazione individuale di sostenibilità e l'art. 4, comma 5, d.lgs. n. 125/2024 per la rendicontazione consolidata di sostenibilità.

lett. a-bis))³¹, le FAQ (non vincolanti) della Commissione europea sembrano muoversi verso il modello opposto³².

L'introduzione del principio FP, pertanto, mirerebbe tra gli altri obiettivi anche a quello di rigettare definitivamente un modello di rendicontazione di sostenibilità basato sulla mera *compliance*.

3. *La ratio del principio di fair presentation negli ESRS.*

L'introduzione del principio FP si pone ulteriori due obiettivi: da un lato, facilitare l'applicazione del principio di (doppia) materialità e, dall'altro, migliorare l'interoperabilità degli ESRS con i principi IFRS di sostenibilità.

In primo luogo, il principio FP dovrebbe risolvere alcune difficoltà riscontrate nella prassi della rendicontazione delle informazioni sulla sostenibilità³³ – in particolare relative ad una divergenza nell'applicazione della nozione di materialità e, come conseguenza, ad una mancanza di comparabilità e rilevanza delle informazioni rendicontate³⁴. Si tratta di criticità riscontrate ormai da anni, fin dall'applicazione della direttiva (UE) 2014/95 (*Non-Financial Reporting Directive* – NFRD)³⁵,

³¹ Art. 34, par. 1, lett. a-bis), direttiva (UE) 2013/34: “[i] revisori legali o le imprese di revisione contabile inoltre [...] se del caso, rilasciano l’attestazione contenente le conclusioni basate su un incarico finalizzato ad acquisire un livello di sicurezza limitato circa la *conformità* della rendicontazione di sostenibilità con le prescrizioni della presente direttiva, compresa la *conformità* della rendicontazione di sostenibilità con i principi di rendicontazione di sostenibilità adottati a norma dell’art. 29 *ter* o dell’art. 29 *quater*, le procedure adottate dall’impresa per individuare le informazioni comunicate secondo detti principi di rendicontazione di sostenibilità, la *conformità* con l’obbligo di marcatura della rendicontazione di sostenibilità ai sensi dell’art. 29 *quinqüies*, nonché l’osservanza degli obblighi di informativa previsti dall’art. 8 del regolamento (UE) 2020/852” (corsivo aggiunto).

³² European Commission, *FAQs on the assurance of sustainability reporting*, 2024, 44, in particolare là dove si legge: “[t]he assurance providers are expected to perform procedures that enable them to conclude that no matter has come to their attention to cause them to believe that the information included in the sustainability statement is not fairly presented, in all material respects”.

³³ EFRAG, *ESRS Revision: Progress Report as of 20 June 2025*, 2025, par. 26. L'introduzione del principio, insieme con altre modifiche, secondo l'EFRAG “*should simplify the DMA to a large extent, and at the same time foster more streamlined reporting by focusing it on relevant and decision-useful information*” (par. 27).

³⁴ EFRAG, *Basis for Conclusions. Draft Amended ESRS*, 2025, par. 40.

³⁵ Commissione europea, *Relazione sulle clausole di riesame o revisione delle direttive 2013/34/UE, 2014/95/UE e 2013/50/UE*, 2021, SWD(2021) 81 final; ESMA, *Final Report: ESMA's Technical Advice to the European Commission on Integrating Sustainability Risks and Factors in MiFID II*,

e non ancora del tutto risolte, come anche dimostrato da recenti documenti dell'ESMA³⁶.

Nei documenti di accompagnamento alla proposta per i nuovi ESRS, l'EFRAG afferma che il filtro della materialità “*was not well understood*” e, in particolare, che non è stata correttamente compresa la sua flessibilità per l'analisi e la descrizione delle circostanze effettivamente rilevanti di volta in volta³⁷. Secondo l'EFRAG, le imprese hanno faticato a comprendere la reale portata della materialità poiché spesso il quadro normativo è stato interpretato come un mero “*compliance exercise*”³⁸.

Proprio con l'obiettivo di risolvere simili criticità, e in particolare di ridurre la rendicontazione delle informazioni non necessarie³⁹, l'EFRAG ha deciso di introdurre il principio della *fair presentation*, considerato proprio per questa ragione un “*key concept*”⁴⁰. È in questo modo, pertanto, che si giustifica l'introduzione del principio nell'ambito di una revisione degli ESRS che si pone un obiettivo generale di semplificazione degli oneri di rendicontazione di sostenibilità. In altre parole, è vero che in un *fair presentation framework* le imprese devono comunicare informazioni ulteriori a quelle previste⁴¹ ma è altrettanto vero che, specularmente, esse possono derogare ai requisiti informativi richiesti dagli ESRS se risultassero non coerenti con il principio FP⁴².

In secondo luogo, l'introduzione del principio consentirebbe ulteriormente di potenziare l'interoperabilità con altri standard internazionali, ed in particolare con gli IFRS S1 (“*General Requirements for Disclosure of Sustainability-related*

2019, ESMA35-43-1737. Si veda anche D. STRAUSS-A.I. SAAD, *Can Investors Rely on Corporate Sustainability Commitments?*, in D.C. ESTY-T. CORT (eds.), *Values at Work Sustainable Investing and ESG Reporting: Sustainable Investing and ESG Reporting*, Londra, 2020, 195 ss.

³⁶ ESMA, *Materiality Matters (!). Results of a fact-finding exercise on 2024 corporate reporting practices under ESRS Set 1*, 2025, ESMA32-846262651-5288; ESMA, *Statement. European common enforcement priorities for 2025 corporate reporting*, 2025, ESMA32-2064178921-9254, 5 ss.

³⁷ EFRAG, *Basis for Conclusions*, cit., par. 50.

³⁸ *Ibidem*. Secondo l'EFRAG, l'interpretazione del quadro normativo come un mero esercizio di *compliance* ha condotto, in particolare, ad una rendicontazione dei *datapoint* senza la flessibilità necessaria per focalizzarsi sulle informazioni rilevanti relative alle specifiche circostanze dell'impresa rendicontante (par. 50).

³⁹ EFRAG, *Public Consultation Survey*, cit., 19.

⁴⁰ *Ivi*, par. 41, lett. a).

⁴¹ EFRAG, *ESRS S1*, cit., 6-7, con riferimento ai c.d. “*application requirements*” (ARs) sul principio di *fair presentation*.

⁴² EFRAG, *EFRAG's technical advice*, cit., 3.

Financial Information”)⁴³ e gli IFRS S2 (“*Climate-related Disclosures*”)⁴⁴. L’interoperabilità degli ESRS con altri standard internazionali è uno degli obiettivi principali della CSRD⁴⁵ e, pertanto, dell’EFRAG⁴⁶ – obiettivo, questo, ancora centrale anche a seguito della proposta *Omnibus*⁴⁷. Infatti, proprio la presenza di più standard di rendicontazione di sostenibilità, e in particolare di più definizioni di materialità, riduce drasticamente la comparabilità a livello internazionale delle informazioni rendicontate⁴⁸.

Gli IFRS qualificano il principio FP come uno dei principi fondamentali della rendicontazione di sostenibilità. In particolare, gli IFRS S1 affermano: “[f]air presentation requires disclosure of relevant information about sustainability-related risks and opportunities that could reasonably be expected to affect the entity’s prospects, and their faithful representation in accordance with the principles set out in this Standard. To achieve faithful representation, an entity shall provide a complete, neutral and accurate depiction of those sustainability-related risks and opportunities”⁴⁹. Secondo gli IFRS S1, il principio FP, inoltre, richiede di divulgare

⁴³ INTERNATIONAL FINANCIAL REPORTING STANDARDS FOUNDATION, *IFRS S1. General Requirements for Disclosure of Sustainability-related Financial Information*, 2023.

⁴⁴ INTERNATIONAL FINANCIAL REPORTING STANDARDS FOUNDATION, *IFRS S2. Climate-related Disclosures*, 2023.

⁴⁵ Si veda, per esempio, il considerando n. 43 della CSRD, secondo cui “[a]l fine di ridurre al minimo i disagi per le imprese che già comunicano informazioni sulla sostenibilità, i principi di rendicontazione di sostenibilità dovrebbero tenere conto, ove opportuno, dei principi e dei quadri di riferimento esistenti per la contabilità e la comunicazione in materia di sostenibilità”.

⁴⁶ *Ibidem*. Si veda anche EFRAG, *EFRAG Shares Revised ESRS Exposure Drafts and Launches 60-Day Public Consultation: FAQ*, 2025, 12. Proprio con questo obiettivo, l’EFRAG ha pubblicato negli ultimi anni alcune guide di interoperabilità tra gli ESRS, da un lato, e altri standard di rendicontazione di sostenibilità dall’altro. Si veda EFRAG-IFRS FOUNDATION, *ESRS-ISSB Standards. Interoperability Guidance*, 2024; EFRAG-TNFD, *TNFD – ESRS. Correspondence Mapping*, 2024; GRI-EFRAG, *GRI-ESRS Interoperability Index*, 2023.

⁴⁷ Quella dell’interoperabilità degli standard IFRS di sostenibilità è una delle c.d. leve (“*lever*”) di semplificazione degli ESRS – e, in particolare, della n. 6: EFRAG, *Basis for Conclusion*, cit., parr. 79 ss. Si veda anche European Commission, *Letter to EFRAG*, cit., 2.

⁴⁸ R.M. JONES, *The Cost of Non-Convergence: The US Climate Disclosure Rule in the Context of Emerging Global Standards*, in *University of Pennsylvania Journal of Business Law*, 2024, 26, 1109 ss.; H. STOLOWY-L. PAUGAM, *Sustainability Reporting: Is convergence possible?*, 2022, disponibile su www.ssrn.com; J. GARST-A. BEANLAND-J. TÄHTINEN, *The Reality of Materiality. Insights from real-world applications of ESG materiality assessments*, 2021, disponibile su www.wbcsd.org. A livello internazionale, si veda il documento CDP-CDSB-GRI-IIRC-SASB, *Statement of Intent to Work Together Towards Comprehensive Corporate Reporting*, 2020.

⁴⁹ IFRS S1, *General Requirements*, cit., par. 13.

informazioni comparabili, verificabili, tempestive e comprensibili⁵⁰. È prevista, poi, una sorta di clausola di chiusura, là dove si afferma che il principio impone di divulgare informazioni ulteriori “*if compliance with the specifically applicable requirements in IFRS Sustainability Disclosure Standards is insufficient to enable users of general-purpose financial reports to understand the effects of sustainability-related risks and opportunities on the entity’s cash flows, its access to finance and cost of capital over the short, medium and long term*”⁵¹.

Poiché gli standard IFRS S1 e S2 mirano a ridurre le differenze tra la rendicontazione finanziaria tradizionale e quella di sostenibilità, è chiaro che il principio FP, come introdotto anche in sede di revisione degli ESRS, tradisce alcune influenze da parte della reportistica tradizionale.

4. *Il principio di fair presentation nella rendicontazione finanziaria tradizionale.*

Il principio FP è conosciuto e applicato ormai da anni nell’ambito della rendicontazione finanziaria tradizionale⁵², in particolare nel contesto degli standard IAS, dell’ordinamento europeo e, infine, di quello nazionale italiano.

Il principio è disciplinato a livello internazionale dallo IAS 1 (“*Presentation of Financial Statement*”)⁵³. In generale, il requisito di rappresentazione veritiera e chiara si colloca in posizione gerarchicamente superiore a qualsiasi principio generale di bilancio nonché ai criteri previsti per le singole poste⁵⁴.

In particolare, le informazioni finanziarie devono presentare “*fairly*” la posizione finanziaria, l’andamento finanziario e il flusso di cassa di una data entità⁵⁵. Più nel dettaglio, il principio FP “*requires the faithful representation of the effects*

⁵⁰ *Ivi*, par. 15, lett. a).

⁵¹ *Ivi*, par. 15, lett. b).

⁵² Il principio rileva anche nell’ambito dei tradizionali dibattiti tra *standard* e *rule* con riferimento alla rendicontazione finanziaria: B. BENNET-M. BRADBURY-H. PRANGNELL, *Rules, Principles and Judgments in Accounting Standards*, in *ABACUS*, 2008, 42, 189 ss.; D. ALEXANDER-E. JERMAKOWICZ, *A True and Fair View of the Principles/ Rules Debate*, in *ABACUS*, 2006, 42, 132 ss.

⁵³ Lo IAS 1 è stato adottato nell’aprile del 2001 dall’*International Accounting Standards Board* (IASB) ed è stato predisposto inizialmente dall’*International Accounting Standards Committee* nel settembre del 1997.

⁵⁴ G. STRAMPELLI-F. URBANI, *I principi contabili internazionali (IAS/IFRS)*, in G. STRAMPELLI, *Diritto contabile*, Torino, 2025, 317.

⁵⁵ IFRS FOUNDATION, *IAS 1*, ultima modifica nel 2024, par. 15.

of transactions, other events and conditions in accordance with the definitions and recognition criteria for assets, liabilities, income and expenses"⁵⁶. Ancora, secondo lo IAS 1, il rispetto del principio FP impone di presentare le informazioni in modo che siano rilevanti, affidabili, comparabili e comprensibili⁵⁷.

Infine, e in aderenza ad un *fair presentation framework*⁵⁸, sono previsti sia obblighi informativi ulteriori sia facoltà derogatorie. Nel primo senso, l'entità rendicontante deve fornire ulteriori informazioni se la mera osservanza degli obblighi degli standard IFRS non permetterebbe agli utenti di comprendere correttamente ed effettivamente la posizione e l'andamento finanziario⁵⁹. Nel secondo senso, "[i]n the extremely rare circumstances" in cui il rispetto degli standard IFRS sia così fuorviante da confliggere con gli obiettivi della rendicontazione, allora l'entità rendicontante può derogarvi pur rispettando specifici requisiti⁶⁰ (c.d. "*true and fair override*" – TFO⁶¹).

In prospettiva futura, lo IAS 1 sarà sostituito dall'IFRS 18 a partire dal 1° gennaio 2027⁶². Alcuni paragrafi dello IAS 1 sono stati, tuttavia, mantenuti e spostati altrove, nello IAS 8 ("*Basis of Preparation of Financial Statements*") o nell'IFRS 7 ("*Financial Instruments: Disclosures*"). In particolare, il principio FP sarà incluso nello IAS 8 con un contenuto identico a quanto oggi è previsto nello IAS 1⁶³.

Nell'ambito dell'ordinamento europeo, e a differenza di quanto visto per la CSRD in cui non è chiara la scelta tra un modello di *compliance framework* ed uno di *fair presentation framework*, la direttiva (UE) 2013/34 propende definitivamente verso il secondo. In particolare, la direttiva richiede che i bilanci di esercizio forniscano "una rappresentazione veritiera e corretta sulla situazione

⁵⁶ *Ivi*, par. 15.

⁵⁷ *Ivi*, par. 17, lett. b).

⁵⁸ Sull'importanza del principio nella rendicontazione finanziaria, così che essa non si limiti ad essere un sistema basato sulla mera *compliance*, si veda M.K. DEFOND-C.S. LENNOX-J. ZHANG, *The Primacy of Fair Presentation: Evidence from PCAOB Standards, Federal Legislation, and the Courts*, in *Accounting Horizon*, 2018, 32, 91 ss.

⁵⁹ IFRS FOUNDATION, *IAS 1*, cit., par. 17, lett. c). In proposito, si veda L. EVANS, *The True and Fair View and the 'Fair Presentation' Override of IAS 1*, in *Accounting and Business Research*, 2003, 33, 311 ss.

⁶⁰ IFRS FOUNDATION, *IAS 1*, par. 19, che rimanda ai requisiti previsti nel successivo par. 20.

⁶¹ D. ALEXANDER-S. ARCHER, *On Economic Reality, Representational Faithfulness and the 'True and Fair Override'*, in *Accounting and Business Research*, 2003, 33, 3 ss.

⁶² IFRS FOUNDATION, *IFRS 18. Presentation and Disclosure in Financial Statements*, 2024.

⁶³ IFRS FOUNDATION, *IAS 8. Basis of Preparation of Financial Statements*, ultima modifica nel 2024, parr. 6A-6C.

patrimoniale e finanziaria dell'impresa, nonché del risultato economico dell'esercizio" (art. 4, par. 3, direttiva *Accounting*)⁶⁴.

Come richiesto dal modello prescelto, la direttiva impone, da un lato, obblighi informativi ulteriori a quelli specificamente previsti e, dall'altro, obblighi (o facoltà) di disapplicazione. Nel primo senso, quando l'applicazione della direttiva non è sufficiente per una rappresentazione veritiera e corretta, "nella nota integrativa sono fornite le informazioni complementari necessarie per rispettare tale obbligo" (art. 4, par. 3, direttiva *Accounting*). Nel secondo senso, può capitare che, in casi eccezionali, l'applicazione di una disposizione della direttiva sia incompatibile con il principio di rappresentazione veritiera e corretta. In questi casi, "la disposizione in questione è disapplicata", con la facoltà degli Stati membri di "definire i casi eccezionali e fissare il corrispondente regime derogatorio" (art. 4, par. 4, direttiva *Accounting*). È ulteriormente previsto che, sempre in casi eccezionali e allo scopo di fornire una rappresentazione veritiera e corretta, possa derogarsi al principio secondo cui "la struttura dello stato patrimoniale e del conto economico non può essere modificata da un esercizio all'altro" (art. 9, par. 1, direttiva *Accounting*). Sono, poi, previste disposizioni specifiche per assicurare il rispetto del principio a seconda delle circostanze rilevanti del caso specifico⁶⁵.

Gli obblighi dei revisori legali confermano ulteriormente il *fair presentation framework* adottato dalla disciplina europea sulla rendicontazione finanziaria tradizionale. In particolare, l'art. 28 della direttiva 2006/48/CE, come modificato dalla direttiva *Accounting*, impone ai revisori di fornire un giudizio che indichi se "il bilancio d'esercizio dia o meno una rappresentazione veritiera e corretta, secondo lo schema di regole dell'informativa di bilancio applicato" (art. 28, par. 1, lett. c), n. i), direttiva 2006/48/CE).

Nell'ambito della rendicontazione finanziaria tradizionale, il principio FP è in definitiva centrale, sia in fase di redazione, ai sensi dello IAS 1, dello IAS 8 e della direttiva *Accounting*, sia in riferimento all'attività di revisione legale.

Anche l'ordinamento giuridico italiano conferma, sulla scia della direttiva *Accounting*, un modello di rendicontazione finanziaria basato su un *fair presentation*

⁶⁴ Sull'origine del principio nell'ordinamento europeo, si veda K. VAN HULLE, *The True and Fair View Override in the European Accounting Directives*, in *European Accounting Directive*, 1997, 6, 711 ss.

⁶⁵ Secondo l'art. 9, par. 3, direttiva *Accounting*, "[g]li Stati membri possono autorizzare o prescrivere il raggruppamento delle voci dello stato patrimoniale e del conto economico precedute da numeri arabi qualora esse rappresentino un importo irrilevante al fine di fornire una rappresentazione veritiera e corretta della situazione patrimoniale e finanziaria dell'impresa, nonché del risultato economico dell'esercizio".

framework. Al di là di quelle imprese che sono tenute per legge ovvero hanno la facoltà di redigere il bilancio secondo i principi contabili internazionali⁶⁶, le fonti fondamentali di riferimento sono il Codice civile, da un lato, e i principi contabili predisposti dall'OIC (Organismo Italiano di Contabilità) dall'altro⁶⁷.

Secondo il principio generale sancito dall'art. 2423 c.c., il bilancio “deve essere redatto con chiarezza e deve rappresentare in modo veritiero e corretto la situazione patrimoniale e finanziaria della società e il risultato economico dell'esercizio”. Si tratta, questi, di principi, previsti anche in sede europea⁶⁸, giustificati dall'obiettivo informativo del bilancio⁶⁹ e qualificabili come clausole generali, con tutte le incertezze esegetiche che ne derivano⁷⁰.

In particolare, e in primo luogo, il requisito di veridicità non va inteso in senso assoluto⁷¹, traducendosi invece nell'obbligo di legge, per il redattore del bilancio, di basarsi su un sufficiente patrimonio di informazioni e su adeguate metodologie da adottare con un atteggiamento neutrale e oggettivo⁷². In modo simile a quanto descritto dell'EFRAG nella proposta dei nuovi ESRS, il principio di veridicità

⁶⁶ L'art. 4 del d.lgs. n. 38/2005 stabilisce quali società siano tenute per legge ad applicare i principi contabili internazionali (in particolare, art. 4, commi 1-5) e quali, invece, hanno la mera facoltà di farlo (art. 4, comma 6).

⁶⁷ Sulla genesi dei principi OIC, si veda C. MEZZABOTTA, *Nuovi principi contabili nazionali per il bilancio di esercizio e consolidato*, in *Rivista dei dottori commercialisti*, 2014, 1, 69 ss.

⁶⁸ Su queste clausole generali, si veda F.P. GRIFFI, *Dai principi di chiarezza e precisione alla rappresentazione veritiera e corretta: prime riflessioni sistematiche*, in AA.VV., *Appunti in tema di bilancio d'esercizio, di bilancio consolidato e di metodi di consolidamento*, Milano, 1999, 12 ss.

⁶⁹ S. FORTUNATO, *Clausole generali e informazione contabile fra integrazione giurisprudenziale e integrazione professionale*, in *Contratto e Impresa*, 2010, 2, 481.

⁷⁰ A. QUAGLI, *Il grado di dettaglio delle informazioni nel bilancio di esercizio*, in *Rivista dei dottori commercialisti*, 2024, 2, 221 ss.; O. CAGNASSO, *Obblighi funzionalmente orientati e principi generali in tema di bilancio di esercizio*, in *Rivista dei dottori commercialisti*, 2021, 2, 319 ss.

⁷¹ La Relazione Ministeriale di accompagnamento al d.lgs. n. 127/1991, che ha introdotto il principio di rappresentazione veritiera e corretta, dichiarava che “l'uso dell'aggettivo veritiero [...] non significa pretendere dai redattori del bilancio né promettere ai lettori di esso una verità oggettiva di bilancio, irraggiungibile con riguardo ai valori stimati, ma richiedere che i redattori del bilancio operino correttamente le stime e ne rappresentino il risultato”. A conferma dell'attualità di tale interpretazione, il passaggio citato viene riportato anche nell'OIC 11. In proposito, si veda anche G. SAVIOLI, *Il bilancio di esercizio secondo i principi contabili nazionali*, Milano, 2024, 31. Il principio di veridicità viene, pertanto, interpretato come verità legale: G. TARANTINO, *L'influenza “indiretta” dei principi contabili internazionali nella redazione del bilancio d'esercizio civilistico*, in *Rivista della Corte dei Conti*, 2024, 3, 85.

⁷² G. STRAMPELLI, *Le valutazioni di bilancio tra non veridicità (civile) e falsità (penale): spunti sulla punibilità dei falsi valutativi*, in *Rivista delle società*, 2016, 1, 130.

postula, tra gli altri, anche un divieto di sottovalutazioni o sopravvalutazioni⁷³.

In secondo luogo, la clausola di correttezza, che non può ridursi interpretativamente in una mera ripetizione di quella di veridicità⁷⁴, impone, da un lato, la corretta osservanza delle regole di carattere tecnico e, dall'altra, la presentazione delle informazioni in modo neutrale e non fuorviante⁷⁵ – requisiti, come si vedrà, ulteriormente specificati nei principi OIC. Il principio di correttezza acquisisce rilevanza centrale in particolare quando una specifica valutazione contabile non risulta disciplinata né dalla legge né dai principi contabili di riferimento⁷⁶.

Esattamente come nel caso degli IFRS e della direttiva *Accounting*, il principio postula sia obblighi informativi ulteriori sia obblighi (o facoltà) di deroga alla legge.

Da un lato, se “le informazioni richieste da specifiche disposizioni di legge non sono sufficienti a dare una rappresentazione veritiera e corretta, si devono fornire le informazioni complementari necessarie allo scopo” (art. 2423, comma 3, c.c.)⁷⁷. Dall'altro, e in primo luogo, non è necessario “rispettare gli obblighi in tema di rilevazione, valutazione, presentazione e informativa quando la loro osservanza abbia effetti irrilevanti al fine di dare una rappresentazione veritiera e corretta” (art. 2423, comma 4, c.c.). In secondo luogo, e in coerenza con la direttiva *Accounting*, “[s]e, in casi eccezionali, l'applicazione di una disposizione degli articoli seguenti è incompatibile con la rappresentazione veritiera e corretta, la disposizione non *deve* essere applicata” (art. 2423, comma 5, c.c. – corsivo aggiunto)⁷⁸. A ben vedere, quest'ultima disposizione non si limita a sancire una mera facoltà, come nel caso dell'art. 2423, comma 3, c.c., ma addirittura impone un vero e proprio obbligo di legge di non applicazione della disposizione in contrasto con il principio⁷⁹.

Dal canto loro, i principi contabili dell'OIC introducono alcune ulteriori caratteristiche, per così dire, qualitative che ricordano quelle previste dal principio

⁷³ G. STRAMPELLI, *Diritto contabile*, cit., 33.

⁷⁴ *Ivi*, 38-39, che ripercorre le principali interpretazioni della clausola di correttezza nel diritto contabile.

⁷⁵ G. SAVIOLI, *Il bilancio di esercizio*, cit., 31.

⁷⁶ G. STRAMPELLI, *Diritto contabile*, cit., 38, che ricorda la centralità del principio di correttezza nell'applicazione delle previsioni degli IAS da parte delle società che predispongono il bilancio secondo il Codice civile.

⁷⁷ *Ivi*, 44-45, che studia la giurisprudenza rilevante ad oggetto l'art. 2423, comma 3, c.c.

⁷⁸ *Ivi*, 38-42, che analizza alcune applicazioni giurisprudenziali della deroga di cui all'art. 2423, comma 5, c.c.

⁷⁹ U. SOSTERO-E. SANTOSSO, *I principi contabili per il bilancio di esercizio*, Milano, 2018, 21.

FP nei nuovi ESRS. In particolare, secondo l'OIC 11 ("Finalità e postulati del bilancio d'esercizio"⁸⁰) i corollari del principio di rappresentazione veritiera e corretta sono, tra gli altri, il requisito di neutralità⁸¹, di rilevanza⁸² e di comparabilità⁸³ – anche se, quest'ultimo, inteso in senso per lo più temporale⁸⁴. Ulteriori precisazioni o conseguenze del principio di rappresentazione veritiera e corretta sono, poi, indicati in diversi principi OIC⁸⁵.

Da tale panoramica, si comprende come il modello che verrebbe introdotto dai nuovi ESRS non si sovrapporrebbe esattamente a quello di rendicontazione finanziaria. In particolare, gli ESRS non prevedono il criterio di veridicità, limitandosi, pertanto, al principio di correttezza nella rappresentazione. Pur se la veridicità, come visto, non è stata interpretata come verità in senso assoluto e oggettivo, si tratterebbe comunque di un principio assai complicato da tradurre nella rendicontazione di sostenibilità. Infatti, nel caso della rendicontazione finanziaria tradizionale l'inevitabile discrezionalità tecnica che accompagna la redazione del bilancio, e in particolare di certe attività o valori stimati, è fortemente condizionata al rispetto di precisi e ormai consolidati principi contabili di riferimento, siano essi internazionali o nazionali. Tali principi, incarnano, in sintesi, un sintomo di ragionevolezza dell'operato dei redattori del bilancio⁸⁶. Nell'ambito della rendicontazione di sostenibilità, invece, il percorso verso il

⁸⁰ In generale, si veda M. CASO, *OIC 11: importanti chiarimenti in materia di rappresentazione sostanziale, di continuità aziendale e di rilevanza*, in *Rivista dei dottori commercialisti*, 2018, 2, 197 ss.

⁸¹ OIC, *Finalità e postulati del bilancio d'esercizio*, 2018, par. 8, secondo cui il "principio di neutralità richiede che il bilancio sia scevro da distorsioni preconconcette nell'applicazione dei principi contabili o da sperequazioni informative a vantaggio solo di alcuni dei destinatari primari del bilancio".

⁸² *Ivi*, par. 15, lett. f).

⁸³ *Ivi*, par. 15, lett. g).

⁸⁴ *Ivi*, parr. 43 ss. Si veda anche l'art. 2423-ter, comma 5, c.c., secondo cui "per ogni voce dello stato patrimoniale e del conto economico deve essere indicato l'importo della voce corrispondente dell'esercizio precedente. Se le voci non sono comparabili, quelle relative all'esercizio precedente devono essere adattate; la non comparabilità e l'adattamento o l'impossibilità di questo devono essere segnalati e commentati nella nota integrativa".

⁸⁵ Per esempio, l'OIC 12 ("Composizione e schemi del bilancio d'esercizio") traduce il principio con riferimento in particolare alla nota integrativa (parr. 106 ss.). Secondo l'OIC 29 ("Cambiamenti di principi contabili, cambiamenti di stime contabili, correzione di errori, fatti intervenuti dopo la chiusura dell'esercizio") la rappresentazione veritiera e corretta costituisce "l'obiettivo finale del bilancio" (par. 31).

⁸⁶ G. STRAMPELLI, *Le valutazioni di bilancio*, cit., 131.

consolidamento di precisi e univoci modelli di redazione e di controllo è ancora in corso⁸⁷.

Il modello, in definitiva, passerebbe sì da un *compliance framework* ad un *fair presentation framework*, ma non con riferimento alla veridicità delle informazioni. Gli obblighi informativi ulteriori, da un lato, e quelli di deroga dall'altro si riferirebbero soltanto alla modalità di rappresentazione, per così dire, qualitativa delle informazioni, con particolare attenzione alle caratteristiche, indicate dalla bozza dei nuovi ESRS, delle informazioni sulla sostenibilità.

5. I dubbi dell'EFRAG sull'introduzione del principio di fair presentation.

L'introduzione del principio FP, pur se con gli obiettivi e i modelli di riferimento appena illustrati, non è stata priva di incertezze. Infatti, l'EFRAG ammette vi sia stato un ampio dibattito nell'ambito del *Sustainability Reporting Board* (SRB) nel processo di revisione degli ESRS⁸⁸. In proposito, risulta particolarmente interessante il documento "*Basis for Conclusions*" che, nell'Appendice 1 ("*Due process approval notes – EFRAG SR TEG*"), riporta le note del processo di approvazione della bozza dei nuovi ESRS⁸⁹.

In tale occasione, si rileva che alcuni componenti dell'SRB ritengono che l'introduzione del principio FP nella rendicontazione di sostenibilità sia, da un lato, inappropriata e, dall'altro, prematura.

Nel primo senso, si ritiene che la CSRD, a differenza della rendicontazione finanziaria in senso tradizionale, "*does not introduce fair presentation but a compliance-based framework*"⁹⁰. Inoltre, il principio FP aumenterebbe in misura eccessiva il rischio di responsabilità per gli organi interni delle imprese rendicontanti e dei revisori di sostenibilità, in particolare considerando la difficoltà di dimostrare il rispetto del principio con riferimento a tutti gli *stakeholder*⁹¹. In altre parole, il dovere in capo ai responsabili della rendicontazione si configurerebbe come una "*open-ended obligation*"⁹². Ulteriormente, l'introduzione

⁸⁷ L. ENRIQUES-A. ROMANO-A.F. TUCH, *Sustainability Assurance*, ECGI Law Working Paper No. 871/2025.

⁸⁸ EFRAG, *Basis for Conclusions*, cit., par. 51, lett. a).

⁸⁹ *Ivi*, 67 ss.

⁹⁰ *Ivi*, 69.

⁹¹ *Ivi*, 76.

⁹² *Ivi*, 77.

del principio rischierebbe di non essere coerente con gli obiettivi del processo di revisione degli standard: da una parte, il rischio è quello di aumentare l'incertezza di cosa debba essere effettivamente rendicontato⁹³ – cosicché il principio FP non rappresenterebbe un reale chiarimento degli attuali ESRS⁹⁴; dall'altra, invece di ridurre gli obblighi informativi, il principio FP tenderebbe ad incrementarli in modo non prevedibile⁹⁵.

Nel secondo senso, pur ritenendo il principio FP potenzialmente applicabile anche al contesto della rendicontazione di sostenibilità, secondo alcuni membri la sua introduzione potrebbe essere esageratamente prematura⁹⁶. Infatti, mentre nel caso della rendicontazione finanziaria tradizionale il principio è ormai ampiamente consolidato, lo stesso non può dirsi rispetto alla rendicontazione di sostenibilità. La zona grigia che ne deriverebbe comporterebbe un'eccessiva incertezza interpretativa prodromica, a sua volta, di un incremento del rischio legale⁹⁷.

L'assenza di un consenso assoluto intorno all'introduzione del principio FP impone, secondo l'EFRAG, di prestare particolare attenzione ai risultati della consultazione pubblica⁹⁸. La consultazione, aperta il 31 luglio 2025 e terminata il 29 settembre 2025, chiedeva al quesito n. 25 di formulare osservazioni sul nuovo principio FP. Sebbene gli ESRS approvati dall'EFRAG il 28 novembre 2025 non abbiano inciso sul principio di *fair presentation* rispetto alla bozza sottoposta a consultazione, le osservazioni formulate dai diversi *stakeholder* risultano di particolare rilievo in vista della futura applicazione del principio medesimo.

6. Alcuni risultati della consultazione pubblica: accoglimenti “condizionati” e rifiuti “incondizionati”.

La maggior parte dei partecipanti alla consultazione ha accolto positivamente l'introduzione del principio FP negli ESRS, pur se, quasi sempre, mostrando alcune preoccupazioni rilevanti.

L'ESMA ritiene che l'introduzione del principio consentirebbe, da una parte, di migliorare l'interoperabilità degli ESRS con gli altri standard internazionali e,

⁹³ EFRAG, *Public Consultation Survey*, cit., 19.

⁹⁴ EFRAG, *Basis for Conclusions*, cit., 76-77.

⁹⁵ *Ivi*, 77.

⁹⁶ *Ivi*, 69.

⁹⁷ *Ivi*, 77.

⁹⁸ *Ivi*, par. 51, lett. a).

dall'altra, di assicurare la qualità della rendicontazione di sostenibilità in conformità all'art. 29-ter direttiva (UE) 2013/34⁹⁹. L'esplicita previsione consentirebbe di chiarire definitivamente il quadro regolatorio, considerando che, secondo l'autorità europea, già oggi le imprese sono in realtà tenute a rispettare i principi di un *fair presentation framework*¹⁰⁰. L'assenza, negli attuali ESRS, di un'espressa previsione in tale senso è causa di incertezza interpretativa e divergenza applicativa, in particolare nell'ambito della revisione legale di sostenibilità¹⁰¹. I nuovi ESRS, invece, assicurerebbero di discostarsi da un "*blind approach to compliance*" alla CSRD nel perseguimento di un obiettivo finale di maggiore protezione degli investitori¹⁰². L'ESMA propone, tuttavia, di introdurre un periodo di transizione al fine di analizzare con attenzione, insieme a tutti gli attori della rendicontazione di sostenibilità, eventuali questioni applicative del principio¹⁰³.

Altri partecipanti alla consultazione esprimono una posizione simile, auspicando che il principio FP possa migliorare l'interoperabilità con gli standard internazionali e possa permettere di abbandonare una mera "*check-list mentality*"¹⁰⁴. Addirittura, alcuni partecipanti suggeriscono di chiarire definitivamente che (anche) la rendicontazione di sostenibilità si poggia su un *compliance framework* modificando in questo senso direttamente la CSRD¹⁰⁵.

Tuttavia, pur se alcuni ritengono che già oggi la CSRD e gli ESRS prevedano un *fair presentation framework* (per es., per il concetto di materialità e di rilevanza delle informazioni c.d. *entity-specific*), è opinione comune sia necessario definire ulteriormente il nuovo principio FP, in particolare in considerazione

⁹⁹ ESMA, *Ref: EFRAG's consultation on its Exposure Draft on the revised European Sustainability Reporting Standards (ESRS)*, 2025, ESMA32-846262651-5289, par. 62. Secondo l'art. 29-ter direttiva (UE) 2013/34: "[i] principi di rendicontazione di sostenibilità assicurano la qualità delle informazioni comunicate, richiedendo che esse siano comprensibili, pertinenti, verificabili, comparabili e rappresentate fedelmente".

¹⁰⁰ *Ivi*, par. 66.

¹⁰¹ *Ivi*, parr. 65-66.

¹⁰² *Ivi*, parr. 68-69.

¹⁰³ *Ivi*, parr. 61 e 70.

¹⁰⁴ KMPG, *Revised ESRS*, 2025, 11. Sulla stessa scia, si veda EUROSIF, *Amended ESRS Exposure Draft Public Consultation*, 2025, 25; FINANCE WATCH, *Consultation Response. EFRAG consultation on revised ESRS exposure draft*, 2025, 4; XBRL US, *XBRL US Response to EFRAG Public Consultation Survey – Draft Amended ESRS*, 2025, 1.

¹⁰⁵ PwC, *PwC response letter to EFRAG Public Consultation Survey – Draft Amended ESRS*, 2025, 2; ERNST & YOUNG (EY), *EY Response to EFRAG Consultation on Revised ESRS Exposure Drafts*, 2025, 11.

delle peculiarità della rendicontazione di sostenibilità rispetto a quella finanziaria tradizionale¹⁰⁶.

La preoccupazione intorno all'effettiva definizione del principio FP è sollevata dalla maggior parte dei partecipanti alla consultazione. Il rischio sarebbe, altrimenti, quello di non perseguire effettivamente l'obiettivo di ridurre gli oneri di *compliance*, sia per le imprese rendicontanti (*over-reporting*)¹⁰⁷ sia, a valle, per i revisori di sostenibilità (*over-auditing*)¹⁰⁸.

In proposito, i timori di un aggravio eccessivo e prematuro dei compiti e degli obblighi dei revisori sono numerosi¹⁰⁹, in particolare considerando che, secondo alcuni, il requisito di completezza potrebbe essere interpretato come esaustività¹¹⁰. A seconda dei partecipanti, si suggerisce, da un lato, di definire ulteriormente non solo il principio FP¹¹¹ ma anche quelli ad esso connessi (per es., di completezza, di comparabilità, etc.), nel rispetto in ogni caso dei principi di rilevanza e di proporzionalità¹¹²; dall'altro, di specificare le procedure di revisione idonee ad assicurare (anche) il rispetto del principio FP¹¹³, considerando che, in particolare, non esistono ancora metodi del tutto consolidati¹¹⁴.

¹⁰⁶ DEUTSCHES RECHNUNGSLEGUNGS STANDARDS COMMITTEE (DRSD), *Exposure drafts of July 2025 on revised ESRS*, 2025, 1-2.

¹⁰⁷ ERNST & YOUNG (EY), *EY Response to EFRAG*, cit., 11; KMPG, *Revised ESRS*, cit., 11; EURELECTRIC, *EFRAG Amended ESRS Exposure Draft July 2025 Public Consultation Survey. A Eurelectric consultation response paper*, 2025, 10.

¹⁰⁸ EUROPEAN BANKING FEDERATION (EBF), *EBF Response to the Consultation on the Revised ESRS Exposure Draft*, 2025, 21. Si veda anche INSURANCE EUROPE, *Joint Insurance Europe and European Insurance CFO Forum response to the Consultation on the Exposure Drafts of the revised European Sustainability Reporting Standards (ESRS)*, 2025, 14.

¹⁰⁹ BUSINESS EUROPE, *Business Europe's Contribution to EFRAG's Public Consultation on the Simplified ESRS*, 2025, 3, secondo cui è necessario specificare che la responsabilità rimarrebbe in capo ai soli amministratori.

¹¹⁰ INSURANCE EUROPE, *Joint Insurance Europe*, cit., 14.

¹¹¹ ASSOCIATION FOR FINANCIAL MARKETS IN EUROPE (AFME), *Response to EFRAG Consultation on revised ESRS Exposure Drafts*, 2025, 18-19, secondo cui ulteriori chiarimenti sono necessari considerando che il principio FP può essere diversamente applicato ed interpretato in sede di revisione.

¹¹² INSURANCE EUROPE, *Joint Insurance Europe*, cit., 14.

¹¹³ ASSOCIATION FRANÇAISE DE LA GESTION FINANCIERE (AFG), *Exposure-draft on Amended ESRS. AFG Response to EFRAG Public Consultation Survey*, 2025, 6; AUTORITE DES NORMES COMPTABLES (ANC), *Exposure-draft on Amended ESRS. ANC Response to EFRAG public consultation survey*, 2025, 13.

¹¹⁴ INSTITUTE OF INTERNATIONAL FINANCE (IIF), *Re: IIF Comments on Amended ESRS – Exposure Draft 2025 Public Consultation Survey*, 2025, 14.

Diversi partecipanti suggeriscono, per facilitare i compiti dei revisori, di svolgere un riferimento esplicito agli standard predisposti dall'ISSB in sede di ulteriore definizione del principio FP¹¹⁵. Nell'ottica di perseguire la massima certezza possibile, si consiglia anche di chiarire se il principio FP presenti, o meno, differenze di metodo e di contenuto rispetto a quello speculare in materia di rendicontazione finanziaria tradizionale¹¹⁶.

Se alcuni ritengono che il rischio potrebbe essere quello di incrementare in realtà gli oneri di *compliance*, altri partecipanti alla consultazione evidenziano il rischio di rarefazione degli obblighi informativi e, pertanto, di riduzione della trasparenza in materia di sostenibilità. Si suggerisce, allora, di specificare che, anche in vigore del principio FP, le entità rendicontanti dovrebbero essere in grado, sempre e in ogni caso, di giustificare i propri giudizi di materialità¹¹⁷.

Pur se la maggior parte dei partecipanti alla consultazione sembra sostenere, pur se in modo condizionato, il principio FP nei nuovi ESRS, emergono alcune posizioni nettamente contrarie provenienti in particolare dal mercato italiano. Le preoccupazioni principali sembrano muoversi in due direzioni. In primo luogo, si teme che il principio FP conduca a rischi eccessivi di responsabilità per i membri degli organi di amministrazione delle entità rendicontanti – tanto da creare una “*open-ended obligation*”¹¹⁸. In secondo luogo, si evidenzia che, ad oggi, la maturità della rendicontazione di sostenibilità non ha ancora raggiunto quella della rendicontazione finanziaria tradizionale¹¹⁹ – in particolare, questo,

¹¹⁵ EUROPEAN BANKING FEDERATION (EBF), *EBF Response*, cit., 21; IIF, *Re: IIF Comments on Amended ESRS – Exposure Draft 2025 Public Consultation Survey*, 2025, 14.

¹¹⁶ AUTORITÉ DES MARCHÉS FINANCIERS (AMF), *Amended ESRS Exposure Drafts: AMF Response to EFRAG Public Consultation Survey*, 2025, 11.

¹¹⁷ PRINCIPLE FOR RESPONSIBLE INVESTMENT (PRI), *Consultation Response. EFRAG Consultation on Revised Exposure Draft European Sustainability Reporting Standards*, 2025, 21.

¹¹⁸ OIC, *EFRAG Consultation on DRAFT Amended ESRS*, 2025, 2-3; ASSONIME, *Amended ESRS exposure draft july 2025 public consultation survey*, 2025, 9; CONFINDUSTRIA, *Rendicontazione di sostenibilità: risposta Confindustria alla consultazione EFRAG semplificazione standard ESRS*, 2025, 2, secondo cui la difficoltà principale per le imprese sarebbe quella di provare che le informazioni rendicontate siano rappresentate correttamente per tutti gli *stakeholder* interessati; ASSIREVI, *ASSIREVI: l'inserimento della “true and fair presentation” nella rendicontazione di sostenibilità è prematuro e rischioso*, Comunicato Stampa, 25 settembre 2025, 2.

¹¹⁹ OIC, *EFRAG Consultation*, cit., 2-3; ASSONIME, *Amended ESRS exposure*, cit., 9; CONFINDUSTRIA, *Rendicontazione di sostenibilità*, cit., 2; ASSIREVI, *ASSIREVI: l'inserimento della “true and fair presentation”*, cit., 2.

considerando la nozione di doppia materialità e il c.d. *multi-stakeholder approach*¹²⁰.

7. Considerazioni conclusive.

L'introduzione del principio FP nella proposta di revisione degli ESRS segnerebbe una significativa evoluzione nella disciplina europea della rendicontazione di sostenibilità. Il principio mira a ricondurre l'informativa di sostenibilità entro un quadro concettuale di tipo sostanziale, orientato alla rappresentazione fedele, completa e neutrale delle informazioni, muovendosi da un *compliance framework* ad un *fair presentation framework*.

Ulteriormente, l'introduzione del principio FP mirerebbe a perseguire due ulteriori obiettivi. Da un lato, esso contribuirebbe a rafforzare l'interoperabilità con i principi internazionali emanati dall'ISSB (in particolare gli IFRS S1 e S2). Dall'altro lato, il principio dovrebbe correggere talune inefficienze applicative riscontrate nell'attuazione della CSRD, in particolare la tendenza ad una rendicontazione standardizzata e sovrabbondante, più attenta alla conformità formale che alla qualità informativa sostanziale.

Nonostante le sue potenzialità sistematiche e metodologiche, l'introduzione del principio FP non sembra esente da criticità. Pur rappresentando un'evoluzione cruciale nel processo di maturazione della rendicontazione di sostenibilità europea, è necessario che la sua implementazione sia accompagnata da un adeguato sforzo di chiarificazione concettuale e di costruzione di prassi applicative condivise, sia per la fase di redazione sia per quella di revisione legale. In mancanza di tali presupposti, esso rischierebbe di tradursi in un ulteriore livello di complessità normativa, compromettendo gli obiettivi di semplificazione e proporzionalità perseguiti dalla proposta *Omnibus*, a monte, e dal processo di revisione degli ESRS a valle.

¹²⁰ Si veda ASSIREVI, *ASSIREVI: l'inserimento della "true and fair presentation"*, cit., 1, secondo cui sussiste una tendenziale incompatibilità tra "un concetto univoco di rappresentazione veritiera e corretta", da un lato, e "la natura di *multi-stakeholder* della rendicontazione di sostenibilità" dall'altro. La definizione di cosa possa considerarsi veritiero e corretto per tutti quanti gli *stakeholder* sarebbe, pertanto, "impraticabile".

I PRINCIPI ESG: DALLA REGOLAMENTAZIONE ALLA RENDICONTAZIONE. UNA PROSPETTIVA OPERATIVA

Francesco Avallone

SOMMARIO: 1. Introduzione. – 2. Le possibili posizioni di banche e imprese. – 3. Il corretto approccio all'ESG: le possibili direttrici di intervento. – 4. Conclusioni.

1. *Introduzione.*

In questo contributo si cercherà di rappresentare la possibile prospettiva delle imprese di fronte al recente rallentamento nella spinta normativa originariamente diretta ad ampliare significativamente l'adozione della rendicontazione di sostenibilità.

La portata della direttiva europea denominata CSRD (*Corporate Sustainability Reporting Directive*) in vigore dal gennaio del 2023, che prevedeva un coinvolgimento iniziale delle sole grandi imprese di interesse pubblico, è stata gradualmente compresa da tutte le imprese nel corso del 2024, anche a seguito del suo recepimento in Italia con il d.lgs. 6 settembre 2024, n. 125.

Proprio nel corso del 2024, infatti, l'avvicinarsi degli esercizi a partire dai quali un numero crescente di aziende avrebbe dovuto iniziare a comunicare obbligatoriamente informazioni in ambito ambientale, sociale e di *governance* (ESG) nel rispetto dei principi ESRS (*European Sustainability Reporting Standards*) dell'EFRAG ha fatto sì che il tema della rendicontazione di sostenibilità diventasse prioritario per il mondo imprenditoriale.

A parte le grandi imprese di interesse pubblico (grandi imprese quotate, grandi banche e assicurazioni con un numero medio di dipendenti superiore a 500 unità) già soggette alla direttiva (UE) 2014/95 (*Non Financial Reporting Directive – NFRD*), per le quali l'obbligo della rendicontazione di sostenibilità nel rispetto dei principi ESRS è iniziata a partire dall'esercizio 2024 (con

pubblicazione del relativo report di sostenibilità nel 2025), un significativo numero di imprese avrebbe dovuto iniziare a rendicontare informazioni ESG nel rispetto dei richiamati principi dell'EFRAG a partire dagli esercizi 2025 e 2026 (con pubblicazione dei rendiconti, rispettivamente, negli esercizi 2026 e 2027). Precisamente, le imprese obbligate sarebbero state anzitutto le imprese di grandi dimensioni e i gruppi di grandi dimensioni¹, a partire dal 1° gennaio 2025, quindi le PMI quotate², a partire dal 1° gennaio 2026.

La platea delle imprese interessate alla raccolta, alla gestione e alla comunicazione di informazioni in ambito ambientale, sociale e di *governance*, tuttavia, sarebbe stata comunque ben più ampia dei confini appena delineati per effetto di tre possibili fattori: *i*) l'impatto della logica di gruppo, *ii*) le pressioni generate all'interno della catena di fornitura e, più in generale, *iii*) le richieste informative provenienti dal sistema finanziario.

Quanto alla logica di gruppo, è evidente che l'obbligo di rendicontazione ESG in capo all'impresa capogruppo avrebbe generato a cascata impegni di raccolta e comunicazione di tali informazioni su tutte le imprese controllate, secondo modalità il più possibile allineate alle impostazioni della capogruppo, al fine di consentirne un più rapido e semplice consolidamento. Inoltre, indipendentemente dai richiamati obblighi formali di rendicontazione, la richiesta ai soggetti obbligati di comunicare informazioni sulla propria catena di fornitura (*value chain*), a monte (*upstream*) e a valle (*downstream*), ha generato (e avrebbe ulteriormente generato) inevitabili pressioni su tutte le imprese della filiera a uniformarsi agli standard ESRS, quantomeno nei limiti della raccolta e della gestione dei dati utili per la predisposizione delle informazioni richieste dai

¹ Per imprese di grandi dimensioni si intendono le imprese che, alla data di chiusura del bilancio, abbiano superato, nel primo esercizio di attività o successivamente per due esercizi consecutivi, due dei seguenti tre limiti: i) totale attività dello stato patrimoniale 25 euro/mln, ii) ricavi netti delle vendite 50 euro/mln, iii) numero medio di dipendenti occupati 250. I gruppi di grandi dimensioni, invece, sono gruppi composti da una società madre e società figlie incluse nel bilancio consolidato che, su base consolidata, alla data di chiusura della società madre superano nel primo esercizio di attività o successivamente per due esercizi consecutivi, due dei limiti poc'anzi richiamati.

² Si definiscono piccole e medie imprese quotate le imprese con valori mobiliari ammessi alla negoziazione su mercati regolamentati italiani o dell'Unione europea che alla data di chiusura del bilancio, nel primo esercizio di attività o successivamente per due esercizi consecutivi, rientrino in almeno due dei seguenti intervalli: i) totale attività dello stato patrimoniale superiore a 450 euro/migliaia e inferiore a 25 euro/mln, ii) ricavi netti delle vendite superiori a 900 euro/migliaia e inferiori a 50 euro/mln, iii) numero medio di dipendenti occupati durante l'esercizio non inferiore a 11 e non superiore a 250.

soggetti obbligati situati al vertice della filiera produttiva (si considerino, a titolo di puro esempio, le emissioni *Scope 3*, le informazioni relative alle condizioni di lavoro per i dipendenti dei principali fornitori, ecc.).

Non da ultimo, un'importante spinta per tutte le imprese ad accelerare nella raccolta e nella gestione di informazioni ESG, indipendentemente dagli obblighi di legge, deriva dalla domanda informativa degli istituti di credito, vuoi tramite la richiesta di compilazione ai propri clienti di approfonditi questionari sulle tematiche ambientali, sociali e di *governance*, vuoi tramite la richiesta di utilizzare specifiche piattaforme a ciò dedicate.

In tale prospettiva, la predisposizione di una rendicontazione di sostenibilità nel rispetto dei principi predisposti dall'EFRAG potrebbe consentire alle aziende di tacitare le attese informative in ambito ESG delle banche, anche tramite una comunicazione di tipo volontario ispirata ai principi VSME dell'EFRAG³, superando la complessità insita nella compilazione di questionari bancari differenti, soprattutto in presenza di una pluralità di istituti di credito finanziatori.

Al proposito è utile ricordare che al fine di garantire maggiore stabilità al sistema finanziario, gli istituti di credito sono stati obbligati a raccogliere crescenti informazioni in ambito ESG sulle aziende clienti per rispettare, anzitutto, le linee guida dell'EBA (*European Bank Authority*) per la gestione dei rischi ESG (EBA/GL/2025/01 dell'8 gennaio 2025 e il seguente *consultation paper* EBA/CP/2025/07 del 22 maggio 2025), che richiedono di considerare adeguatamente i rischi ambientali (fisici e di transizione), nonché quelli sociali e di *governance* nella stima dei rischi sulla cui base delineare le proprie strategie di *risk management*, valutando opportunamente l'esposizione verso i settori più rischiosi in ambito ESG, identificando chiaramente il posizionamento degli attori chiave, degli asset principali (immobili e garanzie fisiche) nonché i livelli di vulnerabilità in funzione di alternativi possibili scenari.

Nella stessa direzione sembrano condurre gli orientamenti in materia di concessione e monitoraggio dei prestiti, sempre dell'EBA (ABE/GL/2020/06 del 29 maggio 2020) che, in estrema sintesi, impongono agli istituti di credito di incorporare i fattori ESG e i rischi ad essi associati nella valutazione del merito

³ Il *Voluntary Sustainability Reporting Standard for Nonlisted SMEs* (VSME), sviluppato dall'EFRAG su richiesta della Commissione europea, è un nuovo standard volontario di rendicontazione della sostenibilità, pensato per micro, piccole e medie imprese non quotate. Il VSME nasce per semplificare la raccolta e la comunicazione di dati ESG (*Environmental, Social, and Governance*), migliorando potenzialmente l'accesso delle PMI ai finanziamenti sostenibili e supportandole nel cogliere nuove eventuali opportunità derivanti da una transizione sostenibile.

creditizio dei clienti. Queste richieste hanno portato a intensificare, da parte degli istituti di credito, le richieste di informazioni ESG ai propri clienti, indipendentemente dagli obblighi di legge.

In tale contesto la Commissione europea, tramite una serie di proposte di semplificazione anche della rendicontazione societaria di sostenibilità (cosiddetto “pacchetto Omnibus”), ha esonerato un significativo numero di imprese dall’applicazione della CSRD, ridotto gli impatti dell’informativa relativa alla catena del valore sulle aziende più piccole, posticipato di due anni gli obblighi informativi per le imprese che rientravano nell’ambito di applicazione della CSRD, ridotto l’onere degli obblighi di informativa relativi alla tassonomia UE e adeguato la modalità di calcolo del principale indicatore basato sulla tassonomia per le banche, il cosiddetto *Green Asset Ratio* (GAR).

Da ciò ne è derivato, inoltre, una spinta alla semplificazione delle informazioni che le imprese obbligate saranno tenute a rendicontare (tramite la riduzione del numero di *datapoints* richiesti), con una significativa revisione da parte dell’EFRAG dei principi ESRS.

Ecco dunque che in presenza di un siffatto scenario, mutevole ma soprattutto complesso poiché condizionato da differenti posizioni da parte degli operatori coinvolti, appare utile ragionare sulle alternative possibili posizioni di istituti di credito e imprese, qui sintetizzate anche a valle di una serie di interviste esplorative (semi strutturate) condotte⁴, nonché presentare come le tematiche ESG potrebbero positivamente impattare sulla gestione aziendale, soprattutto nelle realtà medio-piccole.

2. Le possibili posizioni di banche e imprese.

Nonostante il suddetto rallentamento, almeno sulle tempistiche previste dalla normativa per la diffusione degli obblighi di rendicontazione in materia di sostenibilità, nonché la significativa riduzione del perimetro di aziende da essa direttamente interessate, la posizione degli istituti di credito appare del tutto invariata.

Ciò sembra essere apparentemente in contrasto sia con quanto si apprende sulla posizione dall’amministrazione americana in tema, almeno, di cambiamento

⁴ Interviste condotte all’interno dei progetti di ricerca commissionati dal Comitato Tecnico Scientifico istituito con la convenzione quadro tra il Dipartimento di Economia dell’Università di Genova (DIEC) e l’Ordine dei Dottori Commercialisti ed Esperti Contabili di Genova per gli anni 2024 e 2025. F. AVALLONE-C. DI FABIO-E. RONCAGLIOLO, *Guida al reporting ESG per le PMI*, Rapporto di Ricerca, DIEC, 2024.

climatico (ma non da meno su taluni aspetti sociali), sia con l'atteggiamento di molte aziende, oggi definito "*greenhushing*" e che si traduce nel minimizzare, se non proprio nascondere, le proprie posizioni e i progressi raggiunti in ambito ESG, quantomeno come forma di protezione da possibili critiche provenienti da chi considera le tematiche ESG una "grande truffa". In questa chiave, probabilmente, dovrebbero essere interpretate le recenti decisioni di molteplici importanti istituzioni finanziarie americane di uscire dalla *Net-Zero Banking Alliance*.

In ambito europeo, invece, rimane del tutto invariata la posizione dell'EBA finalizzata a rafforzare la gestione dei rischi ESG nelle banche tramite specifiche Direttive che richiedono crescenti livelli di integrazione dei rischi ambientali, sociali e di *governance* nella gestione dei crediti e nella valutazione del merito creditizio.

Questo implica, per gli istituti di credito che rappresentano gli ingranaggi di trasmissione della suddetta primaria finalità, ulteriori investimenti nella raccolta di informazioni ESG di qualità sulla propria clientela.

La conoscenza della reale situazione dei propri clienti circa l'esposizione ai crescenti rischi ambientali, sociali e reputazionali, nonché della loro eventuale conseguente capacità di mitigarli, rappresenta infatti l'unico modo per poter valutare adeguatamente il rischio di credito.

Al fianco dei tradizionali rischi economico-patrimoniali, finanziari e di contesto strategico-competitivo, che gli istituti di credito hanno da sempre gestito e incorporato nelle proprie procedure operative, si aggiungono ora prepotentemente i rischi ambientali, fisici e di transizione, nonché quelli sociali e di *governance* che possono sinteticamente e genericamente essere ricondotti al più ampio rischio reputazionale delle aziende.

Conoscere l'esposizione a simili rischi da parte delle imprese clienti finanziate, infatti, consente di cogliere l'effettiva capacità di recuperare il finanziamento concesso ottenendone un'adeguata redditività, nonché di stimare la reale garanzia a disposizione (si pensi, a titolo di esempio, a una banca che dispone di garanzie reali su immobili successivamente valutati ad alto rischio fisico ambientale).

Ben si comprende, dunque, come la crescente apertura del ventaglio di rischi potenzialmente analizzati dagli istituti di credito, se da una parte consente potenzialmente di valutare meglio il merito creditizio delle imprese, dall'altro sposta l'attenzione sulla capacità delle banche stesse di raccogliere informazioni di qualità, tanto più se il già citato rallentamento della normativa sulla rendicontazione di sostenibilità e le continue informazioni provenienti dal contesto statunitense rischiano di far percepire alle aziende come sempre meno rilevanti le tematiche ESG.

Il potenziale scollamento tra l'interesse delle banche e la possibile percezione di parte delle imprese potrebbe compromettere la raccolta di informazioni di qualità sui temi ESG, impattando dunque sulla successiva analisi e, in modo ancor più grave, sulle conseguenti scelte operate.

Appare così di primaria importanza, nella prospettiva degli istituti di credito, agire anzitutto come promotori per lo più di una cultura di corretta analisi del rischio all'interno delle aziende, soprattutto piccole e medie, al fine di contribuire alla mitigazione, per quanto possibile, di taluni rischi ESG.

Accogliendo tale prospettiva, in altri termini, tematiche tradizionalmente considerate lontane dagli investitori e dal contesto finanziario⁵ divengono invece parte integrante di una corretta e completa comunicazione finanziaria.

È evidente, tuttavia, che una simile interpretazione richiede necessariamente un'elevata qualità delle informazioni trasferite e utilizzate. Ecco quindi il necessario spostamento di interesse a favore dell'analisi del comportamento e delle effettive percezioni delle imprese, che quelle informazioni devono adeguatamente raccogliere, selezionare e gestire.

Considerando la prospettiva delle imprese, è forte il rischio di osservare una decisa polarizzazione dei comportamenti attorno a due alternativi atteggiamenti. Una prima risposta all'apparente contesto fin qui brevemente delineato potrebbe vedere l'emergere di scetticismo e disorientamento nelle imprese, con il conseguente dirottamento di sforzi e risorse a favore di obiettivi alternativi rispetto ai temi ESG. In questi casi è forte il rischio che le richieste di informazioni sui temi ESG possano essere colte esclusivamente come un fastidio dovuto, da gestire quindi con superficialità e scarso interesse.

Se questo fosse l'atteggiamento prevalente sarebbe forte il rischio, già più volte richiamato, di una scarsa qualità degli input utilizzati dal sistema finanziario, con la conseguenza di accrescere anziché colmare l'asimmetria informativa esistente tra gli operatori, favorendo quindi anziché contrastare possibili atteggiamenti opportunistici, che in questo contesto potrebbero financo sfociare in vere e proprie pratiche di *greenwashing*.

In alternativa, soprattutto nei contesti più sofisticati rappresentati dalle aziende di maggiori dimensioni, è plausibile (nonché auspicabile) immaginare un atteggiamento che, indipendentemente dalla pressione normativa, consenta di cogliere l'utilità associata alla nuova prospettiva nonché la necessità di

⁵ Per approfondimenti sul tema si rinvia a P.M. DECHOW, *Understanding the sustainability reporting landscape and research opportunities in accounting*, in *The Accounting Review*, 98(5), 2023, 481-493 e A. WAGENHOFER, *Sustainability reporting: a financial reporting perspective*, in *Accounting in Europe*, 21(1), 2023, 1-13.

indirizzare adeguati investimenti, non solo finanziari, necessari per coglierla a pieno.

Un corretto approccio al problema, infatti, richiederebbe necessariamente un aggiornamento dei sistemi di identificazione e gestione dei rischi (*Enterprise Risk Management* o ERM), che dovrebbero infatti anzitutto incorporare e gestire i citati rischi ESG oltre ai tradizionali rischi finanziari (prezzo, liquidità, credito, tassi di cambio e di interesse, contenziosi, ecc.). Più precisamente, oltre alla specifica considerazione dei rischi ESG, ciò che è opportuno cogliere è la portata trasversale di tali rischi (fisici, di transizione e reputazionali), in grado di far meglio comprendere gli stessi rischi strategici e operativi che da essi ne risultano direttamente condizionati.

Ecco dunque, a titolo di esempio, che la corretta identificazione e valutazione dei rischi fisici consentirebbe di stimare meglio i rischi strategici (dove posizionare un nuovo investimento?), ma anche quelli operativi (potrebbe esistere un rischio di mancata continuità dell'attività, ovvero un rischio di tale natura in capo ad altri operatori della *value chain* in grado di impattare anche a valle sulla continuità dell'azienda?).

Tali rischi, adeguatamente identificati e valutati, dovrebbero essere quindi incorporati nei sistemi di monitoraggio e rendicontazione interna al fine di essere considerati nelle scelte strategiche e operative aziendali. La pianificazione aziendale dovrebbe alimentarsi sempre più con tali informazioni, in modo da consentire a questi dati di giungere fino al vertice della *governance* e da esso essere adeguatamente considerati.

Questo comporta, però, opportuni e necessari investimenti sulla formazione delle persone, sulle strutture tecniche aziendali (primo fra tutti il sistema informativo) e sulle procedure interne, investimenti che il suddetto rallentamento percepito potrebbe di fatto compromettere.

Ecco dunque l'emersione del richiamato possibile disallineamento tra piani e soggetti differenti. Da una parte una normativa che rallenta nei suoi tempi di adozione, che riduce il perimetro delle imprese coinvolte e il numero di informazioni richieste (*datapoints*), generando nelle imprese meno strutturate la possibile sensazione che le questioni ESG siano poco rilevanti e, al più, confinate esclusivamente ad un problema di *compliance* normativa. Dall'altra il contesto operativo, che in taluni settori, indipendentemente dagli obblighi normativi, impone il rispetto di elevati standard ESG all'interno delle filiere produttive, obbligando tutte le aziende, indipendentemente dalla loro dimensione e dalla loro lungimiranza strategica, ad adattarsi pena l'estromissione dal business.

Tra questi due estremi si possono posizionare i settori al momento meno interessati dalle questioni ESG, per le quali la dimensione, la lungimiranza e le

capacità finanziarie rimangono ancora la principale spinta a modificare l'approccio alla sostenibilità.

Tutto ciò è ulteriormente complicato dalla posizione delle banche che sono chiamate a diffondere un approccio finalizzato alla mitigazione dei rischi ESG, indipendentemente dalla tipologia di interlocutori. Ecco dunque che la gestione di una simile complessità appare essere la principale sfida cui tutte le aziende saranno chiamate a rispondere nell'immediato futuro, considerando soprattutto il possibile citato disallineamento che si sta gradualmente generando tra prospettive e interessi dei diversi operatori economici (aziende medio-piccole, aziende di grandi dimensioni, filiere produttive e sistema finanziario).

3. Il corretto approccio all'ESG: le possibili direttrici di intervento.

Delineato il complesso quadro normativo e operativo di riferimento, merita quindi ragionare sui possibili costi e sulle possibili opportunità che potrebbero derivare alle imprese da una corretta interpretazione delle logiche sottostanti i principi ESG.

Il primo aspetto che dobbiamo qui richiamare rappresenta il fulcro della questione: se accogliamo il fatto che l'ambiente e la relativa normativa, la gestione dei dipendenti dell'impresa e di tutta la catena di fornitura, nonché le procedure interne sono divenuti crescenti fattori di rischio per l'impresa, allora è evidente che una crescente attenzione su tali tematiche è naturalmente richiesta al fine di mitigarne il relativo rischio.

L'aspetto fondamentale, come più volte richiamato nelle pagine precedenti, è il fatto di cogliere l'esistenza, dietro alla rendicontazione di sostenibilità, di un sostanziale problema di identificazione, gestione e mitigazione dei rischi delle imprese. Questo consentirebbe di accrescere la probabilità di operare senza problemi e con continuità, ma al tempo stesso consentirebbe di conseguire finalità utili per tutto il sistema (il cosiddetto *rebound effect*⁶).

Invero, sul punto ci si potrebbe spingere ben oltre, considerando semplicemente il fatto che la gestione del rischio rappresenta oggi uno tra i principali processi aziendali. Esso potrebbe gradualmente orientarsi ad abbracciare sempre più i rischi remoti e di sistema, tradizionalmente esclusi dal perimetro di analisi

⁶ Per approfondimenti si rinvia a EFRAG, *Proposals for a relevant and dynamic EU sustainability reporting standard setting – Final report*, 2021 e EFRAG, *Connectivity Principles – Issues paper*, 2024 (paper 02-04 del 15 febbraio).

dei sistemi di ERM, ma che risultano potenzialmente devastanti in caso di effettiva manifestazione⁷.

Non occorre, infatti, richiamare le recenti situazioni che a livello mondiale abbiamo appena superato o stiamo ancora affrontando (la pandemia da COVID 19 e l'invasione dell'Ucraina da parte della Russia) per riconoscere che i livelli di rischio che le aziende si trovano ad affrontare risultano significativamente maggiori rispetto al passato, non solo per la crescita del numero di rischi possibili e probabili che la globalizzazione dell'economia ha inevitabilmente generato, ma soprattutto per la sempre maggiore frequenza con cui si manifestano gli eventi "imponderabili", anche definiti "cigni neri"⁸.

L'interconnessione tra le aziende su scala mondiale, avvenuta anche a seguito della maggiore rapidità e della crescente economicità dello spostamento di beni e dati, ha amplificato la velocità con la quale eventi rischiosi, possibili e probabili, che nascono localizzati in un singolo e ben definito contesto geografico culminano poi con effetti amplificati sulla restante parte del globo⁹. La globalizzazione, in altri termini, eliminando i confini nazionali dalla prospettiva delle aziende ha inevitabilmente contribuito a produrre minacce globali e sovranazionali. Possiamo affermare che al centro dell'attenzione dovrebbero gradualmente giungere, oltre ai rischi ESG, quei rischi che sono la conseguenza stessa della modernizzazione, che si traducono in minacce potenzialmente irreversibili e che non possono più essere circoscritti a singoli luoghi o singoli gruppi di operatori, ma che mostrano invece una tendenza a sfuggire ai confini nazionali e a produrre minacce globali sovranazionali¹⁰.

In tale prospettiva, un'attenta considerazione dei possibili rischi provenienti dall'ambiente, dal contesto sociale e di governance non può che essere considerata corretta e imprescindibile.

Quanto fin qui affermato conduce inevitabilmente al secondo aspetto meritevole di osservazione, ovvero la necessaria relazione tra le informazioni ESG e la tradizionale prospettiva economico-finanziaria di osservazione delle imprese.

Occorre, in altri termini, evitare che le due prospettive rimangano tra loro

⁷ F. AVALLONE, *La gestione del rischio nell'economia delle aziende private*, in A. QUAGLI (a cura di), *L'interesse nazionale nell'economia delle aziende*, Milano, 2023, 195-218.

⁸ N.N. TALEB, *Il cigno nero. Come l'improbabile governa la nostra vita*, Milano, 2007.

⁹ J.K. SENGUPTA-P. FANCHON, *Efficiency, market dynamics and industry growth*, London, 2009; A. HOOGVELT-A.G. PUXTY-P.J. BUCKLEY-Y. OMAROV, *Multinational enterprise. An encyclopedic dictionary of concepts and terms*, London, 1987.

¹⁰ U. BECK, *La società del rischio. Verso una seconda modernità*, Roma, 2016.

impermeabili e considerate quali processi aziendali indipendenti. Ciò è possibile praticamente immaginando fin da subito un'integrazione delle informazioni e dei loro processi di raccolta, verifica e impiego. Questa diviene cioè una condizione necessaria affinché si possa parlare davvero di *connectivity* tra profili di sostenibilità e profili economico-finanziari. È evidente che il concetto di *connectivity* ha per sua stessa natura un significato mutevole, direttamente dipendente dal mutevole contenuto che contraddistingue l'informativa di sostenibilità e quella economico-finanziaria ¹¹.

Una simile integrazione realizzata sin dall'origine del dato consentirebbe quasi naturalmente l'impiego congiunto delle due tipologie di informazioni nei processi decisionali e, soprattutto, in quelli di pianificazione e definizione delle strategie.

Proprio all'interno delle strategie il concetto di connessione tra profili economico-finanziari e di sostenibilità dovrebbe trovare la massima espressione, dovendo le strategie deliberate dalle aziende rappresentare il punto di incontro tra gli obiettivi di performance economico-finanziaria e quelli di sostenibilità socio-ambientale.

La richiamata "connessione" realizzata dal momento della raccolta del dato implica necessariamente investimenti nei sistemi informativi aziendali, al momento non sempre pronti ad accogliere la portata di una tale integrazione per supportare i sistemi di controllo e di *reporting* delle aziende.

L'alternativa sarebbe rappresentata da una gestione autonoma delle informazioni di sostenibilità, che sarebbero quindi finalizzate esclusivamente alla sola predisposizione di una reportistica a ciò dedicata. È ben evidente a cosa porterebbe un simile atteggiamento, ossia alla semplice risposta a un dettato normativo (una semplice compliance all'obbligo normativo) perdendo completamente la portata strategico-gestionale fin qui più volte richiamata.

Il tema della connessione tra comunicazione finanziaria e di sostenibilità, tuttavia, appare essere un tema particolarmente chiaro alle aziende che, in non pochi casi, definiscono la propria relazione sulla gestione in modo tale (*Combined management report*) da lasciar trapelare la volontà di connettere i due profili di analisi.

Un ultimo aspetto che appare fondamentale considerare, agli occhi di chi scrive, per impostare correttamente l'analisi della sostenibilità nelle imprese è rappresentato dalle procedure interne.

¹¹ L. BAYNE, *Understanding reporting boundaries in annual reports: a conceptual framework*, in *Accounting & Accountability Journal*, 35(5), 2022, 1316-1348; EFRAG, *Boundaries of FR and SR elements of connectivity, and update on IFRS Foundation connectivity-related discussions – Issues Paper*, Paper 07-01 del 13 aprile 2023.

A tal proposito merita attenzione richiamare il fatto che l'art. 2086 c.c. impone all'imprenditore, indipendentemente dalla forma organizzativa prescelta per operare, un dovere di predisporre un assetto organizzativo, amministrativo e contabile adeguato alla natura e alle dimensioni dell'impresa, finalizzato anche alla tempestiva rilevazione della crisi dell'impresa e della perdita di continuità aziendale.

Questo significa, ben si comprende, che l'imprenditore ha l'obbligo di predisporre "adequate" procedure di raccolta e verifica dei dati e un sistema di responsabilità tali da garantire un'analisi integrata dei rischi che potrebbero compromettere la continuità aziendale. Qualora si ritenesse, e a questo punto non pare davvero possibile escluderlo, che i fattori ESG possano potenzialmente generare significativi rischi per le imprese, ecco che l'adeguata raccolta delle informazioni ESG, nonché la loro verifica e gestione, diviene un obbligo per l'imprenditore e conduce necessariamente, seppur in funzione della dimensione e della complessità dell'azienda, a quella reale e necessaria integrazione tra informativa di sostenibilità e informativa economico-finanziaria fin qui richiamata e auspicata.

In tal senso, uno sforzo verso una reale integrazione tra informativa di sostenibilità ed economico-finanziaria può essere visto nella normativa, seppur complessa e migliorabile, della cosiddetta tassonomia UE.

Le informazioni sulla tassonomia UE rappresentano infatti, ad oggi, le uniche comunicate dalle imprese obbligate realmente in grado di allineare la prospettiva ambientale a quella economico-finanziaria. Più precisamente, la tassonomia UE può essere vista come lo sforzo di rendere evidente l'esistenza di un nesso causale tra gli aspetti di sostenibilità e i flussi economico-finanziari prospettici delle aziende, con ciò consentendo alle tematiche ESG di diventare di effettivo interesse per i mercati e gli investitori ¹².

Anche se il focus è esclusivamente quello sulla variabile *environmental*, e non quello della più ampia sostenibilità (dunque anche *social* e *governance*), la tassonomia UE prevede l'identificazione di specifici obiettivi ambientali (mitigazione dei cambiamenti climatici, adattamento ai cambiamenti climatici, uso sostenibile delle risorse, transizione verso un'economia circolare, riduzione dell'inquinamento e protezione e recupero della biodiversità) e identifica le attività economiche effettivamente allineate verso tali finalità, richiedendo quindi alle imprese di comunicare la percentuale dei propri ricavi, delle spese in conto capitale

¹² R. WANG-W. FONG CHUA-R. SIMNETT-S. ZHOU, *Is greater connectivity of financial and non-financial information in annual reports valued by market participants?*, in *British Accounting Review*, 56(6), 2024.

(CAPEX) e delle spese operative (OPEX) effettivamente riconducibili alle attività allineate rispetto al totale dei ricavi realizzati e delle spese sostenute.

Nonostante le evidenti complicazioni, che come detto il “pacchetto Omnibus” intende infatti ritoccare, è utile rilevare la finalità sottostante, ovvero l’effettiva integrazione tra la sostenibilità e la prospettiva economico-finanziaria, aspetto che rappresenta un notevole passo avanti per la corretta comprensione degli sforzi aziendali fatti nella direzione della sostenibilità e dei conseguenti possibili ritorni, anche e soprattutto adottando un linguaggio che consenta al mondo finanziario di coglierne a pieno le potenzialità.

Non a caso è possibile ravvisare un crescente interesse da parte della dottrina aziendalistica verso lo studio della relazione tra informazioni comunicate nel rispetto della tassonomia UE e i *rating* ESG assegnati alle aziende, relazione al momento solo inizialmente indagata ma che potrebbe dimostrare proprio l’utilità di una simile informazione per il mondo finanziario ¹³.

4. Conclusioni.

A conclusione di questo contributo merita richiamare anzitutto il rischio di un disallineamento tra la normativa in tema di sostenibilità e l’effettiva rilevanza di queste tematiche nell’operatività delle imprese.

A tal proposito è stato sottolineato il fatto che a fronte di un apparente rallentamento nell’introduzione diffusa della normativa sul *reporting* ESG si assiste a una crescente attenzione su tali tematiche da parte degli enti creditizi e all’interno delle filiere produttive contraddistinte da possibili maggiori rischi ambientali e reputazionali.

Il corretto allineamento tra il contesto richiamato e le imprese si può avere esclusivamente a condizione che sia correttamente interpretata e declinata la tematica della sostenibilità, ovvero che si comprenda come essa possa essere un modo per migliorare il sistema di *Enterprise Risk Management*, accrescendo la tipologia e il numero di rischi identificati, analizzati e mitigati.

Questo, dunque, è il primo passaggio che richiede, immediatamente dopo, un adeguato investimento nella formazione delle persone, nell’allineamento dei sistemi informativi e di *reporting*. La naturale conseguenza di un simile

¹³ M. DUMROSE-S. RINK-J. ECKERT, *Disaggregating confusion? The EU taxonomy and its relation to ESG rating*, in *Finance Research Letters*, 2022, 48; M. NIPPER-A. OSTERMAIER-J. THEIS, *Mandatory disclosure of standardized sustainability metrics: the case of the EU Taxonomy Regulation*, in *Corporate Social Responsibility and Environmental Management*, 2024, 1-20.

approccio non può che essere un effettivo miglioramento della capacità di utilizzare le informazioni ESG nei processi strategico-decisionali delle imprese, garantendo la loro naturale integrazione con le informazioni economico-finanziarie, ovvero quelle tradizionalmente considerate dai mercati e dagli investitori.

L'attenzione si sposterà piuttosto sull'effettiva qualità delle informazioni ESG, punto al momento davvero nodale, posto che solo l'attitudine a generare e utilizzare informazioni di qualità potrà garantire la capacità delle imprese di prendere le giuste decisioni (sopravvivendo nella sempre più complessa arena competitiva) e, quanto ai mercati, di poter ridurre le asimmetrie informative con le imprese. In un certo senso è su questo terreno che un'adeguata normativa sulla *disclosure* ESG, sintetica ma al tempo stesso in grado di cogliere i temi davvero rilevanti, potrà consentire un passo in avanti verso il raggiungimento di tale obiettivo, come peraltro già dimostrato in taluni studi sul tema ¹⁴.

¹⁴ F. AVALLONE-E. RONCAGLIOLO, *Climate Change Risk Disclosure: Empirical Evidence in the Energy Industry*, in F. MOSCARELLO-M. PIZZO (a cura di), *Climate Change and Corporate Reporting in Europe. Standard Setting and Disclosure Practices*, Cambridge, 2024.

INFORMAZIONI SULLA SOSTENIBILITÀ *FORWARD-LOOKING* E REGIMI SPECIALI DI RESPONSABILITÀ NEI MERCATI PRIMARI

Iunio Giraudo

SOMMARIO: 1. Introduzione. L'incertezza delle informazioni sulla sostenibilità prospettiche. – 2. L'ordinamento statunitense: tradizionali *safe harbor* e nuove informazioni sulla sostenibilità. – 2.1. L'ordinamento statunitense e i tradizionali *safe harbor* per le informazioni finanziarie prospettiche. – 2.2. L'ordinamento statunitense e i *safe harbor* per le informazioni sulla sostenibilità prospettiche. – 3. L'ordinamento del Regno Unito: nuovi *safe harbor* e nuove informazioni sulla sostenibilità. – 3.1. L'ordinamento del Regno Unito e il nuovo *safe harbor* per le informazioni finanziarie prospettiche. – 3.2. L'ordinamento del Regno Unito e il nuovo *safe harbor* per le informazioni sulla sostenibilità prospettiche. – 4. L'ordinamento dell'Unione europea: un percorso ancora *in itinere*. – 4.1. L'ordinamento dell'Unione europea e le informazioni finanziarie prospettiche. – 4.2. L'ordinamento dell'Unione europea e le informazioni sulla sostenibilità prospettiche: una proposta *de iure condendo*. – 5. Conclusioni.

1. Introduzione. L'incertezza delle informazioni sulla sostenibilità prospettiche.

Nel contesto dei mercati finanziari, le informazioni sulla sostenibilità costituiscono la base imprescindibile per il raggiungimento degli obiettivi di sviluppo sostenibile delle attività economiche¹. Tali informazioni possono riportare dati storici, relativi al passato, o dati prospettici, per cui è invece rilevante un tempo

¹ Nel senso che il funzionamento delle normative sulla finanza sostenibile dipende, a ben vedere, dalla presenza di informazioni sulla sostenibilità che siano precise, coerenti, affidabili e comprensibili. Con riferimento all'Unione europea, si pensi per esempio al regolamento (UE) 2019/2088 (*Sustainable Finance Disclosure Regulation* – SFDR) relativo all'informativa sulla sostenibilità nel settore dei servizi finanziari o al regolamento (UE) 2004/3005 sulla trasparenza e sull'integrità delle attività di *rating* ESG.

futuro più o meno lontano, a volte di breve termine, più spesso di medio o lungo termine².

Il possibile carattere prospettico (c.d. *forward-looking*) dipende dalle particolari caratteristiche delle informazioni sulla sostenibilità³. In primo luogo, gli effetti dei rischi connessi alla sostenibilità, come nel caso dei cambiamenti climatici⁴, sono destinati a realizzarsi per lo più nel medio-lungo termine⁵. Pertanto, la gestione di tali rischi, e delle relative opportunità⁶, deve considerare una finestra di largo respiro temporale⁷.

² I principi di rendicontazione di sostenibilità europei (c.d. *European Sustainability Reporting Standard* – ESRS), adottati con regolamento delegato (UE) 2023/2772, hanno definito cosa si intenda per breve, medio e lungo termine nel caso delle informazioni sulla sostenibilità. Nell'ambito degli ESRS 1, per breve termine si intende il periodo di riferimento dei bilanci dell'impresa (par. 77(a)); per medio termine si intendono i cinque anni dalla fine del periodo precedente (par. 77(b)); per lungo termine, infine, si intende un periodo superiore ai cinque anni da quello di riferimento dei bilanci di imprese (par. 77(c)). Simili finestre temporali possono, tuttavia, essere diversamente definite in base alle caratteristiche specifiche del settore industriale (par. 80).

³ A. GIACOMELLI, *Mark to Target Information: Idiosyncratic Forward-looking Information and Its Use to Define Primary ESG Indicators*, in *Ca' Foscari Working Paper*, n. 8, 2022.

⁴ I rischi connessi ai cambiamenti climatici sono considerati, in primo luogo, rischi sistemici, destinati, cioè, ad influire sull'andamento di qualsiasi attività economica, indipendentemente dal settore industriale considerato: B. SJÄFJELL, *Taking Finance Seriously: Understanding the Financial Risks of Unsustainability*, in *EUSFiL Law Research Working Paper*, n. 11, 2024; P.O. MULBERT-A. SAJNOVITS, *The Inside Information Regime of the MAR and the Rise of the ESG Era*, in *ECGI Law Working Paper*, n. 548, 2020, 14 ss. In secondo luogo, è ormai consolidata la distinzione, con riferimento alle questioni ambientali, tra rischi di transizione e rischi fisici: i primi sono quelli connessi alla transizione verso un'economia con minori emissioni di carbonio, e si distinguono ulteriormente in rischi legali, politici, tecnologici, di mercato e reputazionali; i secondi, invece, individuano quelli derivanti dai cambiamenti climatici, e possono essere acuti o cronici. Una simile classificazione è illustrata in TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, *Final Report. Recommendations of the Task Force on Climate-related Financial Disclosures*, 2017, 5-6.

⁵ I. DOBRICK-C. KLEIN-B. ZWERGEL, *ESG As Risk Factor*, in *Journal of Asset Management*, 2025, 26, 44 ss.; J. COFFEE, *The Future of Disclosure: ESG, Common Ownership and Systematic Risk*, in *ECGI Law Working Paper*, n. 541, 2020.

⁶ ICMA, *Updated Analysis of the Proposals for the EuGB Regulation*, 2022, 22 ss.; TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURE, *Forward-Looking Financial Sector Metrics*, 2020, 5 ss.

⁷ S. BATTISTON-A. MANDEL-I. MONASTEROLO, *CLIMAFIN Handbook: Pricing Forward-Looking Climate Risks Under Uncertainty*, 2019, disponibile su www.ssrn.com. Per un esempio su tutti, si pensi allo strumento dell'analisi di scenario con riferimento ai rischi connessi ai

In secondo luogo, le imprese svolgono un ruolo centrale nella transizione sostenibile⁸. In quest'ottica, assumono rilevanza, per esempio, i piani di investimento e le azioni di attuazione che le imprese predispongono e implementano al fine, per esempio, di conformarsi all'Accordo di Parigi o all'obiettivo (europeo) di neutralità climatica entro il 2050⁹. Da un lato, questi strumenti impongono una prospettiva di medio-lungo periodo e, dall'altro, la loro implementazione sconta margini di inevitabile incertezza.

Con riferimento, in particolare, alla disciplina dei mercati finanziari, simili informazioni, tuttavia, non sono una assoluta novità, costituendo esse una categoria delle più ampie c.d. *soft information* – intese, queste ultime, come informazioni per cui i giudizi soggettivi prevalgono su quelli oggettivi¹⁰.

Da un lato, è riconosciuta alle informazioni *forward-looking* una particolare utilità, sia per gli investitori¹¹, in grado di assumere decisioni di investimento più ponderate¹², sia per una migliore efficienza informativa dei mercati¹³ cui

cambiamenti climatici: si veda TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, *Guidance on Scenario Analysis for Non-Financial Companies*, 2020; TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, *The Use of Scenario Analysis in Disclosure of Climate-Related Risks and Opportunities*, 2017.

⁸ OCSE, *Linee guida OCSE per le imprese multinazionali sulla condotta responsabile d'impresa*, 2024; OECD, *G20/OECD Principles of Corporate Governance*, 2023, 44 ss.; COMMISSIONE EUROPEA, *Il Green Deal europeo*, 2019, COM(2019) 640 final; COMMISSIONE EUROPEA, *Piano d'azione per finanziare la crescita sostenibile*, 2018, COM(2018) 97 final.

⁹ Tale obiettivo è stabilito dal regolamento (UE) 2021/1119 del Parlamento europeo e del Consiglio del 30 giugno 2021 che istituisce il quadro per il conseguimento della neutralità climatica e che modifica il regolamento (CE) 2009/401 e il regolamento (UE) 2018/1999 (c.d. normativa sul clima).

¹⁰ J. BERTOMEU-I. MARINOVIC, *A Theory of Hard and Soft Information*, in *The Accounting Review*, 2016, 91, 1 ss.

¹¹ G.S. MILLER-J.D. PIOTROSKI, *Forward-Looking Earnings Statements: Determinants and Market Response*, 2000, disponibile su www.ssrn.com.

¹² A. KEMPF-O. KORN-S. SASSNING, *Portfolio Optimization Using Forward-Looking Information*, 2012, disponibile su www.ssrn.com.

¹³ C.M. PEREIRA, *The Case for Soft Information Disclosure in the New Automated UK Financial Markets*, 2025, disponibile su www.ssrn.com; Z. GUANGLI-Y. CHEN-X. LI-L. QIN, *Forward-Looking Disclosure and Stock Price Crash Risk*, 2024, disponibile su www.ssrn.com; R.J. DENNIS, *Mandatory Disclosure Theory and Management Projections: A Law and Economics Perspective*, in *Maryland Law Review*, 1987, 46, 1197 ss.; J.N. GORDON-L.A. KORNHAUSER, *Efficient Markets, Costly Information, and Securities Research*, in *New York University Law Review*, 1985, 60, 761 ss.

possa conseguire una migliore efficienza allocativa delle risorse finanziarie¹⁴. Si pensi, a titolo esemplificativo¹⁵, alle stime degli utili (c.d. *profit estimate*), relative ad un esercizio chiuso, e alle previsioni degli utili (c.d. *profit forecast*), relative ad esercizi in corso o successivi¹⁶.

Dall'altro, la più volte citata incertezza legata a tali informazioni¹⁷, in particolare se comparate a quelle storiche¹⁸, comporta alcuni rischi per gli investitori. Pertanto, in molti ordinamenti nazionali e continentali è sorta l'esigenza di individuare il corretto bilanciamento tra l'incentivo alla comunicazione di informazioni prospettiche, da una parte, e la protezione degli investitori dall'altra¹⁹.

Al fine di comprendere la disciplina sulla responsabilità in caso di informazioni sulla sostenibilità prospettiche pare necessario, pertanto, analizzare le regole vigenti per le informazioni tradizionali *forward-looking*. Sarà possibile comprendere, così, come il "vecchio" mondo della finanza tradizionale sia in grado di evolversi per reagire alle sfide del "nuovo" mondo della finanza sostenibile²⁰.

¹⁴ S. MANGANELLI, *Financial Markets, Diversification, and Allocative Efficiency: International Evidence*, 2010, disponibile su www.ssrn.com.

¹⁵ A. GIACOMELLI, *Mark to Target Information*, cit., 11 ss., propone una classificazione delle informazioni prospettiche. Esse, secondo l'Autore, si distinguono a seconda (i) della variabile sottesa cui si riferiscono; (ii) dell'obiettivo che si pongono; (iii) del tipo di fonte e di metodo utilizzato; (iv) della relativa modalità di rappresentazione.

¹⁶ J. ARMOUR-D. AWREY-P. DAVIES-L. ENRIQUES-J.N. GORDON-C. MAYER-J. PAYNE, *Principles of Financial Regulation*, Oxford, 2016, 176 ss.

¹⁷ J. DUAN-W. ZHANG, *Forward-Looking Market Risk Premium*, 2013, disponibile su www.ssrn.com.

¹⁸ I. ROUT, *Forward Looking Information: Tomorrow's Hope and Today's Trust for an Informed Decision*, in *Indian Journal of Law and Legal Research*, 2021, 2, 1 ss.; S.K. RIPKEN, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-looking Statements*, in *University of Illinois Law Review*, 2005, 4, 929 ss.

¹⁹ M. GARGANTINI, *Mandatory Disclosure – A Comparative Analysis*, 2023, disponibile su www.ssrn.com.

²⁰ Il confronto tra "vecchio" e "nuovo" mondo è richiamato, per esempio, da M. SIRI, *Finanza sostenibile e greenwashing*, in P. MARCHETTI-S.P. ROSSI-G. STRAMPELLI-F. URBANI-M. VENTORUZZO (a cura di), *La s.p.a. nell'epoca della sostenibilità e della transizione ecologica*, Milano, 2024, 761 ss.

2. L'ordinamento statunitense: tradizionali safe harbor e nuove informazioni sulla sostenibilità.

2.1. L'ordinamento statunitense e i tradizionali safe harbor per le informazioni finanziarie prospettiche.

L'ordinamento statunitense prevede ormai da anni una disciplina particolarmente articolata in materia di informazioni prospettiche. In proposito, un ruolo fondamentale è ricoperto dall'autorità statunitense per i mercati finanziari (*Securities and Exchange Commission* – SEC), che supporta la divulgazione delle informazioni sull'andamento futuro dell'attività economica sia nel mercato primario sia in quello secondario, ritenendole particolarmente utili per gli investitori (*Rule 229.10* ²¹) ²².

Tuttavia, sono previste, da una parte, alcune misure per garantire l'affidabilità delle informazioni e, dall'altra, specifici regimi di responsabilità attenuati (c.d. *safe harbor* ²³). Nel primo senso, tali proiezioni devono avere una base ragionevole ed essere presentate con un formato appropriato (*Rule 229.10(b)*) ²⁴. Nel secondo senso, nel caso di informazione *forward-looking* ²⁵ vige la responsabilità

²¹ Il *Regulation S-K* impone la divulgazione di informazioni per lo più qualitative, mentre il *Regulation S-X* si concentra su quelle di tipo quantitativo: O. SWIFT-R. COLON, *A Content Analysis of the Modernization of Regulation S-K Items 101, 103, and 105*, in *The Journal of Applied Business and Economics*, 2024, 26, 144 ss.

²² Per una ricostruzione della posizione della SEC rispetto alle *soft information*, si veda C.W. SCHNEIDER, *Nits, Grits, and Soft Information in SEC Filings*, in *University of Pennsylvania Law Review*, 1972, 121, 254 ss. Non sempre, infatti, l'autorità statunitense ha incoraggiato la divulgazione delle *soft information*: J. SELIGMAN, *The Sec's Unfinished Soft Information Revolution*, in *Fordham Law Review*, 1995, 63, 1953 ss.

²³ J. CALDERON-R. KOWAL, *Safe Harbors: Historical and Current Approaches to Future Forecasting*, in *Journal of Corporation Law*, 1997, 22, 661 ss.

²⁴ Il formato con cui le informazioni sono presentate è fondamentale per evitare di fuorviare gli investitori, in particolare considerando i pregiudizi (c.d. *bias*) e le euristiche (c.d. *heuristic*) studiate dalla finanza comportamentale. Si pensi, per esempio, al *framing effect*, all'*availability heuristic*, all'*over-confidence*, all'*anchoring effect* o, ancora, al rischio di *over-reaction*. In proposito, si veda per esempio S. SCHNEIDER, *Homo Economicus – or More Like Homer Simpson?*, Deutsche Bank Research, 2010, 4 ss. Si pensi, in generale, anche al concetto di “razionalità limitata”: si veda H. SIMON, *Rational Decision Making in Business Organization*, in *American Economic Review*, 1979, 69, 493 ss.

²⁵ La definizione di *forward-looking statement* è contenuta nella SEC Rule § 230.175(c). In particolare, per essa si intende: “(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

per dichiarazione fraudolenta (*fraudulent statement*), ai sensi della SEC Rule 230.175(d), soltanto se sia provato che l'informazione non abbia una base ragionevole o sia stata divulgata in assenza di buona fede (Rule 230.175)²⁶. L'obiettivo è quello di individuare un punto di equilibrio tra protezione degli investitori e incentivo alla comunicazione di informazioni che, altrimenti, potrebbero non essere comunicate al mercato per il timore di eccessive responsabilità e sanzioni²⁷.

La giurisprudenza statunitense, dal canto suo, ha sviluppato un corposo sistema di precedenti, costruendo in particolare due teorie: la *puffery doctrine* e la *bespeaks-caution doctrine*. Le due teorie vengono applicate nel caso di controverse ad oggetto frodi sui mercati o rappresentazioni informative non veritiere o fuorvianti²⁸. In entrambi i casi, l'obiettivo è quello di distinguere le informazioni (o omissioni) materiali da quelle non materiali – intendendo per materiale quell'informazione che un investitore ragionevole considererebbe importante per la propria decisione di investimento²⁹.

Da una parte, la *puffery doctrine* esclude la materialità nel caso di informazioni vaghe, astratte, ottimistiche, meramente aspirazionali e *forward-looking* che non siano basate su dati di fatto o provenienti da fonti attendibili³⁰. Simili informazioni, in particolare, non sono considerate rilevanti per un investitore ragionevole³¹. Dall'altra, secondo la *bespeaks-caution doctrine* non possono

(2) A statement of management's plans and objectives for future operations; (3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter) or Item 9".

²⁶ M.I. STEINBERG, *U.S. Prospectus Liability – An Overview and Critique*, 2023, disponibile su www.ssrn.com, 10 ss.

²⁷ R.A. CAZIER-K.J. MERKLEY-J.S. TREU, *When are Firms Sued for Qualitative Disclosures? Implications of the Safe Harbor for Forward-Looking Statements*, 2019, disponibile su www.ssrn.com; D.J. SKINNER, *Do the SEC's Safe Harbor Provisions Encourage Forward-Looking Disclosures?*, in *Financial Analysts Journal*, 1995, 51, 38 ss.

²⁸ R.J. HAVAS-C.F. CANNATARO-R. DAVIDIAN-G. GIROUX-S. HAFEEZ-J. JENKINS-D. MURNER-H. SMITTELLI-B. WEINER, *Securities Fraud*, in *American Criminal Law Review*, 2017, 54, 1787 ss.

²⁹ Il *leading case* con riferimento alla nozione di materialità è *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976): si veda R.A. BOOTH, *The Two Faces of Materiality*, in *Delaware Journal of Corporate Law*, 2013, 38, 518 ss.

³⁰ C.M. AJAX-D. STRAUSS, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, in *Ecology Law Quarterly*, 2019, 45, 703 ss.

³¹ J. O'HARE, *The Resurrection of the Dodo: The Unfortunate Re-Emergence of the Puffery Defense in Private Securities Fraud Actions*, in *Ohio State Law Journal*, 1998, 59, 1697 ss.

essere qualificate materiali le informazioni prospettiche accompagnate da un linguaggio che denoti una certa cautela nella comunicazione (*meaningful cautionary statement*)³². Ancora una volta, il presupposto è l'irrilevanza di simili informazioni per un investitore ragionevole³³.

La *bespeaks-caution doctrine* è stata il modello di riferimento per la modifica, intervenuta negli anni Novanta nell'ambito del *Private Securities Litigation Reform Act* (PSLRA)³⁴, della *Section 27A* del *Securities Act* del 1933, per il caso dei mercati primari, e della *Section 21E* del *Securities Exchange Act* del 1934 per il caso dei mercati secondari³⁵. Entrambe le disposizioni sono assai dettagliate, ma, per quanto qui di più interesse, esse individuano un *safe harbor* per le informazioni *forward-looking*, in particolare quando esse siano accompagnate da una cautela linguistica e specifichino le ragioni per cui il contenuto delle informazioni potrebbe differire (*Section 27A(c)(1)(A)(i)* e *Section 21E(c)(1)(A)(i)*). Si tratta, a ben vedere, della codificazione della *bespeaks-caution doctrine* di matrice giurisprudenziale³⁶.

2.2. L'ordinamento statunitense e i safe harbor per le informazioni sulla sostenibilità prospettiche.

Le informazioni sulla sostenibilità che siano *forward-looking* devono confrontarsi con il quadro normativo e giurisprudenziale appena delineato. Pur se

³² L'espressione è apparsa per la prima volta nel 1977 nel caso *Polin v. Conductron Corp.*: si veda A.W. FINE, *A Cautionary Look at a Cautionary Doctrine*, in *Brooklyn Journal of Corporate, Financial & Commercial Law*, 2016, 10, 521 ss. Tuttavia, il *leading case* nel caso della *bespeaks-caution doctrine* è considerato *Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 369: si veda J.B. LURVEY, *Who Is Bespeaking to Whom? Plaintiff Sophistication, Market Information, and Forward-Looking Statements*, in *Duke Law Journal*, 1995, 45, 579 ss.

³³ D.C. LANGEVOORT, *Disclosures that "Bespeak Caution"*, in *The Business Lawyer*, 1994, 49, 481 ss. Per una critica alla teoria, si veda F.A. GEVURTZ, *Important Warning or Dangerous Misdirection: Rethinking Cautions Accompanying Investment Predictions*, in *Maryland Law Review*, 2024, 83, 752 ss.

³⁴ E.M. HARDTKE, *What's Wrong with the Safe Harbor for Forward-Looking Statements – A Call to the Securities and Exchange Commission to Reconsider Codification of the Bespeaks Caution Doctrine*, in *Marquette Law Review*, 1997, 81, 133 ss.

³⁵ A.M. OLAZABAL, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, in *Indiana Law Journal*, 2011, 86, 595 ss.

³⁶ R.A. ROSEN, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law – Has It Achieved What Congress Intended?*, in *Washington University Law Quarterly*, 1998, 76, 645 ss.

con qualche opinione contraria in dottrina³⁷, la SEC ha recentemente esteso il *safe-harbor* previsto dal PSLRA anche ad alcune delle informazioni sulla sostenibilità prospettiche³⁸, poiché considerate anch'esse *soft information*³⁹.

In particolare, e in positivo, il nuovo *Item 1507* del *Regulation S-K* include nel *safe harbor* le informazioni relative ai piani di transizione (*Item 229.1502(e)*), alle analisi di scenario (*Item 229.1502(f)*), al prezzo interno del carbonio (*Item 229.1502(g)*) e agli obiettivi legati alla sostenibilità (*Item 229.1504*). In negativo, le informazioni relative ai fatti storici non rientrano nel *safe harbor*, collocandosi in effetti al di fuori della *ratio* del regime speciale⁴⁰. Inoltre, e a differenza di quanto previsto dalla proposta iniziale della SEC, il *safe harbor* non si applica alle informazioni sulle emissioni c.d. *scope 1*, *scope 2* e *scope 3*⁴¹.

³⁷ Parte della dottrina ha sostenuto l'inapplicabilità dei *safe harbor* previsti dall'ordinamento statunitense alle informazioni sulla sostenibilità, in particolare sulla base di due argomentazioni. Da un lato, si è affermato che la definizione di informazione *forward-looking* contenuta nel PSLRA (*Section 27A(i)(1)* e *Section 21E(i)(1)*) non comprenderebbe anche le informazioni sulla sostenibilità: A.I. SAAD-D. STRAUSS, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, in *Berkeley Business Law Journal*, 2020, 17, 425-27. Dall'altra, si è sostenuto che, oggi, anche le informazioni sulla sostenibilità sono divenute rilevanti per un investitore ragionevole: B.S. SHARFMAN, *Materiality, the 'Reasonable Investor', and the SEC's New Climate-Related Disclosures Rule*, 2024, disponibile su www.ssrn.com; H.V. VIZCARRA, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, 2020, disponibile su www.ssrn.com.

³⁸ SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 2024.

³⁹ *Ivi*, 394.

⁴⁰ Di conseguenza, qualora le informazioni relative ai piani di transizione, alle analisi di scenario, al prezzo interno del carbonio e agli obiettivi relativi alla sostenibilità comprendano dati sia storici sia prospettici, allora si applicherà un regime differenziato: SEC, *Final Rule. The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 2024, 396.

⁴¹ Il *Greenhouse Gas Protocol* (GHG), che costituisce il quadro più importante per la misurazione delle emissioni di gas ad effetto serra, ha distinto tra emissioni *scope 1*, *scope 2* e *scope 3*. Le prime identificano le emissioni che sono diretta conseguenza dell'attività economica; le seconde individuano le emissioni indirette causate dai consumi dell'attività economica; le terze, infine, costituiscono le emissioni indirette nella catena del valore dell'attività economica: si veda GHG, *The Greenhouse Gas Protocol. A Corporate Accounting and Reporting Standard*, 2024, 25 ss. Rispetto alla SEC, si veda C.L. PUGLISI, *Sec's Proposed Climate-Related Disclosure Rule: Comment Analysis and Recommendation for Scope 3 Emissions*, in *Corporate and Business Law Journal*, 2024, 5, 84 ss.

La SEC ha operato sia innovando sia adeguandosi all'attuale PSLRA. Nel primo senso, ha esercitato un potere riconosciuto dal PSLRA⁴² e ha esteso il *safe harbor* oltre i confini previsti dal PSLRA medesimo, applicandolo ad operazioni di mercato ulteriori a quelle là previste (*Item* 1507(2)(i) – (v)). L'obiettivo è, ancora una volta, quello di incentivare la comunicazione di informazioni sulla sostenibilità ritenute utili per gli investitori odierni⁴³. Nel secondo senso, il regime speciale si applica soltanto se sono soddisfatti i criteri definitori previsti dalla *Section* 27A e dalla *Section* 21E – criteri che rimangono ad oggi inalterati. Inoltre, e al netto di qualche ulteriore precisazione di dettaglio sull'applicabilità del *safe harbor*⁴⁴, rimane in ogni caso necessario il rispetto degli altri requisiti previsti dal PSLRA, tra cui, in particolare, quello del linguaggio cautelare⁴⁵.

Infine, la SEC specifica che gli altri *safe harbor* generalmente previsti dall'ordinamento statunitense potranno essere applicati a qualsiasi delle informazioni richieste dalla *Subpart* 1500 del *Regulation* S-K, indipendentemente dal fatto che attengano ai piani di transizione, alle analisi di scenario, al prezzo interno del carbonio o agli obiettivi legati alla sostenibilità. La SEC ricorda, in particolare, la possibile applicazione della *bespeaks-caution doctrine*, della *Rule* 230.175 del *Securities Act* e della *Rule* 240.3b-6 del *Securities Exchange Act* – che introducono, queste ultime due, regimi attenuati di responsabilità in caso di azioni di *enforcement* della SEC⁴⁶. Si tratta, quest'ultima, di una precisazione assai rilevante, considerando il dibattito, sorto in dottrina e in giurisprudenza, intorno all'applicabilità della *bespeaks-caution doctrine* alle informazioni sulla sostenibilità⁴⁷.

In definitiva, l'intervento della SEC riflette la crescente importanza delle informazioni sulla sostenibilità per gli investitori odierni⁴⁸. Partendo dai *safe harbor* previsti in via generale per le informazioni finanziarie prospettiche, la SEC tenta un approccio, per così dire, evolutivo, integrando il “vecchio” mondo con

⁴² 15 U.S.C. 77z-2(g) and 15 U.S.C. 78u-5(g).

⁴³ SEC, *Final Rule*, cit., 397.

⁴⁴ Per esempio, il *safe harbor* non si applica alle informazioni prospettiche che siano incluse nelle dichiarazioni finanziarie e siano predisposte in conformità ai principi c.d. *Generally Accepted Accounting Principles* (GAAP): SEC, *Final Rule*, cit., 399-400.

⁴⁵ SEC, *Final Rule*, cit., 400.

⁴⁶ SEC, *Final Rule*, cit., 396.

⁴⁷ A.I. SAAD-D. STRAUSS, *The New “Reasonable Investor”*, cit., 391 ss.

⁴⁸ GLI ALLIANCE, *Global Sustainable Investment Review 2022, 2023*; A.I. SAAD-D. STRAUSS, *The New “Reasonable Investor”*, cit., 426 ss.

il “nuovo” mondo. L’applicazione concreta delle regole della SEC permetterà di comprendere se il punto di equilibrio tra incentivo alla comunicazione e protezione degli investitori sia stato correttamente individuato ⁴⁹.

3. *L’ordinamento del Regno Unito: nuovi safe harbor e nuove informazioni sulla sostenibilità.*

3.1. *L’ordinamento del Regno Unito e il nuovo safe harbor per le informazioni finanziarie prospettiche.*

La disciplina sui mercati finanziari del Regno Unito si trova, oggi, in una fase di transizione ⁵⁰. Con l’obiettivo di sostituire le speculari disposizioni dell’Unione europea, una recente normativa (*Public Offers and Admissions to Trading Regulations* – POATRs) ⁵¹ ha introdotto un regime speciale di responsabilità per le informazioni prospettiche (*Protected Forward-looking Statement* – “PFLS”) contenute nel prospetto e, quindi, con riferimento specifico al mercato primario. Ancora una volta, l’obiettivo è quello di incentivare la comunicazione di tali informazioni, con conseguente beneficio per gli investitori, una più facile raccolta del capitale e oneri di *compliance* più proporzionati ⁵².

In primo luogo, all’applicazione del regime “PFLS” segue lo *standard* di responsabilità, meno gravoso, della c.d. *recklessness/dishonesty liability*, che si differenzerebbe da quello, previsto in via generale nel caso dei prospetti nei mercati primari, della c.d. *negligence liability* ⁵³ (*Schedule 2(11) POATRs*). In secondo luogo, il regime “PFLS” si applicherebbe a due tipologie di informazioni: da un lato, a quelle specificate ulteriormente dall’autorità inglese dei mercati (*Financial Conduct Authority* – FCA) in sede regolamentare (*Schedule 2(10)(1) (a) POATRs*); dall’altro, a quelle accompagnate da una dichiarazione che le

⁴⁹ Per una critica sistematica alla *Final Rule*, si veda N.V. ANDEL, *An Avalanche of Trivial Climate-Related Information: Why the SEC’s Enhancement and Standardization of Climate-Related Disclosures for Investors Will Fail*, in *Texas Tech Law Review*, 2024, 56, 437 ss.

⁵⁰ E. HOWELL, *An Analysis of the Prospectus Regime: The EU Reforms and the ‘Brexit’ Factor*, in *European Company and Financial Law Review*, 2018, 15, 69 ss.

⁵¹ Il testo normativo è disponibile su <https://www.legislation.gov.uk/uksi/2024/105/contents/made>, con un *memorandum* esplicativo disponibile su https://www.legislation.gov.uk/uksi/2024/105/pdfs/uksiem_20240105_en_001.pdf.

⁵² FCA, *Policy Statement. New Rules for the Public Offers and Admissions to Trading Regime*, 2025, PS25/9, 5.5.

⁵³ FCA, *Policy Statement*, cit., 1.38, 5.3, 5.6, 5.9 e 5.11.

identifichi espressamente come protette dal regime “PFLS” (*Schedule 2(10)(1)(b) POATRs*).

La FCA ha pubblicato a luglio 2025 le nuove regole per la divulgazione sul mercato primario⁵⁴, che entreranno in vigore a partire dal 19 gennaio 2026 (*Prospectus Instrument* (C)). Perché un’informazione prospettica ricada nel nuovo regime, deve, da una parte, rispettare alcune condizioni e, dall’altra, essere accompagnata da una dichiarazione particolare.

Nel primo senso, è previsto, oltre ad ulteriori due requisiti⁵⁵, che siano protette le informazioni dimostratesi false o fuorvianti sulla base soltanto di eventi accaduti successivamente alla pubblicazione (*Prospectus Rules: Admission to Trading on a Regulated Market* – PRM (8.1.3R)(1)(b)⁵⁶) e quelle che un investitore ragionevole probabilmente utilizzerebbe per la propria decisione di investimento (PRM (8.1.3R)(1)(d)). Inoltre, e salvo eccezioni, non possono considerarsi protette quelle informazioni la cui comunicazione deriva da uno specifico obbligo di legge (PRM (8.1.4R)).

Nel secondo senso, è necessario predisporre una dichiarazione generale, presente una sola volta nel prospetto (PRM (8.2.2G)), ed una dichiarazione legata alla specifica informazione prospettica (PRM (8.2.3R)). In particolare, la dichiarazione generale, oltre a spiegare le modalità con cui individuare le informazioni protette (PRM (8.2.4R)(1)), deve ricordare che non è certo l’informazione si riveli accurata (PRM (8.2.4R)(2)(a)), che sussiste un regime di responsabilità meno gravoso per i responsabili del prospetto (PRM (8.2.4R)(2)(b)) e, infine, che non vi è, salvo quanto previsto da disposizioni specifiche, un obbligo generale di aggiornare l’informazione (PRM (8.2.4R)(2)(c)). La dichiarazione specifica, invece, oltre a identificare le informazioni protette (PRM (8.2.5R)(1)), deve includere le ipotesi su cui esse si basano (PRM (8.2.5R)(2)), purché le ipotesi siano ragionevoli, facilmente comprensibili, specifiche e precise (PRM (8.2.5R)(2)(b)), distinguendo ulteriormente quelle su cui gli organi della società possono influire (PRM (8.2.5R)(2)(a)) e quelle che potrebbero modificare significativamente il risultato atteso (PRM (8.2.5R)(2)(c)). Disposizioni finali

⁵⁴ FCA, *Policy Statement*, cit.

⁵⁵ Oltre a quelle citate nel testo, sono previste altre due condizioni: da un lato, la dichiarazione deve contenere informazioni finanziarie ai sensi del PRM (8.1.7R) o informazioni operative ai sensi del PRM (8.1.8R) (PRM (8.1.3R)(1)(a)(i-ii)); dall’altro, la dichiarazione deve includere una stima di quando potrebbero verificarsi l’evento o la serie di circostanze cui si riferisce l’informazione (PRM (8.1.3R)(1)(c)).

⁵⁶ FCA, *Policy Statement*, cit., 5.25: nel caso in cui la verità delle informazioni sia accertabile al momento della relativa pubblicazione, allora esse non possono beneficiare del regime “PFLS”.

assicurano, poi, la comparabilità delle informazioni prospettiche con quelle finanziarie⁵⁷.

In definitiva, il regime “PFLS” mostra, pur con le inevitabili influenze⁵⁸, alcune particolarità rispetto sia all’ordinamento statunitense sia a quello europeo. In primo luogo, si predispone una disciplina comune applicabile a qualsiasi informazione prospettica, purché siano soddisfatti i relativi requisiti⁵⁹. In secondo luogo, si ritiene necessario tutelare informazioni prospettiche ulteriori alle sole previsioni degli utili – non essendo, queste ultime, le sole informazioni rilevanti per gli investitori⁶⁰. In terzo luogo, il nuovo regime non si applica alle stime degli utili (PRM (8.1.4R)(1)(g)), ritenendo queste ultime in realtà poco rilevanti per gli investitori⁶¹. Infine, l’obiettivo generale di incoraggiare la comunicazione di informazioni prospettiche impone, secondo la FCA, di escludere l’introduzione di una *bespeaks-caution doctrine* sul modello statunitense⁶².

3.2. *L’ordinamento del Regno Unito e il nuovo safe harbor per le informazioni sulla sostenibilità prospettiche.*

Le informazioni sulla sostenibilità che siano *forward-looking* devono confrontarsi con il quadro normativo appena delineato. I documenti predisposti dalla FCA, e antecedenti alla pubblicazione delle nuove regole, riportano alcune osservazioni rilevanti.

Nell’*Engagement Paper* del maggio 2023, la FCA evidenzia l’opportunità che il regime “PFLS” si applichi anche alle informazioni prospettiche sulla sostenibilità⁶³. Altrimenti, secondo la FCA le società quotate non sarebbero

⁵⁷ Nel caso in cui nel prospetto siano presenti informazioni finanziarie e storiche dello stesso tipo delle informazioni protette, allora è necessaria una dichiarazione che queste ultime siano comparabili con le prime (PRM (8.2.5R)(3)(a)) e coerenti con le politiche contabili dell’emittente (PRM (8.2.5R)(3)(b)).

⁵⁸ Da una parte, si percepisce l’influenza della precedente disciplina europea, come nel caso del contenuto della dichiarazione specifica; dall’altra, le condizioni perché un’informazione sia tutelata dal *safe harbor* sono, in parte, derivate da alcuni precedenti giurisprudenziali statunitensi – come nel caso della rilevanza del momento in cui l’informazione si rivela falsa: si veda FCA, *Policy Statement*, cit., 5.25.

⁵⁹ *Ivi*, 5.18.

⁶⁰ *Ivi*, 5.17.

⁶¹ *Ivi*, 5.60.

⁶² *Ivi*, 5.17.

⁶³ FCA, *Engagement Paper 3. Protected Forward-looking Statements*, 2023, 32.

incentivate a comunicare simili informazioni, considerando in particolare la relativa incertezza e la prospettiva di medio-lungo periodo rilevante⁶⁴. La FCA, così, si chiedeva quali fossero le tipologie di informazioni sulla sostenibilità prospettiche da tutelare, nel tentativo di trovare il solito equilibrio tra incentivo alla divulgazione e protezione degli investitori⁶⁵.

Nel documento di consultazione CP24/12 del luglio 2024, la FCA dedica il sesto capitolo alla divulgazione delle informazioni sulla sostenibilità⁶⁶. In questa occasione, la FCA propone che le informazioni connesse al clima relative alla strategia, ai piani di transizione, alle metriche e agli obiettivi debbano essere qualificate espressamente come informazioni protette ai sensi del regime “PFLS”, escludendo quelle legate alla *governance* e alla gestione del rischio⁶⁷.

Infine, nella relazione illustrativa annessa alle nuove regole del luglio 2025, la FCA ribadisce l’eventualità che le informazioni sulla sostenibilità ricadano nel regime “PFLS”, purché siano soddisfatte le relative prescrizioni⁶⁸. Nella relazione ricorrono ulteriori esempi a conferma di questa impostazione, come nel caso delle informazioni sulla strategia, sui piani di transizione, sulle metriche e sugli obiettivi legati alla sostenibilità⁶⁹.

Con riferimento alla nuova disciplina predisposta dalla FCA, le informazioni sulla sostenibilità prospettiche possono, pertanto, assumere rilevanza in due modi, uno particolare (e testuale) e uno generale (ed interpretativo). In primo luogo, e come già accennato, se la comunicazione di una certa informazione è prescritta dalla legge, allora essa non può considerarsi protetta dal *safe harbor*. Sono, tuttavia, previste alcune eccezioni, distinte a seconda che le informazioni siano incluse in un documento di registrazione per titoli di capitale, in un documento di registrazione per emissioni secondarie di titoli di capitali o in un documento di registrazione per titoli diversi da quelli di capitale. Tra tali eccezioni, è evidente il ruolo ricoperto anche dalle informazioni sulla sostenibilità prospettiche.

⁶⁴ *Ivi*, 33.

⁶⁵ *Ivi*, 35. La FCA proponeva, per esempio, di escludere dal regime “PFLS” le informazioni sugli impegni nel breve termine.

⁶⁶ FCA, *Consultation Paper. Consultation on the new Public Offers and Admissions to Trading Regulations regime (POATRs)*, 2024, CP24/12, 67 ss.

⁶⁷ *Ivi*, 6.18.

⁶⁸ FCA, *Policy Statement*, cit., 6.38.

⁶⁹ *Ivi*, 6.19.

Infatti, in relazione al documento di registrazione per titoli di capitale (PRM App 2, Annex 1), le informazioni in ogni caso tutelate concernono: la strategia e gli obiettivi dell'emittente, siano essi finanziari o non finanziari (PRM (8.1.4R)(1)(a)); gli impatti potenziali e attuali dei rischi climatici, così come le connesse opportunità (PRM (8.1.4R)(1)(b)); il piano di transizione (PRM (8.1.4R)(1)(c)); le metriche e gli obiettivi per la valutazione e la gestione dei rischi e delle opportunità connesse al cambiamento climatico (PRM (8.1.4R)(1)(d)); le informazioni utili a comprendere lo sviluppo e l'andamento dell'attività dell'emittente, anche con l'utilizzo di *Key Performance Indicator* (KPI) non finanziari (PRM (8.1.4R)(1)(e)); le tendenze, le incertezze, le richieste, gli impegni o gli eventi che ragionevolmente potrebbero avere un effetto significativo sulle prospettive dell'emittente (PRM (8.1.4R)(1)(f)); le previsioni degli utili – ma, come accennato, non le stime degli utili (PRM (8.1.4R)(1)(g)). Le informazioni sulle previsioni degli utili sono tutelate anche nel caso del documento di registrazione per emissioni secondarie di titoli di capitale e nel caso del documento di registrazione per titoli diversi da quelli di capitale (PRM (8.1.4R)(2)(b) e PRM (8.1.4R)(3)), mentre le informazioni su tendenze, incertezze, richieste, impegni o eventi *supra* accennate valgono solo per il primo. Simili regole si applicano anche con riferimento al prospetto di ammissione ad un sistema multilaterale di negoziazione (PRM (8.1.5R)). In questi casi, pertanto, è direttamente il testo della normativa che tutela le informazioni sulla sostenibilità prospettiche.

In secondo luogo, e in generale, qualsiasi informazione sulla sostenibilità prospettica potrebbe rientrare nel regime “PFLS” – e, questo, indipendentemente da una specifica previsione normativa. Infatti, da un lato, è possibile che alcune informazioni sulla sostenibilità rispettino i requisiti previsti dalla definizione generale, così come analizzata. Dall'altro, il fatto che le eccezioni appena *supra* illustrate prevedano espressamente alcune informazioni sulla sostenibilità postula, *a fortiori*, che esse possano considerarsi protette anche in via generale.

4. *L'ordinamento dell'Unione europea: un percorso ancora in itinere.*

4.1. *L'ordinamento dell'Unione europea e le informazioni finanziarie prospettiche.*

Nell'ordinamento dell'Unione europea, la disciplina più articolata sulle informazioni finanziarie prospettiche è contenuta nel regolamento (UE) 2017/1129 (c.d. regolamento Prospetto) e nel regolamento delegato (UE) 2019/980 che,

insieme, costituiscono la disciplina rilevante sulla trasparenza informativa nel mercato primario ⁷⁰.

Anche se non esauriscono la categoria delle informazioni *forward-looking* previste dal regolamento Prospetto – si pensi, per esempio, alle informazioni sulle prospettive dell'emittente (art. 6, par.1, lett. a), regolamento Prospetto) ⁷¹ –, la disciplina più dettagliata è quella sui fattori di rischio e quella sulle stime e previsioni degli utili ⁷².

In primo luogo, i fattori di rischio devono essere individuati sulla base della probabilità di accadimento e dell'entità prevista del relativo impatto negativo (art. 16, par.1, regolamento Prospetto) ⁷³. Per circoscrivere, poi, le informazioni da comunicare, devono essere pubblicati soltanto i fattori di rischio che siano rilevanti e specifici all'emittente e/o ai titoli considerati (art. 16, par.1, regolamento Prospetto) ⁷⁴. Al fine di permettere la massima comprensibilità per gli investitori, ciascun fattore di rischio deve essere “descritto adeguatamente” con riferimento in particolare al modo con cui esso incide sull'emittente o sui titoli (art. 16, par.1, regolamento Prospetto) e deve essere suddiviso in specifiche e limitate categorie (art. 16, par.1, regolamento Prospetto). Poiché le informazioni prospettiche sui fattori di rischio sono considerate assai utili per gli investitori ⁷⁵, è prevista l'elaborazione di appositi orientamenti dell'ESMA (art. 16, par. 4, regolamento Prospetto) ⁷⁶ e l'adozione di atti delegati da parte della

⁷⁰ C.P. BUTTIGIEG, *Public Offerings and the Role of National Law After the Prospectus Regulation*, in F. ANNUNZIATA-M. SIRI (eds.), *EU Banking and Capital Markets Regulation. Open Issues of Vertical Interplay with National Law*, Cham, 2025, 291 ss.

⁷¹ In particolare, il prospetto deve contenere le “informazioni necessarie” (art. 6, par. 1, regolamento Prospetto) perché sia possibile procedere ad una valutazione con cognizione di causa anche “delle prospettive dell'emittente e degli eventuali garanti” (art. 6, par. 1, lett. a), regolamento Prospetto).

⁷² G. CHEN-M. FIRTH-G.V. KRISHNAN, *Earnings Forecast Errors in IPO Prospectuses and Their Associations with Initial Stock Returns*, in *Journal of Multinational Financial Management*, 2001, 11, 25 ss.

⁷³ S. ALVARO-R. LENER-P. LUCANTONI, *The Prospectus Regulation. The long and winding road*, in *Quaderni giuridici Consob*, 2020, 22, 54 ss.

⁷⁴ V. DE SERIÈRE, *The Contents of the Prospectus. Non-Financial Information and Materiality*, in D. BUSH-G. FERRARINI-J.P. FRANX (eds.), *Prospectus Regulation and Prospectus Liability*, Oxford, 2020, 207 ss.

⁷⁵ P. SHAMMO, *EU Prospectus Regulation*, 2024, disponibile su www.ssrn.com, 13 ss.

⁷⁶ Gli orientamenti devono porsi l'obiettivo di “incoraggiare un'informativa adeguata e mirata dei fattori di rischio”, assistendo le autorità competenti nell'esame della relativa specificità e rilevanza (art. 16, par. 4, regolamento Prospetto).

Commissione europea (art. 16, par. 5, regolamento Prospetto) ⁷⁷. Per consentire un corretto equilibrio tra incentivo alla comunicazione e protezione degli investitori, l'ESMA ha, di conseguenza, pubblicato alcuni orientamenti in materia ⁷⁸. Gli allegati del regolamento delegato sul prospetto, infine, specificano le modalità di rappresentazione dei fattori di rischio a seconda del documento rilevante (per es. Allegato 1(3.1) regolamento delegato (UE) 2019/980).

In secondo luogo, le stime degli utili riguardano “gli utili per un esercizio chiuso e per il quale i risultati non sono stati ancora pubblicati” (art. 1, lett. c), regolamento delegato (UE) 2019/980), mentre le previsioni degli utili si riferiscono ai profitti e alle perdite per l'esercizio in corso o per gli esercizi successivi (art. 1, lett. d), regolamento delegato (UE) 2019/980). Gli allegati del regolamento delegato, poi, specificano la disciplina a seconda del documento di volta in volta considerato.

Per esempio, nel caso del documento di registrazione per i titoli di capitale, la previsione o la stima deve essere “chiara e non ambigua” e deve indicare le principali ipotesi alla base di essa (Allegato 1(11.2) regolamento delegato (UE) 2019/980). Sono previste, poi, alcune prescrizioni relative alle ipotesi su cui le stime o previsioni si fondano: da un lato, è necessario indicare quelle su cui gli organi della società possono influire (Allegato 1(11.2)(a)); dall'altro, esse devono essere ragionevoli, facilmente comprensibili, specifiche e precise (Allegato 1(11.2)(b)) e devono indicare i fattori incerti che potrebbero “modificare in senso sostanziale il risultato della previsione” (Allegato 1(11.2)(c)). Ancora, sono previste specifiche regole per assicurare la comparabilità e coerenza di tali previsioni o stime con altre informazioni finanziarie comunicate (Allegato 1(11.3)(a) e (b) ⁷⁹) e per disciplinare il caso di previsioni o stime antecedenti al documento di registrazione ⁸⁰ (Allegato

⁷⁷ Gli atti delegati devono specificare i criteri per la valutazione, da parte dell'emittente, della specificità e della significatività dei fattori di rischio (art. 16, par. 5, regolamento Prospetto).

⁷⁸ ESMA, *Orientamenti in materia di fattori di rischio ai sensi del regolamento sul prospetto*, 2019, ESMA31-62-1293IT.

⁷⁹ In particolare, la normativa prescrive che le previsioni o le stime siano compilate su una base comparabile con le informazioni finanziarie sugli esercizi passati (Allegato 1(11.3)(a)) e in modo coerente con le pratiche contabili dell'emittente (Allegato 1(11.3)(b)).

⁸⁰ In particolare, l'Allegato 1(11.1) prescrive che, nel caso in cui una previsione o stima antecedenti alla pubblicazione del documento di registrazione siano ancora valide, allora devono essere incluse nel documento di registrazione medesimo. Se, invece, la previsione o stima non sono più valide, allora deve essere fornita una dichiarazione in cui si spieghino le ragioni dell'aggiornamento.

1(11.1))⁸¹. Gli altri allegati condividono, per i diversi documenti relativi al prospetto, un'impostazione di fondo simile⁸². Il regolamento Prospetto, poi, ha eliminato la necessità di una valutazione esterna delle previsioni e stime degli utili⁸³.

Inoltre, l'autorità europea dei mercati finanziari (*European Securities and Markets Authority* – ESMA), dal canto suo, ha cercato spesso di fornire ulteriori chiarimenti intorno alle informazioni prospettiche⁸⁴. Da un lato, l'ESMA si sforza di chiarire il significato e la portata della normativa, in particolare adottando un approccio che favorisca la sostanza alla forma⁸⁵. Per esempio⁸⁶, secondo l'ESMA, la disciplina si applica anche nel caso in cui il prospetto neghi la qualifica di previsione degli utili ad un'informazione che, in realtà, è una previsione degli utili⁸⁷. Inoltre, secondo l'ESMA non è necessario, ai fini dell'osservanza della disciplina, che l'informazione sia specificamente qualificata come previsione degli utili⁸⁸.

Dall'altro, l'ESMA cerca di assicurare la massima affidabilità possibile delle informazioni prospettiche. Per esempio, nelle priorità di *enforcement* del 2024 l'ESMA specifica, in primo luogo, che gli emittenti devono comunicare le ipotesi relative al futuro, così come le incertezze più rilevanti connesse alle stime⁸⁹;

⁸¹ In generale, si veda G. STRAMPELLI, *The Contents of the Prospectus: Rules for Financial Information*, in D. BUSH-G. FERRARINI-J.P. FRANX (eds.), *Prospectus Regulation*, cit., 168 ss.

⁸² Si veda l'Allegato 3(7) sul documento di registrazione universale; l'Allegato 6(8) sul documento di registrazione per i titoli diversi dai titoli di capitale destinati agli investitori al dettaglio; l'Allegato 7(8) sul documento di registrazione per i titoli diversi dai titoli di capitale destinati agli investitori all'ingrosso; l'Allegato 8(7) sul documento di registrazione per le emissioni secondarie di titoli diversi dai titoli di capitale; l'Allegato 24(2.7) sul documento di registrazione del prospetto UE della crescita per i titoli di capitale; l'Allegato 25(2.5) sul documento di registrazione del prospetto UE della crescita per i titoli diversi dai titoli di capitale.

⁸³ Tale eliminazione fu particolarmente contestata: M. GARGANTINI, *Mandatory Disclosure*, cit., 12.

⁸⁴ Si veda, per alcuni chiarimenti intorno alle previsioni e stime degli utili, ESMA, *Questions and Answers on the Prospectus Regulation*, 2023, ESMA/2019/ESMA31-62-1258.

⁸⁵ *Ivi*, 42 ss.

⁸⁶ Per gli interventi chiarificatori dell'ESMA, si veda G. STRAMPELLI, *The Contents of the Prospectus*, cit., 187 ss.

⁸⁷ ESMA, *Questions and Answers*, 45.

⁸⁸ *Ivi*, 44.

⁸⁹ ESMA, *European Common Enforcement Priorities For 2024 Corporate Reporting*, 2024, ESMA32-193237008-8369, 3.

in secondo luogo, essa considera necessario siano comunicate spiegazioni sufficienti sui giudizi rilevanti utilizzati per la determinazione delle stime⁹⁰. Simili considerazioni sono presenti anche nelle priorità di *enforcement* degli anni precedenti, a conferma della sempre costante rilevanza del tema⁹¹.

Con riferimento al regime di responsabilità da prospetto, l'ordinamento europeo, a differenza del sistema statunitense ed inglese, non prevede regole differenziate a seconda che le informazioni siano storiche o prospettiche. La disciplina normativa della responsabilità per il caso di informazioni non conformi ai fatti o di omissioni rilevanti è, pertanto, la medesima (art. 11, regolamento Prospetto)⁹².

In proposito, l'ESMA, nell'ambito di una *Call for Evidence* (CfE) del 2024 in tema di armonizzazione delle regole sulla responsabilità da prospetto⁹³, si è interrogata sulla necessità di introdurre uno specifico *safe harbor* per le informazioni prospettiche (*forward-looking statement* – FLS)⁹⁴. Nel *Final Report*, l'ESMA svolge le riflessioni conclusive sull'argomento⁹⁵. In primo luogo, rileva che la proposta di *safe harbor* è stata accolta favorevolmente dalla maggior parte dei partecipanti alla consultazione⁹⁶. In secondo luogo, sostiene che una definizione delle FLS non dovrebbe essere eccessivamente restrittiva né, al contempo, dare adito a dubbi intorno alla relativa applicabilità⁹⁷. In terzo luogo, le informazioni protette dovrebbero essere accompagnate da una specifica dichiarazione, idonea ad avvertire che, da un lato, le previsioni e proiezioni non necessariamente potrebbero verificarsi e, dall'altro, che le informazioni beneficiano di

⁹⁰ *Ivi*, 4.

⁹¹ Per esempio, ESMA, *European Common Enforcement Priorities For 2021 Annual Financial Reports*, 2021, ESMA32-63-1186, 5.

⁹² Si veda la parte III, dedicata alla responsabilità da prospetto, di D. BUSH-G. FERRARINI-J.P. FRANX (eds.), *Prospectus Regulation*, cit., 441 ss.

⁹³ Sull'armonizzazione della responsabilità da prospetto, si veda D. BUSH-M. LEHMANN, *Prospectus Liability Rules in Europe and Beyond: Towards Uniformity*, Oxford, 2025; R. VEIL, *Prospectuses: Primary Markets Law in a European Capital Markets Code*, in R. VEIL (ed.), *Regulating EU Capital Markets Union. Fundamentals of a European Code*, Oxford, 2024, 343 ss.

⁹⁴ ESMA, *Call for Evidence on Potential Further Steps Towards Harmonising Rules on Civil Liability Pertaining to Securities Prospectuses Under the Prospectus Regulation*, 2024, ESMA32-117195963-1257.

⁹⁵ ESMA, *Final Report. Technical Advice Concerning Civil Prospectus Liability*, 2025, ESMA32-117195963-1413, in particolare parr. 58-80 e parr. 187-196.

⁹⁶ *Ivi*, par. 60.

⁹⁷ *Ivi*, parr. 72-73.

un regime di responsabilità attenuato⁹⁸. Infine, l'ESMA sottolinea come sia necessario escludere l'applicabilità del regime speciale in caso di informazioni fuorvianti per dolo o colpa grave⁹⁹.

4.2. *L'ordinamento dell'Unione europea e le informazioni sulla sostenibilità prospettiche: una proposta de iure condendo.*

Le informazioni sulla sostenibilità prospettiche si devono confrontare con il quadro normativo appena delineato, evidentemente ancora in evoluzione. In proposito, particolarmente rilevanti sono le preoccupazioni, sollevate di recente dal *Securities and Markets Stakeholder Group* (SMSG), intorno al fenomeno c.d. *green-bleaching* (o *greenhushing*)¹⁰⁰. Le imprese, cioè, potrebbero decidere di non comunicare alcune informazioni sulla sostenibilità – anche se positive – per timore degli eventuali e successivi rischi legali¹⁰¹. Si tratta, in sintesi, di una dinamica di mercato speculare a quella di *greenwashing*¹⁰² che, pur presentando minori problemi etici rispetto a quest'ultimo, causa comunque inefficienze allocative delle risorse finanziarie¹⁰³. Tale dinamica può interessare anche le informazioni sulla sostenibilità che siano prospettiche, in particolare se riferite ad obiettivi, impegni o andamenti attesi legati alla

⁹⁸ *Ivi*, par. 75-77.

⁹⁹ *Ivi*, par. 78.

¹⁰⁰ SMSG, *SMSG Advice to ESMA On the ESAs' Call for Evidence on Greenwashing*, 2023, ESMA22-106-4384, par. 11-12.

¹⁰¹ *Ibidem*. Si veda anche F.P.C. DIAS-F.Z. BAGATINI-M.G. PERIN, *Green "Under-Communication": A Systematic Literature Review on Greenhushing*, in *Brazilian Journal of Marketing*, 2025, 24, 387 ss.

¹⁰² L'autorità di vigilanza sui mercati finanziari (ESMA), sulle assicurazioni e pensioni (EIOPA) e sulle banche (EBA) hanno di recente individuato una comune definizione di *greenwashing*, intesa come “a practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants”: ESMA, *Final Report on Greenwashing Response to the European Commission's Request for Input on "Greenwashing Risks and the Supervision of Sustainable Finance Policies"*, 2024, ESMA36-287652198-2699, par. 231. Per una panoramica, si veda E. MACCHIAVELLO, “Greenwashing” in *Investment Intermediation: Investor Protection and the Difficult Role of Enforcement*, in *EUSFiL Law Research Working Paper*, n. 28, 2024.

¹⁰³ A. RASCHE, *The Concepts of Greenwashing and Greenhushing*, 2025, disponibile su www.ssrn.com.

sostenibilità¹⁰⁴. È necessario, pertanto, individuare il corretto equilibrio tra *green-bleaching* e *greenwashing*¹⁰⁵.

Nell'ambito di un sistema normativo che non ha ancora individuato una disciplina specifica in merito, un modello di partenza per un'eventuale *safe harbor* sembra essere l'attuale regime sulle previsioni e sulle stime degli utili, così come previsto dal regolamento delegato sul prospetto, e in particolare dall'Allegato 1 del regolamento delegato (UE) 2019/980¹⁰⁶. Un simile modello sembra essere adeguato sia per le informazioni prospettiche tradizionali sia per quelle sulla sostenibilità.

In primo luogo, l'obbligo di dichiarare se una stima comunicata nel passato sia ancora, o meno, valida (Allegato 1(11.1)) consentirebbe di aggiornare il patrimonio informativo già divulgato, evitando che le società continuino a beneficiare di previsioni, magari anche particolarmente positive, non più veritiere¹⁰⁷. In secondo luogo, i principi di chiarezza e non ambiguità (Allegato 1(11.2)) consentirebbero di escludere dal *safe harbor* le informazioni eccessivamente vaghe o indeterminate¹⁰⁸ – anche considerando che, secondo l'ESMA, le informazioni sulla sostenibilità prospettiche sono spesso parziali o generiche¹⁰⁹. In terzo luogo, l'obbligo di illustrare le principali ipotesi alla base della previsione (Allegato 1(11.2)) eviterebbe di tutelare informazioni non sufficientemente affidabili, per cui i rischi di *greenwashing* sono maggiori.

Particolarmente utili sarebbero, ancora una volta, le regole ad oggetto le ipotesi su cui l'informazione si basa: in particolare, la valorizzazione dei fattori su cui i membri degli organi interni possono influire (Allegato 1(11.2)(a)) consentirebbe agli investitori di prendere decisioni di investimento più consapevoli; la necessità che le ipotesi siano ragionevoli, facilmente comprensibili, specifiche e precise (Allegato 1(11.2)(b)) circoscriverebbe le informazioni protette a quelle

¹⁰⁴ GENOA CENTRE FOR LAW AND FINANCE, *Re: ESMA Call for Evidence on Potential Further Steps Towards Harmonizing Rules on Civil Liability Pertaining to Securities Prospectuses Under the Prospectus Regulation* (ref. ESMA32-117195963-1257), 13.

¹⁰⁵ M. SIRI, *Finanza sostenibile*, cit., 761 ss.; A. FALCHI-G. GROULLEAU-N. MZOGHI, *Why Companies Might Under-Communicate Their Efforts for Sustainable Development and What Can Be Done?*, in *Business Strategy and the Environment*, 2022, 31, 1938 ss.

¹⁰⁶ M. SIRI, *Finanza sostenibile*, cit., 761 ss.

¹⁰⁷ G. MEEKS, *Profit Forecasts in the Annual Report: The Problem of Economic Assumptions*, in *British Accounting Review*, 1998, 30, 159 ss.

¹⁰⁸ ESMA, *Final Report. Technical Advice*, cit., par. 71.

¹⁰⁹ ESMA, *Report. 2022 Corporate Reporting Enforcement and Regulatory Activities*, 2023, ESMA32-63-1385, 158.

effettivamente rilevanti per gli investitori; inoltre, la specificazione dei fattori incerti che potrebbero modificare sostanzialmente il risultato della previsione (Allegato 1(11.2)(c)) avvertirebbe gli investitori dell'incertezza intorno all'informazione. Infine, la comparabilità con le informazioni finanziarie e la coerenza con le pratiche contabili dell'emittente (Allegato 1(11.3)(a) e (b)) consentirebbero, da un lato, l'organicità delle informazioni finanziarie e, dall'altro, l'interconnessione delle informazioni finanziarie con quelle sulla sostenibilità – esigenza, quest'ultima, molto sentita dalle istituzioni europee ¹¹⁰.

Un simile modello di partenza dovrebbe essere arricchito da ulteriori regole, in parte già anticipate dall'ESMA e in parte derivate da alcuni ordinamenti nazionali. Nel primo senso, sarebbe certo necessaria la dichiarazione, proposta dall'ESMA ma presente anche nell'ordinamento inglese, che avverta dell'esistenza di un regime di responsabilità attenuato. Nel secondo senso, incrementerebbe l'affidabilità delle informazioni l'obbligo che esse siano basate (non soltanto su ipotesi, ma anche) su fatti reali – prendendo spunto, in quest'ultimo caso, da alcuni ordinamenti europei, tedesco e francese in particolare ¹¹¹. Ancora, parrebbe necessaria la regola, di ispirazione inglese, secondo cui si considerano protette esclusivamente le informazioni la cui falsità o il cui carattere fuorviante possano essere determinati esclusivamente con riferimento ad eventi o circostanze successivi alla pubblicazione dell'informazione medesima.

Non sempre le regole previste in altri ordinamenti stranieri, tuttavia, paiono potenzialmente coerenti e adeguate a quello europeo. Da un lato, un regime che prenda come modello la *bespeaks-caution doctrine* rischierebbe, nel contesto dell'Unione europea, di creare più dubbi che certezze ¹¹². Pur se ormai risalente, la teoria non ha ancora permesso, nemmeno nell'ordinamento statunitense, il consolidamento di indirizzi interpretativi e giurisprudenziali certi ed univoci ¹¹³. Pertanto, e considerando a maggior ragione che nel contesto dell'Unione europea costituirebbe una novità, un simile trapianto normativo potrebbe risultare

¹¹⁰ ESMA, *Final Report. Guidelines on Enforcement of Sustainability Information*, 2024, ESMA 32-992851010-1600; si veda, in particolare, la prima linea guida (82-83).

¹¹¹ P. LUCANTONI, *Prospectus Liability in Europe: The Relevant Breach of Duties*, in *Journal of European Tort Law*, 2023, 14, 169-170.

¹¹² Senza, questo, considerare le possibili esternalità negative della *bespeaks-caution doctrine*, che potrebbe, cioè, disincentivare gli investitori a confidare nelle informazioni prospettiche: W.G. COUTURE, *Materiality and A Theory of Legal Circularity*, in *University of Pennsylvania Journal of Business Law*, 2015, 17, 474.

¹¹³ A.W. FINE, *A Cautionary Look*, cit., 521 ss.

in contrasto con l'obiettivo, individuato dall'ESMA, di costruire un regime con i minori dubbi applicativi possibili ¹¹⁴.

Dall'altro, sorgono alcuni dubbi sull'opportunità e necessità di introdurre un riferimento allo *standard* dell'investitore ragionevole, così come previsto dalle nuove regole inglesi sul prospetto informativo. Pur se già presente nel contesto europeo con riferimento alla definizione di informazione privilegiata nella disciplina sugli abusi di mercato (art. 7, par. 4, *Market Abuse Regulation* – MAR) ¹¹⁵, si tratta di uno *standard* tipico di un sistema di *common law* ¹¹⁶, in cui la giurisprudenza ha tradizionalmente maggiore abitudine ad interpretare, anche in senso evolutivo, le clausole indeterminate della disciplina sui mercati finanziari ¹¹⁷. Proprio come nel contesto degli abusi di mercato, il rischio sarebbe quello di introdurre una clausola che, da un lato, non comporti particolare certezza giuridica, soprattutto in un sistema di *civil law*, e, dall'altro, risulti essere di scarsa utilità pratica ¹¹⁸.

Un regime di responsabilità così delineato per le informazioni prospettiche permetterebbe, in primo luogo, un equilibrio fra l'incentivo alla comunicazione di dati rilevanti, sia finanziari sia sulla sostenibilità, e la protezione dell'investitore. In secondo luogo, si otterrebbe un *safe harbor* che, pur con le necessarie flessibilità, non rischierebbe di essere *over-inclusive* – così da non incentivare, cioè, la comunicazione (e la protezione) di informazioni ulteriori a quelle davvero rilevanti per gli investitori ¹¹⁹. In terzo luogo, utilizzare come modello una

¹¹⁴ ESMA, *Final Report. Technical Advice*, cit., parr. 72-73.

¹¹⁵ M. VENTORUZZO, *Reflection on the Notion of Reasonable Investor*, in *Rivista delle società*, 2019, V-VI, 1296 ss.

¹¹⁶ M. VENTORUZZO, *Comparing Insider Trading in the United States and in the European Union: History and Recent Developments*, in *ECGI Law Working Paper*, n. 257, 2014.

¹¹⁷ R. LA PORTA-F. LOPEZ-DE-SILANES-A. SHLEIFER, *The Economic Consequences of Legal Origins*, in *Journal of Economic Literature*, 2008, 46, 285 ss.

¹¹⁸ Poiché, come accennato nel testo, una clausola quale quella dell'investitore ragionevole è tipica di un sistema di *common law*, la letteratura anglosassone, in particolare statunitense, si interroga ormai da anni su di essa. Per qualche esempio, si veda S.S. GUAN, *Finfluencer and the Reasonable Retail Investor*, in *University of Pennsylvania Law Review Online*, 2024, 172, 43 ss.; T.C.W. LIN, *Reasonable Investor(s)*, in *Boston University Law Review*, 2015, 95, 461 ss.; B. BLACK, *Behavioral Economics and Investor Protection: Reasonable Investor, Efficient Market*, in *Loyola University Chicago Law Journal*, 2013, 22, 1493 ss.; J.M. HEMINWAY, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, in *William & Mary Journal of Women and the Law*, 2009, 15, 291 ss.

¹¹⁹ Obiettivo, questo, fondamentale con riferimento a qualsiasi divulgazione nel contesto

disciplina vigente ormai da anni nel contesto europeo, quale quella sulle stime e sulle previsioni degli utili, consentirebbe agli attori dei mercati di interpretare ed applicare con minori dubbi ed incertezze le nuove regole. Infine, un simile regime permetterebbe di regolare nello stesso modo sia le informazioni prospettiche finanziarie in senso stretto sia quelle sulla sostenibilità, considerando, in particolare, che le seconde scontano le medesime criticità ed incertezze delle prime ¹²⁰.

5. Conclusioni.

La disciplina delle informazioni sulla sostenibilità prospettiche deve assumere, a mo' di modello di partenza, quella delle informazioni tradizionali prospettiche. In entrambi i casi, infatti, il quadro giuridico si pone l'obiettivo di individuare il corretto bilanciamento tra incentivo alla comunicazione delle informazioni, da un lato, e protezione degli investitori dall'altro.

In proposito, gli ordinamenti giuridici si stanno muovendo a velocità differenti. L'ordinamento statunitense, che da anni conosce specifici regimi per le informazioni prospettiche, ha gradualmente incluso in questi ultimi anche alcune informazioni sulla sostenibilità. L'ordinamento inglese, invece, ha elaborato assai recentemente un regime speciale di responsabilità per le informazioni prospettiche, che si applicherà anche alle informazioni sulla sostenibilità.

L'ordinamento europeo, infine, si trova oggi in una fase di evoluzione, alla ricerca, cioè, di un eventuale *safe harbor* per le informazioni prospettiche. Partendo dagli archetipi giuridici anglosassoni, nonché dall'attuale disciplina europea sulle informazioni prospettiche tradizionali, l'ordinamento dell'UE potrebbe finalmente introdurre un regime efficiente e idoneo a individuare il giusto temperamento. La soluzione assumerebbe a mo' di modello il "vecchio" mondo della finanza tradizionale, per poi adattarlo alle esigenze del "nuovo" mondo della finanza sostenibile – dimostrando, ancora una volta, come le complementarità tra i due mondi sia necessaria per assicurare che le informazioni comunicate siano coerenti, nel corso degli anni, con le mutevoli esigenze informative degli investitori.

dei mercati finanziari: L. ENRIQUES-S. GILOTTA, *Disclosure and Financial Markets Regulation*, in N. MOLONEY-E. FERRAN-J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation*, Oxford, 2015, 513 ss.

¹²⁰ ESMA, *Consultation on Draft Technical Advice Concerning the Prospectus Regulation and on Updating the CDR on Metadata*, 2024, ESMA32-117195963-1276.

IL RAPPORTO TRA LA *SOFT LAW* INTERNAZIONALE E IL DIRITTO UE IN MATERIA ESG: IL PARTICOLARE *STATUS DEI REPORT* SCIENTIFICI DELL'IPCC

Maria Chiara Accardo

SOMMARIO: 1. La *soft law* internazionale in materia ESG. – 2. Il consolidamento degli obblighi ESG nella *hard law*: il caso dell'UE. – 3. Il particolare caso della materia climatica: i *report* scientifici nelle norme di *hard law* e nella *climate change litigation*. Il ruolo dell'IPCC. – 4. Conclusioni: la natura duplice dei *report* scientifici in materia climatica, uno stimolo per la Corte di giustizia UE?

1. *La soft law internazionale in materia ESG.*

L'attuale architettura giuridica della materia ESG¹ ha radici risalenti, come emerge già dai precedenti contributi del presente volume: è, infatti, noto come nel corso dei decenni la sensibilità sulle tematiche ambientali (E), sociali (S) e di *governance* (G) sia notevolmente aumentata anche e soprattutto in relazione

¹ Si tratta, per vero, di un'etichetta sotto la quale ricadono i tre pilastri fondamentali della sostenibilità aziendale: aspetti *environmental*, *social*, e di *governance*. Sebbene di difficile definizione, la nozione di ESG non è assimilabile a quelle di *business and human rights* e *corporate social responsibility*. Queste ultime implicano – meramente, per così dire – l'esistenza di una responsabilità in capo all'impresa nella forma di una intersezione tra attività economica e rispetto di diritti umani e (per la seconda figura anche) ambiente. Per vero la materia ESG costituisce un ambito più ampio di situazioni e, in particolare, di possibilità, dal momento che sotto il suo "cappello" la tutela delle sfere sociale e ambientale sarebbero piuttosto una vera e propria opportunità anche per gli stessi investitori della società, innescando meccanismi virtuosi all'interno del ciclo produttivo con ricadute positive in termini di profitto. In generale cfr. R. ROLLI, *L'impatto dei fattori ESG. Modelli di governance e nuove responsabilità*, Bologna, 2020; ID., *Dalla Corporate Social Responsibility alla Sustainability, alla Environmental, Social and Governance (ESG)*, in *Corporate Governance*, 2022; G. CARELLA, *Art. 19 della risoluzione dell'Institut de droit international su Human Rights and Private International Law: attuazione della responsabilità sociale d'impresa e diritto internazionale privato*, in *Dir. umani e dir. internaz.*, 2023, 169 ss.

ad una loro declinazione divenuta “unitaria”, afferente cioè ad ambiti così intimamente collegati da assurgere ad unica – ancorché trina – disciplina.

Del resto, l'esigenza di onerare i principali operatori economici delle nazioni più sviluppate di una responsabilità sociale di impresa in termini di “integrazione su base volontaria, da parte delle imprese, delle preoccupazioni sociali e ambientali nelle loro operazioni commerciali e nei loro rapporti con le parti interessate”² risale già alla seconda metà del secolo scorso³, allorché si affermò l'idea che la generazione di profitto per soci ed investitori da parte delle grandi società si dovesse misurare con le istanze di tutela dei diritti umani e dell'ambiente. La tendenza alla minimizzazione dei costi e alla massimizzazione di produzione e guadagno, da un lato, e il perseguimento di economie di scala, dall'altro, stavano già all'epoca, infatti, conducendo ad uno sfruttamento sconsiderato di manodopera umana e risorse naturali, favorito proprio da quella struttura a catena dei rapporti tra società tipica del mercato globalizzato, ossia di quel mercato in grado di plasmare le attività economiche organizzandole su base sovranazionale e inducendole ad avvalersi di una rete di rapporti commerciali essa stessa transnazionale.

Colta a livello di studio la difficile sostenibilità di un modello di *business* improntato esclusivamente alla massimizzazione del profitto, si rendeva necessaria la diffusione di tale raggiunta consapevolezza *latu sensu* scientifica presso le imprese stesse operanti nelle *value chains* globalizzate: in altre parole, che fossero codificati taluni valori condivisi in grado di coniugare finalmente esigenze produttive di impronta capitalistica, da una parte, e tutela sociale ed ecosistemica, dall'altra.

In tale rinnovato contesto, nelle diverse sedi internazionali si sono moltiplicati documenti, dichiarazioni, carte, raccomandazioni – in qualsivoglia modo denominati – volti a coniugare *i*) modelli di *business*, *ii*) diritti umani, *iii*) questione ambientale. Tra gli altri si possono citare i Principi Guida delle Nazioni Unite su Imprese e Diritti Umani⁴, il Patto mondiale delle Nazioni

² Libro Verde “Promuovere un quadro europeo per la responsabilità sociale delle imprese”, COM (2001) 366 definitivo, 18 luglio 2001.

³ Le prime teorizzazioni dottrinarie risalgono in effetti agli anni Cinquanta del secolo scorso e in particolare al lavoro di H.R. BOWEN, *Social responsibilities of the businessman*, New York, 1953.

⁴ I Principi guida delle Nazioni Unite su imprese e diritti umani sono uno strumento composto da 31 principi che implementano il quadro “Protezione, rispetto e rimedio” dell'ONU sulla questione dei diritti umani, delle società transnazionali e di altre imprese. Il testo – adottato dal Consiglio dei diritti umani delle NU all'unanimità nel 2011 – è reperibile online al sito guidingprinciplesbusinesshr_en.pdf (ohchr.org).

Unite⁵, l'Agenda ONU 2030 per lo sviluppo sostenibile⁶; le Linee guida OCSE per le imprese multinazionali sulla condotta responsabile d'impresa, la Guida OCSE sul dovere di diligenza per la condotta d'impresa responsabile⁷; la Dichiarazione tripartita di principi sulle imprese multinazionali e la politica sociale dell'Organizzazione Internazionale del lavoro⁸; le Linee guida dell'Organizzazione Internazionale per la Standardizzazione 26000 sulla responsabilità sociale di impresa⁹.

In ragione di tratti indiscutibilmente comuni – l'indirizzamento della condotta degli operatori destinatari mediante una normazione per principi e *standard*, la conseguente in-determinatezza degli obblighi, il pedissequo monito

⁵ Proposto per la prima volta nel 1999 presso il *World Economic Forum* di Davos dall'ex segretario delle Nazioni Unite Kofi Annan e reso operativo l'anno successivo, si tratta di un insieme di dieci principi che ispirino le società multinazionali ad ottenere valore sostenibile all'interno delle maggiori sfide su scala globale, garantendo un quadro etico e valoriale comune al fine di definire la sostenibilità societaria. Ad oggi, è l'iniziativa in tal senso più partecipata con un numero (crescente) di firmatari, contando ad oggi più di 14mila società e 3mila800 soggetti non commerciali, residenti in 160 paesi diversi.

⁶ Adottata con risoluzione dell'Assemblea generale il 25 settembre 2015 da 193 Paesi delle Nazioni Unite, contiene i 17 Obiettivi di Sviluppo Sostenibile che forniscono alle aziende i valori e la visione necessari per aiutarle a dare un contributo significativo alle persone e al pianeta. Hanno, in particolare, il merito di fornire un giudizio sull'insostenibilità dell'attuale modello di sviluppo, non solo sul piano ambientale, ma anche su quello economico e sociale, superando in questo modo definitivamente l'idea che la sostenibilità sia unicamente una questione ambientale e affermando una visione integrata delle diverse dimensioni dello sviluppo.

⁷ OECD, *Linee guida OCSE per le imprese multinazionali sulla condotta responsabile d'impresa*, Paris, 2024 e *Guida dell'OCSE sul dovere di diligenza per la condotta d'impresa responsabile*, Paris, 2018; reperibili, rispettivamente, agli indirizzi <https://doi.org/10.1787/cdce11ac-it> e <https://doi.org/10.1787/1b9c59cb-it>. I due documenti incoraggiano i contributi positivi che le imprese possono apportare al progresso economico, ambientale e sociale ed a ridurre al minimo gli impatti negativi nelle aree della responsabilità d'impresa, inclusi i diritti umani, i diritti del lavoro, l'ambiente, la corruzione, gli interessi dei consumatori, la divulgazione, la scienza e la tecnologia, la concorrenza, la fiscalità, il cambiamento climatico, la biodiversità, lo sviluppo tecnologico, l'integrità aziendale e la due diligence nella catena di fornitura.

⁸ OIL, *Dichiarazione tripartita di principi sulle imprese multinazionali e la politica sociale*, Roma, 2022. Si rivolge in particolare a imprese multinazionali, governi e organizzazioni dei datori di lavoro e dei lavoratori, e il suo obiettivo è il raggiungimento di standard per un lavoro dignitoso, una crescita economica inclusiva e lo sviluppo sostenibile.

⁹ UNI EN ISO 26000 Guida alla responsabilità sociale, pubblicata nel 2020 e derivante dalla UNI/PdR 18:2016; si tratta di un modello applicativo rivolto a tutte le aziende di carattere internazionale che vogliano dotarsi di un sistema di governance efficace e affidabile, grazie a cui sviluppare e definire una strategia di crescita e sviluppo sostenibile.

(*rectius*, auspicio) a che siano gli Stati a adottare in fine misure volte a implementarli – tutti questi strumenti rientrano a buon diritto¹⁰ nella *soft law* di livello internazionale. Si tratta, in sostanza, di una esortazione agli Stati al rispetto dei diritti umani [e dell'ambiente] (primo pilastro); parallelamente, di una responsabilizzazione delle imprese (secondo pilastro); quindi, dell'adozione da parte di queste ultime di sistemi di gestione interna inclusivi di quelle prospettive (terzo pilastro)¹¹.

In altre parole, proprio in ragione della loro natura indeterminata non suscettibile come tale di assurgere a diritto positivo, trattasi di *standard* volutamente non definiti volti sì ad ispirare la condotta dei soggetti cui si rivolgono, ma senza coercizione; senza, cioè, affidarne la applicazione ad un apparato sanzionatorio repressivo di comportamenti eventualmente difformi.

In questo contesto è vero che nel 2014 il Consiglio dei diritti umani delle Nazioni Unite adottò una risoluzione finalizzata ad insediare un Gruppo di Lavoro per l'adozione di un trattato di diritto internazionale volto a regolamentare le attività delle imprese multinazionali: il tentativo rappresenta senza dubbio un esempio di *hardening*¹² della *soft law* a mezzo del diritto internazionale con l'approvazione di un testo unitario di natura vincolante di *standard* finalmente condivisi ed uniformi applicabile in tutti gli Stati (e, vieppiù, da parte di tutti gli Stati) aderenti. Tuttavia, è vero anche che fu forte – e tutt'ora lo è – la resistenza nei confronti dell'iniziativa in particolare ad opera di quegli Stati ove hanno sede le grandi imprese interessate, così i lavori, a dieci anni dall'avvio, procedono a rilento¹³.

¹⁰ A voler seguire la dottrina assolutamente maggioritaria, pur non senza qualche voce contraria – comunque meritevole di segnalazione – con particolare riferimento agli Obiettivi di Sviluppo Sostenibile di cui all'Agenda 2030 dell'ONU (v. nota 7) su cui cfr. D. FRENCH, *The Global Goals: Formalism Foregone, Contested Legality and "Re-Imaginations of International Law"*, in *Ethiopian Yearbook of International Law*, 2017, 164-165. L'Autore, non ritenendoli annoverabili tra le norme di *soft law*, in quanto manchevoli di quel minimo grado di "legalità formale", li considera, piuttosto, mera cristallizzazione di impegni di natura politica.

¹¹ La struttura in pilastri, si rammenta, è propria del sistema dei Principi Guida dell'ONU sopracitati.

¹² In generale sul tema cfr. C. MACCHI-C. BRIGHT, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in L. MAGI-D. RUSSO-N. LAZZERINI (eds.), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, Brill, 2020.

¹³ Gli aggiornamenti e il calendario delle sessioni (quella di fine ottobre 2025 sarà l'undicesima) sono disponibili al sito <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-ontnc>. In tema, si vedano *ex multis* E. CORCIONE, *La tutela dei diritti umani nelle catene globali*

A fronte di questo panorama di normazione – per così dire – “verticale”, meritano anche una qualche considerazione i tentativi regolatori in materia ESG di natura viceversa “orizzontale”, scaturenti, cioè, da quelle analisi (non giuridiche, bensì) economiche¹⁴ che evidenziano da tempo come le aziende che si mostrino responsabili verso i temi dei diritti umani e dell’ambiente presentino anche *i*) una migliore capacità a lungo termine di gestione dei rischi e *ii*) una superiore attrattività commerciale agli occhi dei consumatori consapevoli. Il pregio di queste analisi risiede nel mostrare come quelle che giuridicamente parrebbero necessità, se assunte in una prospettiva imprenditoriale, si trasformerebbero in opportunità sia di crescita che di competitività. In effetti, a fronte di una evoluzione del mercato dei consumatori e degli investitori in favore di modelli di *business* sostenibili, gli operatori si stanno orientando *motu proprio* verso *policies* commerciali in grado anche di tutelare il lavoro e assicurare un impiego non distruttivo di materie prime e (quindi) ambiente¹⁵.

2. Il consolidamento degli obblighi ESG nella hard law: il caso dell’UE.

A volerla osservare dal punto di vista del sistema delle fonti, che la spinta verso comportamenti imprenditoriali responsabili e virtuosi provenga in

del valore, in G. ADINOLFI-S.M. CARBONE-F. MUNARI-G. SACERDOTI-M. VELLANO-G. VENTURINI (a cura di), *Diritto internazionale dell’economia*, Torino, 2024, 104-107; G. BRUNO, *More ‘Treaty Tantrums’ or a Small Ste Forward? The Eighth Session of the UN Open-ended Intergovernmental Working Group on Business and Human Rights*, in *Dir. umani e dir. internaz.*, 2023; M. FASCIGLIONE, *Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights*, in *Dir. umani e dir. internaz.*, 2018.

¹⁴ La cui summa può consultarsi tra gli altri in M. TONELLO-T. SINGER, *The Business Case for Corporate Investment*, in *ESG Practices*, July 23, 2015, <https://www.conference-board.org>.

¹⁵ Tipicamente, e senza pretesa di ulteriore approfondimento: nell’impossibilità di controlli capillari all’interno della catena produttiva in cui sono inserite, le imprese intraprendono due tipi di strade: la prima fa ricorso all’adozione di codici di condotta interni, anche – comprensibilmente – nell’ottica di accreditarsi sulla scena internazionale come operatori economici virtuosi; l’altra si affida a schemi volontari di sostenibilità (SVS), ovvero sistemi privati di certificazione in ragione dei quali, operate le opportune verifiche, soggetti certificatori rilasciano una dichiarazione di conformità dell’impresa e del suo modello di business a determinati standard in materia di rispetto di diritti umani e ambiente. Si vedano sul tema: A. PETERS *et al.* (eds.), *Non-State actors as standard setters*, Cambridge, 2010; D. BRINKS *et al.* (eds.), *Power, participation and private regulatory initiatives: human rights under supply chain capitalism*, Philadelphia, 2021; E. PARTITI, *Regulating Transnational Sustainability Regimes*, Cambridge, 2022.

particolare da atti (solo) para-normativi¹⁶ e pertanto non vincolanti¹⁷ costituisce – pur fisiologico – un aspetto interessante della questione, senza dubbio legato alla accresciuta complessità delle relazioni internazionali: la complessità chiede di per sé di essere regolata da strumenti innovativi, flessibili e, tipicamente, di compromesso, *soft*, appunto. Del resto, a partire almeno dalla fine del secolo scorso si registra una moltiplicazione degli attori internazionali, i quali – come ricordato sopra – non sono più solamente Stati sovrani o enti loro ricollegabili, ma anche imprese multinazionali, organizzazioni non governative e *partnerships* pubblico-private, che hanno trovato terreno fertile nell’epoca della globalizzazione economica e che necessitano, a differenza e più degli attori tradizionali, di accedere ad una regolamentazione che sia contemporaneamente flessibile, tecnica, di celere formazione¹⁸.

Per le caratteristiche di cui si è detto la *soft law* è capace di incorporare in sé la risposta (*rectius*, la soluzione) a queste esigenze. Ma vi è di più, in realtà. Da un lato, pur manchevole della cogenza tipica degli strumenti di *hard law*, la natura “morbida” della *soft law* la porta ad essere naturalmente una componente atipica dell’ordinamento giuridico, capace di assurgere a “pre-diritto” in vista della formazione di regole appunto *hard*, ossia codificate¹⁹; dall’altro, con riferimento specifico all’ambito ESG, le norme *soft* tendono a declinarsi piuttosto come “para-diritto”: una dimensione parallela (e, per vero, complementare²⁰ rispetto) a quella delle norme giuridiche vincolanti, capace di fornire essa stessa soluzioni a problemi di portata globale mediante la propria autonoma e peculiare capacità (non già impositiva, ma) persuasiva.

Se lo scenario del diritto internazionale in tema di ESG restituisce allora da

¹⁶ L’impiego nel testo del prefisso “para-” è assunto nel significato comune riportato dal Vocabolario online “Treccani” al mero fine di evidenziare “somiglianza, affinità o anche relazione secondaria”, nello specifico tra strumenti regolatori *hard* o *soft*.

¹⁷ Al netto del citato tentativo ancora in corso di codificare in un trattato internazionale gli *standard* in parola.

¹⁸ Per una più ampia riflessione sulle nuove esigenze di regolamentazione dei fenomeni economici su scala globale cfr. E. TRAMONTANA, *Il soft law e la resilienza del diritto internazionale*, in *Ars interpretandi*, 2, 2017. Con particolare riferimento allo spazio della *soft law* in materia ambientale si v. M. ELIANTONIO, *Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of It?*, in *Yearbook of European Law*, vol. 37, n. 1, 2018, 496-524.

¹⁹ Qui da intendersi come regola cogente di qualsiasi tipo, anche di diritto internazionale consuetudinario.

²⁰ Cfr. *infra*, p. 148.

decenni una situazione di sostanziale carenza di capacità regolatoria ad opera dei soggetti cui la regolamentazione competerebbe con la conseguente necessità di un ricorso alternativo a strumenti solo para-giuridici, parzialmente diverso è il caso del *jus positum* a livello regionale e nazionale.

Partendo dagli ultimi, di base gli ordinamenti interni hanno approcciato differentemente la questione della sostenibilità ambientale degli attuali modelli di *business*, mostrando preferenza per le discipline di *hard law*: nel tempo sono state gradualmente approvate nei diversi Paesi normative settoriali ascrivibili alla materia ESG, talvolta proprio in dichiarato recepimento dei principi non vincolanti di *soft law* internazionale in tema di gestione sostenibile dell'attività di impresa²¹.

Similmente – ciò che qui più ci interessa – si è mosso il legislatore dell'UE. L'Unione si è dotata già da inizio millennio di una serie di atti di diritto derivato su aspetti specifici della sostenibilità ambientale delle attività imprenditoriali: dalla direttiva sul sistema per lo scambio di quote di emissioni dei gas a effetto serra²² del 2003, a quella sulla comunicazione di informazioni di carattere non finanziario del 2014²³ passando per la direttiva sulla valutazione dell'impatto ambientale del 2011²⁴.

Tuttavia, nel contesto UE il vero cambio di passo è avvenuto con la recente (2024) direttiva sulla cd. *Corporate Social Due Diligence*²⁵ (CSDDD) che per la

²¹ Si v. C. MACCHI-C. BRIGHT, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, cit., 2020, il riferimento è, ad esempio, agli strumenti legislativi adottati in relazione al contrasto alla schiavitù moderna, alla protezione del fanciullo e, in generale, all'obbligo di *due diligence* delle imprese per il rispetto dei diritti umani.

²² Direttiva 2003/87/CE del Parlamento europeo e del Consiglio, del 13 ottobre 2003, che istituisce un sistema per lo scambio di quote di emissioni dei gas a effetto serra nella Comunità e che modifica la direttiva 96/61/CE del Consiglio.

²³ Direttiva 2014/95/UE del Parlamento europeo e del Consiglio, del 22 ottobre 2014, recante modifica della direttiva 2013/34/UE per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni, in un certo qual modo antesignana della *CSRD* di cui *infra* alla nota 27 in quanto disciplinante la *disclosure* in materia di sostenibilità (pur mantenendo ancora la dicitura “vaga” di “informazioni di carattere non finanziario”).

²⁴ Direttiva 2011/92/UE del Parlamento europeo e del Consiglio, del 13 dicembre 2011, concernente la valutazione dell'impatto ambientale di determinati progetti pubblici e privati.

²⁵ Direttiva (UE) 2024/1760 del Parlamento europeo e del Consiglio, del 13 giugno 2024, relativa al dovere di diligenza delle imprese ai fini della sostenibilità e che modifica la direttiva (UE) 2019/1937 e il regolamento (UE) 2023/2859 già oggetto di trattazione in questo volume.

prima volta ²⁶ recepisce in un atto a carattere vincolante “i principi contenuti negli strumenti internazionali di *soft law* in materia di *business and human rights*, senza limitazioni relative al settore di operatività delle imprese interessate, né relative al diritto tutelato” ²⁷.

La direttiva CSDDD ha il pregio di riunire sotto la propria architettura normativa proprio quelle regole ESG di origine *soft* in grado di porre in capo (agli Stati membri in prima battuta e per via mediata) alle imprese obblighi in materia ambientale, sociale e di *governance* – questa volta sì – determinati e cogenti, riuscendo a riempire di significato giuridico ²⁸ i sopra menzionati *standard* internazionali di tutela sociale e ambientale e di correlata responsabilità delle imprese: la direttiva – nel presupposto che gli impatti negativi che le società potrebbero generare all’interno del proprio ciclo produttivo finirebbero per afferrare diritti umani e/o obblighi e divieti in materia ambientale considerati da strumenti di *hard law* quali le convenzioni di diritto internazionale ²⁹ – proceduralizza il sistema di loro individuazione, valutazione, prevenzione, arresto ed eventuale rimedio *a posteriori*. La *due diligence* viene imposta non solo alle società aventi determinati requisiti dimensionali ³⁰, ma anche a tutti i loro *partner* commerciali nella catena del valore nella quale esse sono incardinate e sulla cui diligenza hanno il dovere di vigilare.

Il principale strumento di *private enforcement* introdotto al fine di sanzionare le violazioni degli obblighi imposti dalla direttiva è la previsione di una vera e propria clausola di responsabilità civile nei confronti delle società destinatarie della normativa: se l’impresa non rispetta i propri obblighi di prevenire e porre

²⁶ Per vero già la direttiva sul *Corporate Sustainability Reporting* aveva dimostrato – pur con specifico riferimento alla trasparenza finanziaria – di volersi misurare con l’intera materia ESG, in ossequio all’impostazione inaugurata con il regolamento (UE) 2019/2089: direttiva (UE) 2022/2464 del Parlamento europeo e del Consiglio del 14 dicembre che modifica il regolamento (UE) n. 537/2014, la direttiva 2004/109/CE, la direttiva 2006/43/CE e la direttiva 2013/34/UE per quanto riguarda la rendicontazione societaria di sostenibilità. In tema cfr. tra gli altri F. SALERNO, *Gli obblighi di “attestazione” della rendicontazione di sostenibilità nella CSRD*, in *Nuovo dir. soc.*, 2, 2024; F. CECI, *Dalle dichiarazioni di carattere non finanziario alla rendicontazione societaria di sostenibilità: una prima lettura della direttiva (UE) 2022/2464*, in *BlogDUE*, 2 marzo 2023.

²⁷ E. CORCIONE, *La tutela dei diritti umani nelle catene globali del valore*, cit., 166.

²⁸ Di fatto rinunciando alla regolamentazione per mezzo di un “pre-” o “para-” diritto.

²⁹ Si v. in particolare l’allegato alla direttiva in parola che stila un vero e proprio catalogo della normativa di rilievo internazionale sulle tematiche sociali e ambientali.

³⁰ Tenzialmente, con riferimento al fatturato annuo ottenuto nel mercato UE e al numero dei dipendenti, art. 2 della direttiva.

fine agli impatti negativi – tanto effettivi quanto potenziali – delle proprie attività³¹ e se, a seguito di tale inadempimento, si verifica un impatto negativo dannoso, l'impresa stessa ne dovrà essere ritenuta responsabile³².

Al di là delle ulteriori caratteristiche tecniche della direttiva³³ e delle critiche che le si potrebbero muovere (e le sono state mosse)³⁴, ciò che conta ai fini della presente ricerca è evidenziare che il sostrato regolatorio da cui la stessa direttiva trae linfa è proprio rappresentato da quella *soft law* formatasi sul piano internazionale di cui si è detto sopra: è agevole constatare come la tipologia di obblighi imposti dalla direttiva in capo alle imprese ricalchi l'impostazione propria dei

³¹ E delle attività degli altri soggetti economici presenti nella *value chain* di riferimento, salvo il caso in cui il danno sia stato causato unicamente da un partner commerciale nella catena di attività cui partecipa detta società: in quest'ipotesi la responsabilità civile della società è esclusa.

³² A meri fini di completezza si segnala qui anche come la direttiva preveda anche un regime di controllo pubblicistico sull'operato delle società coinvolte fondato su un sistema di autorità indipendenti con poteri di supervisione, vigilanza e sanzionatori.

³³ Per le quali, oltre che a quanto già nel presente volume, si rimanda altresì a E. CORCIONE, *La tutela dei diritti umani nelle catene globali del valore*, cit.; F. CECI, *Luci e ombre della direttiva sul dovere di diligenza ai fini della sostenibilità*, in *Quaderni AISDUE*, 2024; B. MELE, *Rilevanza e pervasività dei codici di condotta nella CSDDD*, in *Corporate governance*, 2025, 95-106; N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *Dir. umani e dir. internaz.*, 3, 2023; G. CARELLA, *La responsabilità civile dell'impresa transnazionale per violazioni ambientali e di diritti umani: il contributo della proposta di direttiva sulla due diligence societaria a fini di sostenibilità*, in *Freedom, Security & Justice: European Legal Studies*, n. 2, 2022; C.G. CORVESE, *La proposta di direttiva sulla Corporate Sustainability Due Diligence e i suoi (presumibili) effetti sul diritto societario italiano*, in XIV Convegno annuale ODC "Imprese, mercati e sostenibilità: nuove sfide per il diritto commerciale" – 26 e 27 maggio 2023 – Università degli Studi Roma Tre – Atti del Convegno 2023; C.G. CORVESE, *La sostenibilità ambientale e sociale delle società nella proposta di Corporate Sustainability Due Diligence Directive (dalla «insostenibile leggerezza» dello scopo sociale alla «obbligatoria sostenibilità» della Due Diligence)*, in *Banca Impresa Società*, 2022, 391-432; T. PANTAZI, *The proposed Corporate Sustainability Due Diligence Directive and its provisions on civil liability and private international law in particular*, in N. GRMELOVÁ (ed.), *Perspectives of law in business and finance*, 2022, 33-144.

³⁴ In via di mera ricognizione, le maggiori criticità in merito all'efficacia della CSDDD sono quelle relative: al suo campo di applicazione soggettivo (che attualmente – dati i requisiti molto elevati posti in termini di fatturato e numero di dipendenti – vedrebbe incluse solo una piccola percentuale di imprese operanti all'interno di catene del valore), e alla sua effettiva applicabilità in ragione del coordinamento con il regime generale di diritto internazionale privato di cui all'art. 4 del regolamento Bruxelles I-bis che prevede la giurisdizione dell'autorità del luogo in cui la società in ipotesi convenuta abbia la propria residenza (come noto, spesso non all'interno del territorio dell'UE).

Principi Guida dell'ONU (pur se riferiti solamente al fattore sociale delle tematiche ESG), in modo particolare i principi dal 17 al 21, i quali scandiscono esattamente il processo di *due diligence* che le imprese devono tenere.

Di più: la stessa nozione di *due diligence* societaria – lungi dal costituire nozione autonoma – è interamente mutuata da quella già definita non solo nei Principi Guida delle Nazioni Unite, ma anche nelle linee guida OCSE e nella dichiarazione tripartita OIL sopra citate.

Ed ancora: il rapporto di osmosi giuridica tra la legislazione *hard* europea e gli strumenti *soft* internazionali è apertamente ammesso all'interno dei considerando³⁵ che precedono il corpo della direttiva e alla luce dei quali la stessa deve essere interpretata e applicata.

In conclusione: pare chiaro – oltrech  pregevole – l'intento del legislatore UE di *i*) riempire di significato i principi ESG, *ii*) dare concretezza agli obblighi

³⁵ Si leggano in particolare i considerando da n. 5 a n. 8, che vale qui la pena riportare: 5 “Le norme internazionali vigenti in materia di condotta d’impresa responsabile specificano che le società dovrebbero tutelare i diritti umani e stabiliscono le modalità con cui dovrebbero inserire la protezione dell’ambiente in tutte le attività che svolgono e le catene del valore cui partecipano. I principi guida delle Nazioni Unite su imprese e diritti umani (principi guida delle Nazioni Unite) riconoscono la responsabilità delle società di esercitare il dovere di diligenza in materia di diritti umani individuando, prevenendo e attenuando gli impatti negativi delle loro attività sui diritti umani e rendendo conto delle modalità con cui affrontano tali impatti. I principi guida delle Nazioni Unite stabiliscono che le imprese debbano evitare di violare i diritti umani e debbano affrontare gli impatti negativi sui diritti umani che hanno causato, cui hanno contribuito o cui sono collegate nel contesto delle proprie attività, di quelle delle proprie filiazioni e tramite i rapporti d’affari diretti e indiretti che intrattengono”; 6 “Il concetto di dovere di diligenza in materia di diritti umani è stato esposto e sviluppato ulteriormente nelle linee guida dell’Organizzazione per la cooperazione e lo sviluppo economico (OCSE) destinate alle imprese multinazionali (linee guida per le imprese multinazionali), che hanno esteso l’applicazione del dovere di diligenza ai temi dell’ambiente e della governance. Le linee guida dell’OCSE sul dovere di diligenza per la condotta d’impresa responsabile (linee guida per la condotta d’impresa responsabile) e le linee guida settoriali sono quadri riconosciuti a livello internazionale che stabiliscono misure pratiche relative al dovere di diligenza per assistere le società a individuare, prevenire e attenuare gli impatti, siano essi effettivi o potenziali, e rendere conto delle modalità con cui li affrontano nel contesto delle loro attività e catene di approvvigionamento e di altri rapporti d’affari. Il concetto di dovere di diligenza è altresì integrato nelle raccomandazioni della dichiarazione tripartita di principi sulle imprese multinazionali e la politica sociale dell’Organizzazione internazionale del lavoro (OIL)”; 7 “Tutte le imprese hanno la responsabilità di rispettare i diritti umani, che sono universali, indivisibili, interdipendenti e interconnessi”; e 8 “Gli obiettivi di sviluppo sostenibile delle Nazioni Unite, adottati da tutti gli Stati membri dell’ONU nel 2015, comprendono la promozione di una crescita economica duratura, inclusiva e sostenibile. L’Unione si è prefissa lo scopo di conseguire gli obiettivi di sviluppo sostenibile delle Nazioni Unite. Il settore privato contribuisce a tali obiettivi”.

già formulati in termini *soft* a livello internazionale e *iii*) farli finalmente assurgere a parametri imprescindibili per un'impresa che operi nel contesto di una *value chain* su scala globale mediante la previsione di norme *hard* le quali, se violate, farebbero scattare rimedi – anche sanzionatori – immediati e certi.

In altri termini, l'ordinamento UE, per il tramite della CSDDD, è riuscito a sfruttare l'efficacia persuasiva a livello valoriale e politico del diritto *soft* già esistente in materia sul piano internazionale facendolo assurgere a base giuridica (in senso improprio) dello stesso diritto derivato UE, questa volta *positum* e cogente.

3. *Il particolare caso della materia climatica: i report scientifici nelle norme di hard law e nella climate change litigation. Il ruolo dell'IPCC.*

Per vero, gli stessi considerando della CSDDD³⁶ si soffermano su un elemento particolare dei fattori ESG: la lotta – in ambito ambientale (E) – ai cambiamenti climatici³⁷. Essi richiamano, infatti, da un lato, il diritto internazionale facente capo alla Convenzione quadro delle Nazioni Unite (UNFCCC)³⁸, dall'altro la stessa legislazione UE attuativa proprio di quei vincoli di derivazione internazionale in materia climatica³⁹.

Ciò che emerge dal combinato disposto di tutte queste fonti *hard* è, a parere

³⁶ Considerando nn. 10, 11, 12.

³⁷ Per una panoramica generale sulla tutela dell'ambiente anche in chiave evolutiva cfr. F. MUNARI-L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente*, Bologna, 2012; G. COR DINI-P. FOIS-S. MARCHISIO, *Diritto ambientale Profili internazionali europei e comparati*, Torino, 2024. Con riferimento specifico al diritto del clima si v. L. SCHIANO DI PEPE, *Cambiamenti climatici e diritto dell'Unione europea: obblighi internazionali, politiche ambientali e prassi applicative*, Torino, 2012; S. VEZZANI-M. C. CARTA (eds.), *International and European Union Law in the Face of Climate Change*, Torino, 2024; C.P. CARLARNE-K.R. GRAY-R.G. TARASOFSKY (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford (UK), 2016; D. BODANSKY-J. BRUNNÉE-L. RAJAMANI, *International Climate Change Law*, Oxford (UK), 2017.

³⁸ Convenzione quadro delle Nazioni Unite sui cambiamenti climatici adottata a Rio de Janeiro nel 1992, che ha fornito il contesto nel quale sono stati successivamente implementati ulteriori impegni vincolanti di livello internazionale, tra cui il Protocollo di Kyoto del 1997 e l'Accordo di Parigi del 2015.

³⁹ Il riferimento è in particolare al regolamento (UE) 2021/1119 del Parlamento europeo e del Consiglio del 30 giugno 2021 che istituisce il quadro per il conseguimento della neutralità climatica e che modifica il regolamento (CE) n. 401/2009 e il regolamento (UE) 2018/1999, di cui si dirà più oltre.

di chi scrive, il valore intimamente *science based* del diritto climatico: in altri termini, non solo sarebbe dato acquisito che il cambiamento climatico interferisce con il godimento di diritti umani e che dunque l'impatto su entrambi non può non entrare nella definizione delle *policies* aziendali, ma è parimenti acquisito che si tratti di un settore – come già rilevava alla fine del secolo scorso la stessa Corte internazionale di giustizia⁴⁰ – in cui il dato scientifico (lessicalmente: “*new scientific insights*”) la fa da padrone.

Del resto, il valore della scienza (per ora, ma solo per ora, il termine viene qui impiegato senza ulteriore specificazione) e degli organismi scientifici in materia climatica è così apertamente riconosciuto a livello internazionale che, come mostra l'intero “sistema” di Rio a partire dalla citata UNFCCC del 1992, è proprio il dato scientifico – qui lessicalmente “*results of scientific research*” – ad orientare ed ispirare il decisore politico.

Vale la pena riportare qui nel testo il passaggio in cui gli Stati firmatari premettono di essere “*conscious of the valuable analytical work being conducted by many States on climate change and of the important contributions of the World Meteorological Organization, the United Nations Environment Programme and other organs, organizations and bodies of the United Nations system, as well as other international and intergovernmental bodies, to the exchange of results of scientific research and the coordination of research*”. E ancora a questi stessi organismi tecnici “internazionali e intergovernativi” – cui è affidato appunto il compito di definire, svolgere, valutare la ricerca, la raccolta e l'osservazione sistematica di dati – la Conferenza delle Parti può richiedere servizi e informazioni⁴¹.

Posta allora la rilevanza in ambito climatico del dato scientifico – sia inteso come *new scientific insights* che come *results of scientific research* – e occorrendo, adesso, delimitarne l'ambito semantico ai fini della presente ricerca, è utile

⁴⁰ Si veda CIG, sentenza 25 settembre 1997, *Case concerning the Gabčíkovo-Nagymaros Project*: “*Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development*”.

⁴¹ Artt. 5 e 7 UNFCCC. Le Conferenze delle Parti (COP) sono le riunioni annuali in cui i Paesi firmatari del Protocollo si riuniscono per monitorare i progressi e valutare il percorso da seguire per l'attuazione della Convenzione.

richiamare qui la sistematica già proposta dalla filosofia ottocentesca⁴²: ovvero la bipartizione delle scienze tra *i*) le discipline che usano metodi matematici e linguaggi formalizzati, ossia le scienze esatte, sperimentali (fisica, chimica, biologia), dette anche dure (*hard*) e *ii*) le scienze molli (*soft*), ossia le discipline – scienze anch'esse, in verità, ma piuttosto nel senso generico di “conoscenze” – umanistiche e sociali, quali quelle giuridiche, appunto, ovvero politiche, del linguaggio, della comunicazione.

Merita soffermarsi brevemente sul significato di tale concettualizzazione. Al di là della smania “categorizzatrice” tipica del positivismo, v'è un condivisibile elemento di fondo: le scienze esatte (*hard*) debbono essere intese naturalisticamente superiori rispetto a quelle sociali poiché *i*) uniche dotate di reale capacità di previsione e *ii*) solo limitatamente suscettibili di interpretazione⁴³. In ogni caso, è indubbio che questo presupposto sistematico appartenga ancor oggi, pur forse inconsciamente, al comune sentire di giudici e *policymakers*, i cui già citati riferimenti alla scienza (qui in particolare, climatica) – che si tratti di *new scientific insights* ovvero di *results of scientific research* – si riferiscono di per certo alle sole scienze dure, esatte, previsionali.

Di più. Di tale bipartizione e del rapporto tra scienza ambientale e ordinamento giuridico è, invece, ben consapevole autorevole dottrina⁴⁴ che giova qui richiamare almeno per brevi cenni.

Con particolare riguardo alla giurisprudenza della Corte di giustizia dell'UE essa ha avuto modo *i*) da un lato, di parlare di scienza nella declinazione *hard* del termine⁴⁵, *ii*) dall'altro, di osservare che “quando la decisione del giudice europeo implica la valutazione di nozioni non strettamente giuridiche è

⁴² Sul punto e in breve si cfr. le voci “Scienze” e “Scienza e società” della *Enciclopedia Treccani online*. In particolare, a J.S. MILL, *A system of Logic*, New York, 1843 si deve la più chiara esposizione della differenza tra leggi naturali immutabili e leggi sociali modificabili.

⁴³ Qui intesa nel senso di interpretazione che sfocia in fraintendimento se non proprio elusione. Sempre dalle teorizzazioni di Mill deriva il quesito se le scienze “moralì” (*soft*) avrebbero mai potuto raggiungere una capacità di predizione analoga alle leggi *hard* della fisica e della meccanica razionale. La concezione gerarchica delle due tipologie di scienza è stata successivamente avallata e approfondita da A. COMTE, *Corso di filosofia positiva*, Parigi, 1830-1842, conosciuto come il teorico del positivismo.

⁴⁴ F. MUNARI, *Il ruolo della scienza nella giurisprudenza della Corte di giustizia in materia di tutela della salute e dell'ambiente*, in *Dir. Un. eur.*, 1, 2017, 131 ss.

⁴⁵ Ovvero la scienza il cui “metodo consiste nella formulazione di ipotesi, nella realizzazione di esperimenti riproducibili, nella costruzione di teorie, loro verifica e predizione di possibili nuove osservazioni sperimentali: le più tipiche delle scienze dure sono quindi la fisica e la chimica”. È l'Autore stesso ad accennare (nota 3) alle teorizzazioni di Comte sul punto.

notevole e apprezzabile il *self-restraint* a favore del ‘metodo scientifico’ compiuto sistematicamente dalla giurisdizione unionale”. Ciò anche perché “nel mondo in cui viviamo le acquisizioni scientifiche [sono] sempre più complicate e approfondite”, sicché “l’ordinamento nel suo complesso, e non solo il giudice, [sono] tenuti ad adeguarsi”⁴⁶.

La medesima dottrina, e dalla medesima angolazione ottica, avrebbe avuto poi modo di notare taluni ulteriori aspetti che connoterebbero il rapporto tra diritto internazionale ambientale e scienze dure (*hard*), muovendo dal presupposto – implicito, ma di certo non ignorato – che il diritto in sé è scienza sociale, pertanto molle (*soft*)⁴⁷.

In particolare, ha evidenziato come all’esito Conferenza di Stoccolma del 1972 sarebbe “prevalsa la ritenuta ‘superiorità’ dei canoni giuridico-morali – quelli cioè, con cui da sempre si fanno le norme – rispetto alle scienze dure. Conseguentemente, a dir poco pallida fu la percezione della necessità di confrontarsi con la scienza per capire quale effettivo impatto avevano le azioni dell’uomo nell’ambiente e sull’ambiente, e conseguentemente provare a concepire, sulla base delle conoscenze scientifiche, regole di diritto internazionale dell’ambiente”. Inevitabilmente, i giuristi avrebbero finito per “costruire un diritto ambientale purtroppo troppo spesso e troppo a lungo autoreferenziale”, scollegato dalla sua matrice intimamente scientifica. Anzi, ancor peggio, avrebbero omesso di interrogarsi “con la dovuta profondità sul significato di ‘pericolose’: un tale attributo, necessariamente, deve essere esclusivamente connesso alla scienza, e in particolare ai postulati della chimica; viceversa, il giurista interpreta l’aggettivo ‘pericoloso’ secondo un senso comune, rischiando così di non comprenderne il significato, e ancora una volta di fallire l’obiettivo di normare in modo corretto i fenomeni naturali e ambientali”⁴⁸.

Ciò che qui interessa maggiormente rispetto alla scienza strettamente climatica è il ruolo dell’*Intergovernmental Panel on Climate Change* (IPCC): sottolinea l’Autore come siano innegabili le “difficoltà che hanno incontrato gli scienziati dell’IPCC a persuadere i *policymakers* di cosa stava e sta succedendo al

⁴⁶ L’Autore è altresì consapevole che “questa giurisprudenza non può essere trasposta sic et simpliciter a qualunque altra ipotesi di valutazione, da parte del giudice, di situazioni implicanti rischi per la salute umana o l’ambiente, essendo evidentemente collegata a una specifica disciplina che individua misure e procedure *ad hoc*”.

⁴⁷ F. MUNARI, *L’inadeguata percezione della scienza nel diritto internazionale dell’ambiente e l’esigenza di un cambiamento di paradigma*, in *Riv. giur. ambiente*, 2, 2023, 443 ss.

⁴⁸ Qui il riferimento era alla c.d. Convenzione POP sugli inquinanti organici persistenti firmata a Stoccolma nel 2001.

nostro Pianeta, senza contare le difficoltà immense che, da questa tardiva percezione, questi ultimi incontrano nel modificare le regole, al fine di provare a porre rimedio alle emergenze segnalate dagli scienziati”.

Insomma, ai fini della presente analisi non pare vano quanto anzi opportuno raccogliere e, in un certo qual modo, sviluppare tale riflessione – *rectius*, sfogo – dell’Autore sulla sorte proprio dei *report* scientifici prodotti dall’IPCC (sul presupposto che si tratti di scienza “dura”).

Com’è noto, l’IPCC fu istituito nel 1988⁴⁹ con l’avallo della stessa Assemblea Generale delle Nazioni Unite al precipuo “scopo di fornire al mondo una visione chiara e scientificamente fondata dello stato attuale delle conoscenze sui cambiamenti climatici e sui loro potenziali impatti ambientali e socioeconomici”⁵⁰ proprio dalla *World Meteorological Organization* (WMO) e dallo *United Nations Environment Programme* (UNEP), ossia – si noti bene – da quei due organismi cui gli Stati aderenti alla UNFCCC avrebbero riconosciuto l’importante contributo allo scambio dei risultati della ricerca scientifica e al coordinamento della ricerca⁵¹.

Il Panel, in quanto costituito all’interno del sistema stesso delle Nazioni Unite e composto da esperti in materia ambientale-climatica, si è affermato nei decenni quale vero e proprio foro scientifico dedicato allo studio dei cambiamenti climatici. Non avendo il compito di attività di ricerca “sul campo” è nei fatti vero e proprio “valutatore” della letteratura scientifica *peer reviewed*, sì che, ad oggi, le principali risultanze scientifico-climatiche vengono rese note all’interno dei suoi *report*⁵².

Tale attività valutativa – autorevole e indipendente – dell’IPCC è assurda, poi, a vera e propria “politica climatica” allorquando è confluita – come scienza “dura” – in uno strumento di diritto internazionale codificato, l’Accordo di Parigi⁵³.

⁴⁹ Sulla storia e sul metodo di lavoro dell’IPCC si rimanda a C.P. CARLARNE-K.R. GRAY-R.G. TARASOFSKY (eds.), *The Oxford Handbook of International Climate Change Law*, cit.

⁵⁰ Si veda quanto riportato sul sito italiano dell’IPCC.

⁵¹ Si veda, nel testo in lingua originale, *supra*.

⁵² Il sesto e, ad ora, ultimo report di sintesi è stato pubblicato il 20 marzo 2023.

⁵³ Che l’Accordo di Parigi abbia compiuto “decisi passi avanti, almeno di impostazione” rispetto ai segnalati “approcci ‘ideologici’, ma in realtà basati su assunti giuridicamente deboli perché non fondati su una solida analisi scientifica e dei dati” è opinione anche della dottrina sopra richiamata (si v. F. MUNARI, *L’inadeguata percezione della scienza nel diritto internazionale dell’ambiente*, cit., 460), la quale nota come, in effetti, esso non si risolve nella individuazione di “norme-modello per il comportamento degli Stati”, bensì riesca a stabilire “un obiettivo comune che gli Stati debbono raggiungere insieme”.

Come noto, il maggiore risultato di tale accordo fu quello di vincolare gli Stati aderenti a “mantenere l’aumento della temperatura media globale ben al di sotto di 2 °C rispetto ai livelli preindustriali, e proseguire l’azione volta a limitare l’aumento di temperatura a 1,5° C rispetto ai livelli preindustriali, riconoscendo che ciò potrebbe ridurre in modo significativo i rischi e gli effetti dei cambiamenti climatici”. Ciò “*in accordance with best available science*”, implicitamente ricollegabile a quella dell’IPCC⁵⁴.

Per vero, gli obiettivi enucleati all’interno di questo accordo costituiscono proprio il riflesso da un lato, della necessità – crescente e sempre più condivisa nel contesto della Comunità internazionale – di un sostrato scientifico (per l’appunto, autorevole e indipendente) che giustifichi, se non addirittura legittimi, la politica climatica, dall’altro, della presa di coscienza che l’adozione di misure di contrasto al cambiamento climatico necessiti di essere orientata da strumenti di tipo tecnico al fine di individuare *i)* i fattori di rischio rispetto a fenomeni che incidono in modo preoccupante sulla salute umana e *ii)* auspicabilmente le soluzioni più adeguate per prevenire o arginare gli effetti dannosi che talune condotte siano suscettibili di produrre⁵⁵.

L’intima derivazione scientifica degli obiettivi codificati nell’Accordo di Parigi è, del resto, anche riconosciuta a livello giurisprudenziale: si legga, a titolo di esempio, il seguente passaggio della sentenza del Tribunale distrettuale de L’Aja nella (ormai celebre) controversia *Milieudefensie v. Royal Dutch Shell*⁵⁶:

“The goals of the Paris Agreement are derived from the IPCC reports. The IPCC reports on the relevant scientific insights about the consequences of a temperature increase, the concentrations of greenhouse gases that give rise to that increase, and the reduction pathways that lead to a limitation of global warming to a particular temperature. Therefore, the goals of the Paris Agreement represent the best available scientific findings in climate science, which is supported by widespread international consensus”.

Insomma, la materia climatica più di altre pare in grado di “richiamare” più facilmente quel necessario rapporto osmotico tra il dato scientifico qualificato (i *best available scientific findings in climate science* forniti dall’IPCC) e la decisione politica, o meglio: tra la *best available science* e la norma giuridica.

Si tratta di cosa ben evidenziata anche dalle risultanze del *Report* della Conferenza delle Parti di Glasgow del 2021, essa considera:

⁵⁴ Art. 4 dell’Accordo.

⁵⁵ C. RAGNI, *Scienza, diritto e giustizia internazionale*, Milano, 2020.

⁵⁶ Su cui *infra* all’interno di questo par.

“with serious concern the findings from the contribution of Working Group I to the Intergovernmental Panel on Climate Change Sixth Assessment Report, including that climate and weather extremes and their adverse impacts on people and nature will continue to increase with every additional increment of rising temperatures”.

L’individuazione in questi termini dello strumento (non giuridico, bensì) scientifico valutativo duro (*hard*) in materia climatica in uno con l’autorevolezza internazionale della paternità (l’IPCC) consentono – ad avviso di chi scrive – di interrogarsi sulla inquadrabilità dei *report* dell’IPCC nell’ambito della *soft law* internazionale.

In altri termini: se possa quel diritto (*rectius*: para-diritto o pre-diritto) *soft* – formato da principi comunemente accettati, da *standard* volti solo ad ispirare le condotte e non ad obbligare – accogliere naturalmente al proprio interno le rappresentazioni e/o conclusioni in materia climatica contenute in elaborati (*report*) propri della scienza “dura” quando diffusi da un organismo a propria volta unanimemente riconosciuto in sede internazionale quale è l’IPCC.

In sostanza il quesito – sorto dallo sfogo cui si è fatto cenno – è: possono i *report* scientifico-valutativi in materia climatica diffusi dall’IPCC essere considerati *soft law* internazionale e come tali maneggiati da giudici e giuristi?

A ben vedere, infatti, i rapporti dell’IPCC godono delle citate caratteristiche della *soft law* internazionale: per un verso, redazione da parte di un organismo di rilievo internazionale, per l’altro, carattere non strettamente cogente. Pur non atti sorretti, al momento della loro adozione, dalla volontà di fornire *standard* di condotta o principi generali – come viceversa gli strumenti tradizionalmente detti di *soft law* – generano di fatto nella materia climatica una consapevolezza così radicata e diffusa che: a monte, suscita allarme sociale e pertanto l’urgenza⁵⁷ di stimolare il legislatore sulle questioni ambientali⁵⁸; a valle, stimola l’adozione di politiche positive e virtuose, finendo per tutelare, benché per via mediata, l’ambiente.

La proposta declinazione dei *report* scientifico-climatici dell’IPCC come strumento di *soft law* pare suffragata dalla lettura dei regolamenti (UE) 2021/1119⁵⁹

⁵⁷ Questa pare proprio essere la visione accolta dal regolamento (UE) 2023/857 al suo considerando n. 2 a mente del quale “[l]a necessità di agire per ridurre le emissioni di gas a effetto serra sta diventando sempre più urgente, come afferma il gruppo intergovernativo di esperti sul cambiamento climatico (IPCC) nelle sue relazioni [...]”. L’Unione dovrebbe pertanto affrontare questa urgenza intensificando i propri sforzi”.

⁵⁸ *Lato sensu* inteso.

⁵⁹ C.d. legge europea sul clima, la quale ha fissato l’ambizioso obiettivo della riduzione entro il 2030 del 55% delle emissioni di gas ad effetto serra rispetto ai livelli del 1990. Per una

e 2023/857: questi accolgono le predizioni dell'organismo rubricandole *apertis verbis* come "raccomandazioni", tali pertanto da integrare e ispirare le condotte dei poteri in termini di diligenza, correttezza, buona fede, prudenza e precauzione.

Rimanendo nel contesto del diritto UE, quanto proposto può essere colto anche, e ancora una volta, nella CSDDD: la direttiva include, infatti, tra gli obblighi di diligenza che gli Stati dovranno imporre alle imprese multinazionali, quelli di adottare ed attuare "un piano di transizione per la mitigazione dei cambiamenti climatici volto a garantire [...] che il modello e la strategia aziendali siano compatibili con la transizione verso un'economia sostenibile e con la limitazione del riscaldamento globale a 1,5°C in linea con l'accordo di Parigi [...]"⁶⁰, ossia con le predizioni/raccomandazioni (della scienza dura) dell'IPCC.

Allora: anche per effetto del diritto (positivo) UE, le misure di tutela dell'ambiente da assumere nell'ambito delle *policies* imprenditoriali non potranno che avere come riferimento esattamente quelle "prove scientifiche conclusive, ovvero prove che abbiano ricevuto una convalida scientifica indipendente coerente con uno scenario di riscaldamento globale di 1,5°C quale definito dal gruppo intergovernativo di esperti sul cambiamento climatico (IPCC)"⁶¹.

La tecnica legislativa adottata, sia a livello internazionale che UE, in relazione all'approccio *science based* sopra illustrato pare effettivamente essere quella della riserva di scienza⁶², capace di ridurre la discrezionalità politico-amministrativa in sede attuativa e contestualmente dare luogo ad un sistema di "rinvio mobile"⁶³ al dato scientifico. D'altra parte, allorché il legislatore sia chiamato ad

panoramica si v. F. EROICO, *La legge europea sul clima: effettivo passo in avanti o opportunità mancata?*, in *Quaderni AISDUE*, 2024; D. BEVILACQUA, *La normativa europea sul clima: una regolazione strategica o un passo troppo timido?*, in *RGA online*, 2022.

⁶⁰ Art. 22.

⁶¹ Si veda il considerando n. 73.

⁶² D. SERVETTI, *Riserva di scienza e tutela della salute. L'incidenza delle valutazioni tecnico-scientifiche di ambito sanitario sulle attività legislative e giurisdizionale*, Pisa, 2019; M. CARDUCCI, *La ricerca dei caratteri differenziali della "giustizia climatica"*, in *DPCE online*, 2, 2020, 1345 ss.

⁶³ Si pensi, tra gli altri, all'obbligo di cui all'art. 22 della CSDDD secondo il quale le società dovrebbero dotarsi di un piano di transizione per la mitigazione dei cambiamenti climatici, volto a garantire che "il modello e la strategia aziendali siano compatibili con la transizione verso un'economia sostenibile", e che quindi implica una prospettiva diacronica dell'obbligo al cambiare delle evidenze scientifiche.

esercitare le proprie funzioni alla luce di determinate cognizioni tecnico-scientifiche *i*) è tenuto ad assumere come propri punti di riferimento fonti qualificate sotto il profilo della competenza e dell'affidabilità, *ii*) gli è in ogni caso precluso un potere discrezionale in via esclusiva⁶⁴.

La rilevanza della scienza e in particolare dei *report* scientifici dell'IPCC, come anticipato, non si esaurisce tuttavia nella fase della formulazione delle regole giuridiche, ma investe anche quella della loro applicazione. In altri termini: anch'essi (similmente alla normazione tipicamente *soft*), oltre ad ispirare e riempire di contenuto tecnico la normativa cogente, influiscono anche sulla discrezionalità interpretativa del giudice.

Ed in effetti non sono mancate occasioni in cui le previsioni dell'IPCC sono confluite nei *decisa* giudiziali appartenenti alla cd. *climate change litigation*⁶⁵. Il *corpus* normativo in materia climatica⁶⁶ consente un'analisi anche *a posteriori* (ovvero in sede di contenzioso) di quelle "raccomandazioni" scientifiche, ossia un'analisi circa la capacità del dato scientifico *hard* – laddove pretermesso – di ingenerare responsabilità a carico dei soggetti (pubblici e privati) operanti a livello globale.

Ecco qui di seguito talune vicende giudiziarie che parrebbero corroborare l'osservazione.

⁶⁴ D. SERVETTI, *Riserva di scienza e tutela della salute: l'incidenza delle valutazioni tecnico-scientifiche di ambito sanitario sull'attività legislativa e giurisprudenziale*, cit.

⁶⁵ Su cui, in generale, si v. P. IVALDI, *European Union, Environmental Protection and Private international Law: Article 7 of Rome II Regulation*, in *The European Legal Forum*, 2013, 137; A. GIORDANO, "Climate Change" e strumenti di tutela. Verso la "Public Interest Litigation?", in *Riv. it. dir. pubbl. comun.*, 2020, 763; P. DE VILCHEZ-A. SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in *Yearbook of International Environmental Law*, 2021, 3; S. BALDIN-P. VIOLA, *L'obbligazione climatica nelle aule giudiziarie. Teorie ed elementi determinanti di giustizia climatica*, in *Dir. pubbl. comparato ed europeo*, 2021, 597; F. SCALIA, *La giustizia climatica*, in *federalismi.it*, vol. 10, 2021, 269; M. RAMAJOLI, *Il cambiamento climatico tra "Green Deal" e "Climate Change Litigation"*, in *Riv. giur. ambiente*, 2021, 53; B. POZZO, *La "Climate Change litigation" in prospettiva comparatistica*, in *Riv. giur. ambiente*, 2021, 271; M. DELSIGNORE, *Il contenzioso climatico dal 2015 ad oggi*, in *Giorn. dir. amm.*, 2022, 265; C. MASIERI, *La "Law of Torts" alla prova dei cambiamenti climatici*, in *Riv. giur. ambiente*, 2022, 457; R. FORNASARI, *Condannare allo Stato di agire: "Climate Change" e responsabilità civile del potere pubblico*, in *Persona e mercato*, 2022, 480; F. MUNARI, *Public e private enforcement del diritto ambientale dell'Unione*, in *Atti convegni AISDUE*, gennaio 2023, 1, 1.

⁶⁶ In relazione al quale, come visto, esistono regole cogenti di livello internazionale e regionale/nazionale che creano obblighi in capo agli Stati contraenti e ai soggetti privati nel senso di generare una vera e propria obbligazione climatica.

Un primo caso, storico e apripista della giurisprudenza in materia di giustizia climatica, vide contrapporsi l'ONG olandese *Urgenda Foundation* e il governo dei Paesi Bassi⁶⁷. Già nel 2015 la sentenza di primo grado del Tribunale distrettuale de L'Aja⁶⁸, ritenendo sussistente in capo allo Stato un dovere di diligenza nei confronti dei propri cittadini, riconobbe l'obbligo di adozione di misure contenitive dei gas climalteranti coerenti con le previsioni dell'IPCC. Proprio i *report* del Panel furono usati dal giudice olandese come parametro scientifico per l'individuazione della percentuale di riduzione delle emissioni di gas da considerarsi virtuosa ai fini del contrasto al cambiamento climatico⁶⁹: anche nella successiva sede di legittimità il governo olandese venne condannato a ridurre, entro la fine del 2020, il livello di emissione di gas serra del 25% rispetto al livello del 1990.

Simile, ma foriera di sviluppi ancora più interessanti ai fini della presente ricerca, l'azione proposta nel 2021 dall'organizzazione ambientalista *Milieudefensie* contro la *Royal Dutch Shell* ancora dinanzi al Tribunale distrettuale de L'Aja⁷⁰: in questa circostanza il Giudice olandese ordinò a *Shell* di ridurre entro il 2030 le emissioni – proprie e delle società del gruppo – del 45% rispetto ai livelli del 2019⁷¹.

⁶⁷ Conclusosi con la sentenza della Corte suprema dei Paesi Bassi, sent. 20 dicembre 2019, *Paesi Bassi c. Urgenda Foundation*, sulla quale si leggano S. DOMINELLI, *Sui limiti – giurisdizionalmente imposti all'emissione di gas serra: i giudici olandesi diventano i «front-runners» nella lotta ai cambiamenti climatici*, in *Riv. giur. ambiente*, 2020, 749 ss.; W. KAHL-M.P. WELLER, *Climate change litigation: a handbook*, Monaco, 2021, 363; J. GRAAF, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, in *Journal of Environmental Law*, 2015, 517; T. SCOVAZZI, *La corte condanna lo Stato a ridurre le emissioni di gas a effetto serra*, in *Riv. giur. ambiente*, 2015, 305; ID., *L'interpretazione e l'applicazione «ambientalista» della Convenzione europea dei diritti umani, con particolare riguardo al caso «Urgenda»*, in *Riv. giur. ambiente*, 2020, 419; ID., *Due recenti decisioni nazionali in materia di ambiente che richiamano il caso «Teitiota»*, in *Riv. giur. ambiente*, 2021, 415; F. PASSARINI, *Cedu e cambiamento climatico nella decisione della Corte suprema dei Paesi Bassi nel caso «Urgenda»*, in *Dir. umani e diritto internazionale*, 2020, 777.

⁶⁸ Sentenza del 24 giugno 2015 in cui l'attività dell'IPCC viene citata circa sessanta volte.

⁶⁹ Ancorché i *report* fossero ritenuti dallo stesso giudice «neutri, rilevanti per la politica, ma non prescrittivi».

⁷⁰ Con sentenza del 26 maggio 2021 sulla quale cfr. C. MACCHI, *Imprese multinazionali, violazioni ambientali e diritti individuali: la sentenza Shell della Corte distrettuale dell'Aja*, in *Dir. umani e dir. internaz.*, 2023, 517 ss.; B. MAYER, *The Duty of Care of Fossil-Fuel Producer for Climate Change Mitigation. Milieudefensie v. Royal Dutch Shell District Court of the Hague (The Netherlands)*, in *Transnational Environmental law*, 2022, 407 ss.

⁷¹ La sentenza di prime cure cita – in una cinquantina di pagine – più di trentacinque volte l'attività e la caratura scientifica internazionalmente riconosciuta dell'IPCC. Per vero, in grado

Qui merita sottolineare come *i)* partendo dall'assunto che il cambiamento climatico sia un fattore di rischio per la collettività in virtù delle sue ripercussioni anche su diritti umani fondamentali come quello alla salute, *ii)* facendo largo utilizzo proprio dei *report* dell'IPCC in materia, il Giudice riconobbe sussistere⁷² in capo alla società un dovere di diligenza rispetto alla questione climatica nell'esercizio della propria attività di impresa.

Di più. Il Giudice sentì l'esigenza di suffragare il riconoscimento di un tale dovere proprio attraverso il riferimento a strumenti tradizionali di *soft law* internazionale: da un lato, i Principi Guida e il Patto Mondiale delle Nazioni Unite, dall'altro le Linee Guida per le imprese multinazionali dell'OCSE. Così il Tribunale arrivò ad affermare che il dovere di diligenza in materia climatica comporta per le imprese l'obbligo di mantenere i propri livelli di emissioni in linea con il raggiungimento dei *target* stabiliti dall'Accordo di Parigi, ossia quei livelli individuati a loro volta sulla scorta delle risultanze scientifiche dell'IPCC⁷³.

Senza pretese di esaustività in relazione al contenzioso climatico, i casi qui riportati paiono di particolare rilievo rispetto alla logica sopra rappresentata: il dato scientifico pare influenzare, formandolo, il "vissuto" di Stati ed operatori economici, chiamati così a confrontarsi con un dovere di *due diligence* solo all'apparenza generale e sfumato, generatore, al contrario, di specifiche conseguenze anche sul piano giudiziario.

In ogni caso, e al fine di fornire un quadro di insieme "diacronico" in relazione al rapporto del diritto (vivente) con la scienza climatica, non può omettersi quanto statuito dalla Corte europea per i diritti dell'uomo e le libertà fondamentali nel caso *Verein KlimaSeniorinnen*⁷⁴.

d'appello la prima decisione è stata riformata integralmente non essendo stati accolti gli argomenti di *Milieudéfensie*: sentenza del 12 novembre 2024 della Corte d'Appello dell'Aja contro la quale in data 11 febbraio 2025 la ONG ha proposto ricorso nanti la Corte Suprema dei Paesi Bassi.

⁷² Sulla base di una norma del codice civile olandese, che di fatto impone un generale obbligo di *due diligence*.

⁷³ Si v. *supra*, p. 148. Ancor più di recente sempre l'ONG *Milieudéfensie* ha citato in giudizio davanti al Tribunale distrettuale di Amsterdam a inizio 2025 la società *ING Bank*. Anche qui è curioso notare come l'attività dell'IPCC sia stata citata circa cinquecento volte all'interno dell'atto introduttivo del giudizio. L'associazione attrice ripropone i medesimi argomenti spesi per la precedente causa contro Shell, argomentando che la responsabilità di soggetti non statali operanti a livello internazionale è applicabile altresì alle banche. Per una traduzione ancorché non ufficiale dell'atto di citazione in inglese si v. https://www.climatecasechart.com/documents/milieudéfensie-v-ing-group-and-ing-bank-summons_54f7.

⁷⁴ Corte EDU, sentenza del 9 aprile 2024, *Verein KlimaSeniorinnen Schweiz e al. c. Svizzera*.

In una sorta di prosecuzione ideale di quella giurisprudenza sopracitata che accerta nel merito un nesso diretto tra ambiente, diritto alla salute e responsabilità degli Stati nella lotta ai cambiamenti climatici, condannando la Svizzera per aver violato gli obblighi della Convenzione EDU, la Corte di Strasburgo ha, per quanto qui di interesse, assunto una presa di posizione decisa in relazione ai dati scientifici sul cambiamento climatico.

Testualmente:

“546. In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC (see paragraphs 104-120 above), the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth’s atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention”⁷⁵.

Ad avviso di chi scrive, non è peregrino derivare da tale passaggio motivazionale alcune considerazioni.

Anche la Corte EDU presuppone il fatto che, nel contesto del sistema di Rio, i rapporti dell’IPCC rappresentino già di per sé la *best available science*. Merita, per vero, di essere sottolineato il cambio di passo, in ottica evolutiva, nel rapporto tra potere giudiziario e scienza (climatica), in particolare: nella concreta applicazione al caso di specie del dato scientifico proveniente dall’IPCC. Nel conoscere della domanda risarcitoria posta dagli attori nei confronti dello Stato, la Corte non si limita ad applicare la regola internazionale di diritto codificato (l’Accordo di Parigi e l’UNFCCC) che – come visto – pone obiettivi precisi e scientificamente dati, ma ritiene di qualificare la posizione del dato scientifico all’interno dell’ordinamento internazionale in materia climatica. La scienza cui si riferisce la norma non è più neutralmente intesa, bensì positivamente connotata come “*cogent*”: convincente, valida a tal punto da poter essere posta a fondamento di un’azione di responsabilità.

Il vaglio della Corte, in altri termini, conduce al riconoscimento del dato scientifico di fonte IPCC quale “*cogent scientific evidence*”, non più solo “*new*

⁷⁵ Medesimo richiamo si ha anche al punto 478: “*The Court notes that there is cogent scientific evidence demonstrating that climate change has already contributed to an increase in morbidity and mortality, especially among certain more vulnerable groups, that it actually creates such effects and that, in the absence of resolute action by States, it risks progressing to the point of being irreversible and disastrous (see paragraphs 104-120 above) [...]*”.

scientific insights” né “*results of scientific research*” e persino qualcosa in più di “*best available science*”⁷⁶.

Insomma, anche la giurisprudenza (esempi ne siano le decisioni sopra citate) ha contribuito a riconoscere – benché non espressamente – l’esistenza di un sistema di *standard* precisi e – se così si può dire – cogenti *per relationem* in quanto ancorati a un dato scientifico esso stesso cogente (esatto, duro, *hard*): un sottosistema para-normativo di regole giuridiche morbide (*soft*) costituite nella sostanza non dai tradizionali precetti giuridici, bensì *i*) da raccomandazioni politiche di rilievo internazionale nonché *ii*) da *report* tecnico-scientifici di riconosciuta affidabilità in quanto resi da un organismo di prestigio globale quale l’IPCC.

Se si accettasse questa impostazione l’operatore del diritto (*rectius*, qualunque operatore del diritto) climatico potrà avere come dinanzi a sé due sistemi tra loro complementari, uno di *hard law* (il diritto positivo nazionale, sovranazionale ed internazionale) ed uno di *soft law* (nel quale confluirebbero altresì i *report* scientifico-valutativi dell’IPCC). Di modo che – anche in un settore del diritto relativamente giovane come quello climatico – la regola cogente (*hard*) possa rimanere volutamente ampia e di compromesso in quanto comunque in grado, poi, in sede applicativa di poggiarsi su raccomandazioni (*soft*) – tra cui quelle dell’IPCC – chiare ed autorevoli. Raccomandazioni che, essendo *strictu sensu* scientifiche, risultino esse stesse, in realtà, sufficientemente cogenti, dure (*hard*) e come tali azionabili anche dinanzi al Giudice.

4. Conclusioni: la natura duplice dei report scientifici in materia climatica, uno stimolo per la Corte di giustizia UE?

Alla luce di tutto quanto precede pare possibile, in primo luogo, trarre alcune considerazioni di ordine generale per poi contestualizzarle nell’ordinamento UE.

Che la materia ESG – volutamente ampia, ad oggi non definita, né definibile – si stia facendo strada tra le fonti del diritto cogente di livello internazionale, regionale e nazionale è oramai dato di fatto. Analogamente il più volte riscontrato inserimento di normazione di *soft law* internazionale in atti di tipo

⁷⁶ Embriionalmente questo ragionamento era già presente nella sentenza *Milieudefensie* sopra citata, nella parte in cui riconosceva che i target climatici imposti dall’Accordo di Parigi corrispondono ai *best available scientific findings* forniti dall’IPCC, il quale a sua volta pubblica *report* pregni – ad avviso del giudice – di *relevant scientific insights* sulle conseguenze del cambiamento climatico.

*hard*⁷⁷ costituisce a propria volta prassi positiva ed auspicabile, una fisiologica evoluzione del diritto: lo *standard* non cogente, privo di conseguenze strettamente giuridiche (pur denso di implicazioni di rilievo sociale ed ambientale), si pone quale antecedente logico (forse, meglio: etico e/o culturale) della regola codificata facendo della *soft law* un vero e proprio para- o pre- diritto in funzione non tanto definitoria quanto piuttosto – col consenso di Democrito e Hobbes – “naturalistica”, “materiale” della normazione cogente che contribuisce a creare.

Esisterebbero, tuttavia, all’interno del sistema delle fonti di *soft law* (intese in modo tradizionale) nella materia strettamente climatica talune tipologie di *standard*, di raccomandazioni in grado di assumere per loro propria “durezza” scientifica una posizione del tutto peculiare: ci si riferisce, se la ricostruzione qui proposta fosse accolta, ai *report* scientifici in materia climatica resi dall’IPCC. Essi, infatti, godono di una doppia natura – scientifica (*hard*) e contemporaneamente regolatoria (*soft*) – idonea a renderli *ex se* complementari alle disposizioni di diritto positivo, ossia alle fonti cogenti (*hard*) le quali, per propria stessa volontà, assorbono⁷⁸ le raccomandazioni scientifiche riempiendosi di significato grazie a loro.

In altri termini: a divenire cogente (*hard*) nel mondo del diritto è un dato che nasce altrove, ossia nel mondo della scienza esatta (*hard*), ma che grazie alla fonte internazionale ed autorevole da cui proviene (l’IPCC), condivide anche *ex se* la natura di *standard* regolatorio morbido (*soft*).

Quel che si intende dire è che i *report* scientifico-valutativi in materia climatica dell’IPCC vanno riconosciuti alla stregua di *soft law* di rilievo internazionale, in quanto: non solo sostrato e antefatto scientifico del *ius positum*, ma anche e soprattutto *standard* in grado di contribuire alla politica climatica nella forma di stimolo prima per gli operatori commerciali e quindi per il legislatore.

La riconosciuta osmosi tra questo “ramo” della *soft law* di matrice scientifica⁷⁹ e il diritto *hard* avrebbe risvolti non trascurabili anche da un punto di vista di

⁷⁷ Il già citato *hardening* della *soft law*.

⁷⁸ V’è da capire se tale assorbimento significhi, o comunque debba significare anche la rielaborazione del dato scientifico da parte del decisore politico e dell’apparato amministrativo. Qui potrebbe tra l’altro inserirsi il discorso sulla differenza tra legislazione *strictly* e *slightly science-based* per la quale si rinvia a A. BONOMO, *L’approccio science-based sul cambiamento climatico: quale spazio per il decisore pubblico?*, in *Riv. quadr. dir. ambiente*, 1, 2024.

⁷⁹ Che, per dovere di precisione, non eliderebbe in tesi il *corpus* di regole “morbide” già esistenti e di natura più prettamente politica cui si è fatto riferimento in apertura (in particolare quelle provenienti dal sistema ONU), al contrario vi si affiancherebbe nella sottocategoria climatica del diritto ambientale.

effettività della tutela: il dato scientifico (*hard*, si intende, di fonte IPCC) riuscirebbe ad imporsi a tutti gli effetti come *standard* di condotta di cui pretendere il rispetto ad opera degli attori di livello internazionale – pubblici o privati che siano – eventualmente anche mediante l’esperimento delle ordinarie vie giudiziarie.

Al fine di raccogliere, come ci si era riproposti, quello “sfogo” (derivato *aliunde*) sul “che fare” dell’allarme della comunità scientifica non raccolto dai *policy makers* e di darvi per quanto possibile una soluzione, ciò che pare all’esito di questa (breve) disamina è che il parere della comunità scientifica internazionale, se riconosciuto autorevole (*best available* e, di più, *cogent*), acceda esso stesso a quel sistema para- (oltreché pre-) giuridico. Ciò non già perché si tratti di norme di condotta a carattere politico (come per gli atti della *soft law* tradizionalmente intesa), ma perché se ne riconosce globalmente la caratura tecnico-scientifica: quel parere, allora, ben potrebbe confluire all’interno dell’ordinamento *soft*, privo di cogenza normativa, non dotato di apparato sanzionatorio specifico, purtuttavia di non trascurabile impatto etico e culturale.

Tale riconoscimento costituirebbe una tappa evolutiva del diritto, nella fattispecie climatico, con due importanti risultati anche a livello di evoluzione dottrinale in materia: diverrebbe, da un lato, immanente l’osservazione secondo cui la scienza – intesa come insieme delle conoscenze disponibili o acquisibili in un determinato momento – mentre a monte pone le esigenze stesse di regolamentazione giuridica, poi a valle “è utilizzata come *standard* in base al quale misurare l’adeguatezza della condotta dello Stato [e delle imprese di rilievo multinazionale] rispetto all’obiettivo indicato dalla norma”⁸⁰; si avvererebbe, dall’altro, l’auspicio di chi ritiene necessario, allorché liberi da un fardello di cultura esclusivamente giuridica, “dare più spazio alla scienza, che non ha valori etico-morali da comunicare, ma ci consente di conoscere, e prima ancora di misurare, quello che ci serve prima di creare le relative regole”⁸¹.

In estrema chiusura, e tornando a considerare specificamente l’ordinamento giuridico e giudiziario UE.

Si è visto come, nell’intento di porsi capofila nella politica (ESG e in

⁸⁰ C. RAGNI, *Scienza, diritto e giustizia internazionale*, cit., 22.

⁸¹ F. MUNARI, *L’inadeguata percezione della scienza nel diritto internazionale dell’ambiente*, cit., 457 ss. L’Autore precisa come con ciò non si voglia “sostenere che le regole di responsabilità non siano fondamentali anche nel diritto ambientale; esse, tuttavia, non possono rappresentare l’architrave del sistema, dovendo piuttosto operare a valle dell’individuazione di un (diverso e più ponderato) sistema di regole, che sua volta presuppone una misurazione dei fenomeni, una conoscenza scientifica approfondita, una conseguente condivisione di gerarchie, priorità, e da ultimo, ma solo alla fine, di valori”.

particolare) climatica e fondandosi proprio su prestigiosità e attendibilità a livello internazionale dell'operato dell'IPCC, il diritto dell'UE si sta dotando di una robusta normativa (*hard*) in funzione dell'obiettivo della neutralità climatica entro il 2050. Allora, se accolta la ricostruzione proposta, si potrebbe dire che nell'ambito del diritto UE l'ambizioso obiettivo precedentemente collocato solo nella dimensione di *soft law* è transitato ora nella sfera di *hard law*: l'impegno politico dell'Unione è divenuto obbligo giuridico formale e vincolante, conservando tuttavia chiari gli *standard* da rispettare, quelli appunto già individuati, tra gli altri, dalla *soft law* scientifica costituita dai *report* dell'IPCC.

Ciò che non può farsi a meno di notare è che ad oggi lo sforzo in materia climatica profuso dall'UE a livello legislativo non trovi analogo afflato nella giurisprudenza della propria Corte di giustizia. Allora, almeno sul fronte dell'ordinamento (giudiziario) sovranazionale allo sfogo di cui sopra non è ancora possibile fornire risposta.

È noto come ad oggi i Giudici di Lussemburgo abbiano avuto modo di entrare nella materia climatica in due fattispecie: si tratta delle vicende *Sabo* e *Carvalho*⁸².

Ebbene, non pare di poterli annoverare tra i contenziosi “riusciti” in cui il Giudice europeo si sia mostrato recettivo rispetto all'istanza di giustizia – nella specie, climatica – sottopostagli, al contrario: la Corte, infatti, ha ritenuto in entrambe le situazioni di dichiarare, in rito, il difetto di legittimazione a ricorrere degli istanti, rilevando in capo ad essi la carenza *ex art.* 263, comma 4, TFUE⁸³

⁸² Rispettivamente Corte giust. UE, ord. 14 gennaio 2021, causa C-297/20 P, *Peter Sabo c. Parlamento europeo e Consiglio* e sentenza 25 marzo 2021, causa C-565/19 P, *Armando Carvalho e altri c. Parlamento europeo e Consiglio dell'Unione Europea*. Si vedano sui due contenziosi: M. MESSINA, *Il locus standi delle persone fisiche e giuridiche e i problemi dell'accesso alla giustizia climatica dinanzi al giudice dell'UE dopo la sentenza Carvalho: necessità di riforma della formula Plaumann?*, in *Riv. giur. ambiente*, vol. 1, 2022, 121; A. KREŽEL, *Access to Justice and Strategic Climate Litigation in the EU: Curing the Incurable?*, in *European Law Journal*, 2024, 265 ss.; G. WINTER, *Armando Carvalho and others v. EU: invoking human rights and the Paris Agreement for better climate protection legislation*, in *Transnational Environmental Law*, vol. 1, 2020, 143; M. MONTINI, *La giustizia climatica nell'unione europea: il caso Carvalho e le prospettive future*, in *Ordine internazionale e diritti umani*, 2023, 654; F. GALLARATI, *Caso Carvalho: la Corte di Giustizia rimanda l'appuntamento con la giustizia climatica*, in *DPCE online*, vol. 2, 2021.

⁸³ “Qualsiasi persona fisica o giuridica può proporre, alle condizioni previste al primo e secondo comma, un ricorso contro gli atti adottati nei suoi confronti o che la riguardano direttamente e individualmente, e contro gli atti regolamentari che la riguardano direttamente e che non comportano alcuna misura d'esecuzione”.

dell'interesse diretto ed individuale all'annullamento degli atti di diritto UE impugnati.

Orbene, con un *corpus* normativo nel frattempo divenuto ricco, robusto e scientificamente supportato come quello messo in piedi dalla CSDDD la giurisprudenza dell'UE ben potrebbe – e dovrebbe – prendere finalmente posizione sulle responsabilità in materia climatica dei vari attori internazionali. In altri termini: ben potrebbe – e dovrebbe – abbandonare l'impostazione sinora assunta, quella di (decidere di) non decidere.

Uno stimolo in tal senso potrebbe venire dal riconoscimento dei *report* scientifico-valutativi dell'IPCC (non solo come meri dati scientifici, ma anche e primariamente) quali strumenti rientranti nel *genus* della *soft law* internazionale: in quanto atti in-sé-e-per-sé para-normativi (pre-diritto), *standard*, evidenze cogenti unanimemente riconosciute come autorevoli, diverrebbero – benché non recepiti all'interno di norme di diritto positivo – più facilmente impiegabili anche in sede giudiziaria per accertare responsabilità in materia climatica in capo a soggetti tanto pubblici quanto privati.

SECTION II

THE ENFORCEMENT OF THE ESG PRINCIPLES
IN A TRANSNATIONAL DIMENSION:
JURISDICTION AND APPLICABLE LAW

GENERAL REPORT ON THE ENFORCEMENT OF THE ESG PRINCIPLES IN A TRANSNATIONAL DIMENSION: JURISDICTION AND APPLICABLE LAW

Hans van Loon *

SUMMARY: 1. Introduction. – 1.1. Context of ESG Principles. – 1.2. EU and EU Member States' initiatives. – 1.3. Public and private enforcement. – 2. Jurisdiction. – 2.1. General EU regime – Basic rules. – 2.2. General EU regime – Operation in practice. – 2.3. No jurisdiction provisions in the CSDDD. – 2.4. How to fill the gap? – 3. Applicable law. – 3.1. General EU regime regarding torts/delicts. – 3.2. No applicable law provisions in the CSDDD. – 3.3. How to fill the gap? – 4. *Postscriptum*: the Commission's *Omnibus* I proposal.

1. *Introduction.*

1.1. *Context of ESG Principles.*

The theme “Enforcement of ESG Principles in a Transnational dimension” sits at the intersection of public and private international law. The *UN Guiding Principles on Business and Human Rights* (UNGPR), a non-binding (soft law) instrument of public international law, can be considered the starting point for the development of ESG principles at the global, regional, and national level through both public and, incrementally, private international law. As formulated by the Rapporteur J. Ruggie, there is currently at the global level a “fundamental institutional misalignment between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by

* This text corresponds to the report submitted to the Conference in December 2024. See § 4 *Postscriptum* for an update of the Omnibus I simplification package proposal, aimed at amending some provisions of the CSDDD that are discussed in this contribution.

corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed”¹.

Negotiations on a binding UN treaty on business and human rights are continuing at the UN, but this is proving to be a difficult process. Meanwhile, the UNGP, which were approved by the UN Human Rights Council in 2011, are being widely invoked and have become an authoritative benchmark, regarding negative impacts not only on human rights, but also on the environment and good governance.

Other global initiatives with similar aims include: the *2000 UN Global Compact*; the 2015 UN General Assembly 2030 Agenda with its 17 Sustainable Development Goals; the 1977/2017 ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*; and the 2018 OECD *Due Diligence Guidance for Responsible Business Conduct*.

All these global initiatives face a common problem: under traditional public international law, transnational corporate conduct is not directly subject to international rules: the primary obligation to respect international law rests with States. Therefore, lawsuits against transnational corporations cannot, in principle, be brought before international courts, therefore, legal action must be taken in domestic/national courts.

1.2. *EU and EU Member States' initiatives.*

The EU has taken some hard law measures concerning ESG principles, including:

- The 2010 Timber Regulation (Regulation (EU) No 995/2010); now replaced by the 2023 Deforestation Regulation (Regulation (EU) No 2023/1115);
- The 2017 Conflict Minerals Regulation (Regulation (EU) No 2017/821);
- The 2019 Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464);

and now also:

- Directive 2024/1760 of 13 June 2024 on Corporate Sustainability Due Diligence (CSDDD), entered into force on 25 July 2024.

¹ J. RUGGIE, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNGA doc. A/HRC/4/35, 2007, 3.

- In addition, some EU Member States and the UK have adopted domestic regulatory frameworks:
- France: cross-sectoral 2017 *Loi sur le devoir de vigilance*, provides for civil liability under tort law where the company breaches its own vigilance obligations. The French law has provided inspiration for CSDDD.
- Germany: *Lieferkettengesetz* 2021, does not provide for civil liability but has a range of fines against companies.
- Netherlands: 2019 Child Labour Due Diligence Act (still not in force).
- UK: 2015 Modern Slavery Act.

1.3. *Public and private enforcement.*

The CSDDD seeks to achieve its purpose primarily through public enforcement, but in addition provides for private enforcement through civil liability under its Article 29, which establishes a substantive regime for civil liability of companies and the right to full compensation.

Article 29(7) provides: “Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to that effect is not the national law of a Member State”. This provision therefore already presupposes the operation and effectiveness of rules of the applicable law.

Issues of private international law (PIL), in particular concerning jurisdiction and applicable law, arise under the CSDDD, the *Loi sur le devoir de vigilance*, and any other Member States’ domestic provisions on civil liability in ESG matters.

2. *Jurisdiction.*

2.1. *General EU regime – Basic rules.*

According to Regulation (EU) No 1215/2015 (Brussels Ia Regulation), when the defendant is domiciled in the EU Article 4 applies, in conjunction with Article 63, that defines the domicile of legal persons as their statutory seat, central administration or principal place of business. Similar provisions are included in the 2007 Lugano Convention in Articles 2 and 60.

These grounds of jurisdiction essentially correspond with the “jurisdictional filters” for recognition and enforcement of judgments issued in EU Member States by third countries under the 2019 Hague Judgments Convention, i.e.

Articles 5(1)(a) and (b) (habitual residence and place of business of natural persons) and Article 3(2) (habitual residence of legal persons: statutory seat, state of law of incorporation, central administration, principal place of business).

If the claim is brought against a plurality of defendants domiciled within the EU, Article 8 of the Brussels Ia Regulation allows the plaintiff to sue them at the court of the domicile of one of them “provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments ...”. Article 6 of the 2007 Lugano Convention contains a similar provision.

This ground of jurisdiction does not correspond with any “jurisdictional filter” for recognition and enforcement of judgments rendered in EU Member States by third countries under the 2019 Hague Judgments Convention. For each co-defendant the jurisdictional filter of Article 5 (read in conjunction with Article 3(2)) must be respected.

The Brussels Ia Regulation provides additional special fora for defendants domiciled in the EU, namely for disputes concerning (a) contractual obligations (Article 7(1), place of performance of the obligation, mirrored by Article 5(1) of the 2007 Lugano Convention) or (b) torts (Article 7(2), to be interpreted as the place where the harmful event occurred or may occur as well as the place of the event giving rise to damage, mirrored by Article 5(3) of the Lugano Convention); and for (c) disputes arising out of the operations of a branch (Article 7(5), mirrored by Article 5(5) of the Lugano Convention)².

These grounds of jurisdiction partially correspond with the “jurisdictional filters” for recognition and enforcement of judgments issued in EU Member States by third countries under the 2019 Hague Judgments Convention. In particular, (a) Article 5(1)(g) of the latter is partially comparable with Article 7(1)(a) of the Brussels Ia Regulation and Article 5(1) of the 2007 Lugano Convention, but only if the activities of the defendant in relation to the transaction clearly constituted “a purposeful and substantial connection” to the State of origin; (b) Article 5(1)(j) of the Hague Convention is comparable with Article 7(2) of the Brussels Ia Regulation and Article 5(3) of the Lugano Convention, but (i) only where the non-contractual obligation arises from death, physical injury, damage to or loss of tangible property, and (ii) only if the event giving rise to the harm occurred in State of origin; and (c) Article 5(1)(d) of the Hague Convention is comparable with Article 7(5) of the

²The Brussels Ia Regulation, unlike the 2007 Lugano Convention, provides additional fora in case of *lis pendens* vis-à-vis third countries at Articles 33 and 34.

Brussels Ia Regulation and Article 5(5) of the Lugano Convention ³.

If the defendant is domiciled in a non-EU Member State, Article 6 of the Brussels Ia Regulation provides that jurisdiction is determined by national law, subject to Articles 18(1) (consumer contracts), 21(2) (employment contracts), 24 (exclusive jurisdiction), 25 (choice of court agreements). Comparable provisions are provided by the Lugano Convention at Article 4, but national jurisdiction criteria apply only where Articles 22 (exclusive jurisdiction) and 23 (choice of court agreements) do not apply. Under the Lugano Convention national provisions of law apply also in case of *lis pendens* and/or connected proceedings in third countries.

For purposes of the recognition and enforcement of judgments rendered in EU Member States by third countries under the 2019 Hague Judgments Convention, the “jurisdictional filters” of Article 5 of the latter must be respected.

In case of co-defendants domiciled in one or more third countries, Article 8 of the Brussels Ia Regulation and Article 6 of the 2007 Lugano Convention do not apply and jurisdiction must be determined by national rules on co-defendants.

For purposes of the recognition and enforcement of judgments rendered in EU Member States by third countries under the 2019 Hague Judgments Convention, the “jurisdictional filters” of Article 5 of the latter must be respected for each co-defendant.

2.2. General EU regime – Operation in practice.

Where the defendant is based within the EU or in a State bound by the 2007 Lugano Convention, the case-law of the Court of Justice of the EU has established several general principles. It has confirmed that the jurisdiction criteria are accessible also to plaintiffs domiciled outside the EU ⁴, and that the *forum non conveniens* doctrine does not apply ⁵. Thus, in cases where ESG principles are involved, the defendant’s domicile provides a firm forum ⁶.

³ According to the case-law of the Court of Justice, when subsidiaries appear vis-à-vis third parties as a mere branch of the foreign defendant, they may also be regarded as a branch: see CJEU, 9 December 2017, C-218/16, *SAR Schotte GmbH v. Parfums Rothschild SARL*.

⁴ CJEU, 13 July 2000, C-412/98, *Group Josi v. UGIC*.

⁵ CJEU, 1 March 2005, C281/02, *Owusu v. Jackson*.

⁶ Court of Appeal Hamm, 28 May 2025, *Lliuya v RWE*; Court of Appeal The Hague, 18 December 2015, *Akpan et al. v RDSHELL, Dooh et al. v RDSHELL, Oguru and Efanga et al. v*

The same approach was followed pre-Brexit by the UK Supreme Court in *Vedanta Resources PLC and another v Lungowe and others*⁷: because of *Owusu v Jackson*, the Supreme Court stated that the English court was unable to stay the proceedings against the (anchor) defendant Vedanta on the ground that England was not the appropriate forum. However, bringing a case against a foreign subsidiary of an anchor defendant domiciled in the UK did require proof of a “real case” against the anchor defendant, and did not (just) involve a matter of proper administration of justice.

Post Brexit, Article 4(1) of the Brussels Ia Regulation and the *Owusu* solution do not apply any longer in the UK and the *forum non conveniens* doctrine revived and takes precedence. Therefore, it has become harder to bring claims against multinationals domiciled in the UK where the connecting factors point to the alternative foreign jurisdiction. However, claimants may still succeed with the argument that they cannot obtain substantial justice in the alternative jurisdiction, and in so far *Vedanta* will retain its significance when English courts are faced with (mass) claims against UK multinationals in relation to their foreign subsidiary’s activities abroad⁸.

In relation to co-defendants domiciled in third countries, as indicated above, jurisdiction must be determined by national law. In some Member States the principle established at Article 8 of the Brussels Ia Regulation and Article 6 of the Lugano Convention is extended in this regard. For example, according to Article 7(1) of the Dutch Code of civil procedure (Rv) “If, in cases which must be brought by writ of summons, the Dutch court has jurisdiction over one of the defendants, it also has jurisdiction over other defendants involved in the same proceedings, provided that the claims against the various defendants are so interrelated that reasons of expediency justify joint proceedings”⁹. Once assumed under Article 7(1) Rv, jurisdiction remains in place even if it is later found that the anchor claim against the parent company is unfounded¹⁰.

As indicated above, the recognition and enforcement of such judgments in

RDSshell, ECLI:NL:GHDHA:2015:3587; *Asmania et al. v. Holcim*, pending before Cantonal Court of Zug.

⁷ UKSC/2017/0185, followed by *Okpabi and others v Royal Dutch Shell Petroleum Development Company of Nigeria Ltd*, UKSC/2018/0068.

⁸ Court of Appeal, *Limbu v Dyson Technology Ltd and others*, 13 December 2024: overturning the High Court’s decision, the Court of Appeal ruled that England was the proper forum since group policies were promulgated, implemented and overseen from the UK.

⁹ See also Rotterdam District Court, 21 September 2022, *Victims Macéio v. Braskem SA*.

¹⁰ Court of Appeal The Hague, *Akpan v. Shell* (fn 6).

third countries may be rejected under the 2019 Hague Judgments Convention, since the Article 5 indirect competence criteria must be respected for each co-defendant. For example, in *Victims Maceío v. Braskem SA* the indirect competence of Dutch court could not be grounded on either Article 5(1)(d) (branch), since the claim did not arise out of the activities of the Dutch branch, or Article 5(1)(j) (*forum damni*), since the activity and the damage had taken place in Brazil.

2.3. *No jurisdiction provisions in the CSDDD.*

The CSDDD does not include any provisions on jurisdiction. The original European Parliament (EP) JURI Committee's *Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020) did include a draft Directive that contained also proposals for amendments to the Brussels Ia Regulation.

In particular, a new paragraph 5 was inserted in Article 8, according to which "In matters relating to business civil claims for human rights violations within the value chain within the scope of [the Directive], an undertaking domiciled in a Member State may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship within the meaning of Article 3 of [the Directive]". Moreover, a new Article 26a was inserted regarding business-related civil claims based on human rights violations within the value chain of a company domiciled in the EU or operating in the EU within the scope of [the Directive], according to which "Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised".

However, in the final version of the proposal (COM (2022) 71), this suggestion was rejected, and the Commission did not propose any rules on jurisdiction, despite criticism from academic circles and the proposal from the European Group on Private International Law (GEDIP-EGPIL – see 2.4.).

2.4. *How to fill the gap?*

At the end of 2021, just before the Commission proposal was published, GEDIP/EGPIL suggested that some provisions on jurisdiction should be inserted to cover cases where the defendant was not domiciled in a Member State¹¹.

First, a general provision in case of a plurality of defendants, according to which “without prejudice to the application of the provisions of the Brussels Ia, a person not domiciled in a Member State may in matters falling within the scope of this Instrument also be sued for compensation or other remedies... where (s)he is one of a number of defendants, in the courts for the place where anyone of them is domiciled, provided the claims are connected such that it is expedient to hear and determine them together”. This provision is slightly different from Article 8(1) of the Brussels Ia Regulation insofar as it does not include either the words “so closely” or the purpose “to avoid risk of irreconcilable proceedings”.

Second, a jurisdiction criterion based on *forum necessitates*, stating that the action could be brought in the courts of a Member State with which the case has a link “where no jurisdiction is available within the EU, and if proceedings outside the EU are impossible or cannot reasonably be required to be brought”. Contrary to the existing EU *forum necessitatis* rules (Article 7 of the Maintenance Regulation No 4/2009, Article 11 of the Succession Regulation No 650/2012, Article 11 of the Matrimonial Property Regulation No 2016/1103, and Article 11 of the Property consequences of registered partnerships Regulation No 2016/1104), the GEDIP/EGPIL proposal did not include the requirement of a “sufficient” link with the Member State “in view of the fundamental nature of the matters” of the future Directive.

Yet, the GEDIP/EGPIL proposals may raise some questions.

- (1) In case of connected claims, is a simple “connection” too weak or loose as a link to establish jurisdiction? Would it favour forum shopping?
- (2) As far as the *forum necessitatis* is concerned, GEDIP/EGPIL’s proposal is fully justified since the Brussels Ia Regulation does not provide a forum to sue companies domiciled in third countries but operating selling goods/providing services in the internal market (Article 2(2) CSDDD): except for Articles 18(1), 21(2), 24 and 25, the Regulation leaves this issue to

¹¹ See <https://gedip-egpil.eu/wp-content/uploads/2021/02/Recommandation-GEDIP-Recommendation-EGPIL-final-1.pdf>, followed by <https://gedip-egpil.eu/wp-content/uploads/2022/07/Recommendation-GEDIP2022E.pdf>.

national law (Article 6(1)). However, is the GEDIP/EGPIL's approach enough to level the playing field? Or should the Brussels Ia Regulation (instead/in addition) provide a specific forum for companies referred to in Article 2(2) CSDDD, e.g., linked to the Member State of its supervisory authority (Article 24(3))? Such a rule could read: "A company referred to in Article 2(2), which is not domiciled in a Member State shall be sued as regards a civil claim for liability under Article 29 in the courts of the Member State in which the company has a branch. If the company does not have a branch in any Member State, or has branches located in different Member States, it shall be sued in the Member State in which it generated most of its net turnover in the Union in the financial year preceding the last financial year before the date indicated ... or the date on which the company first fulfils the criteria laid down in Article 2(2), whichever comes last". In addition, "A company referred to in Article 2(2) may, on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State, make a duly reasoned request to the court to transfer the case to the competent court in that other Member State".

3. Applicable law.

3.1. General EU regime regarding torts/delicts.

The provisions on the law applicable to torts/delicts that may apply in cases where ESG principles are involved are set out in the Rome II Regulation. In particular, Article 4(1) provides for the application of the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to damage occurred and of the countries where indirect damage occurs. Two exceptions are provided in Article 4(2) and (3), whereby the law of the country of the common habitual residence of the victim and alleged tortfeasor or the law of country with the closer connection to the tort applies, respectively.

In case of an environmental damage, Article 7 provides that Article 4(1) applies, unless the person seeking compensation for damage chooses to base his or her claim on the law of country where the event giving rise to damage occurred.

Moreover, the parties may agree on the applicable law where the conditions established at Article 14 are satisfied. Finally, under Article 17, account shall be

taken, as a matter of fact, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

It is worth recalling that the conflict of laws rules of the Regulation enjoy universal character, i.e., any law specified by the Regulation shall be applied whether or not it is the law of an EU Member State.

Recent environmental and climate change cases provide an illustration of these rules.

In some instances, the courts decided that the law of the place where the damage occurs applied, in these cases the law of an African country, but stated that that law was equal or similar to English law¹².

In other cases, it was decided that the applicable law was the law of the country in which the event giving rise to the damage occurred. In *Milieudefensie v. Shell*, the plaintiff argued that the “event giving rise to the damage” was the corporate policy as determined by defendant RDSHELL, whose headquarters were then in the Netherlands. Therefore, Dutch law should apply. The defendant contested this argument invoking that their corporate policy was a preparatory act falling outside Article 7, since the mere adoption of a policy does not cause any damage: the “event giving rise to the damage” were the actual CO2 emissions, which therefore lead to the applicability of a plurality of legal systems. The Hague District Court sided with the plaintiff, stating that the corporate policy was indeed (one of) the event(s) giving rise to the damage¹³. In appeal Shell accepted the application of Dutch law¹⁴, while insisting on the application of the (many) local rules of safety and conduct, as per Article 17 of the Rome II Regulation¹⁵.

Similarly, in *Lluya v RWE*, the German courts addressed the issue of the law applicable to climate-related tort claims. The case concerned a claim brought by a Peruvian farmer against RWE AG for its alleged contribution to climate change and the resulting risk of flooding affecting his property in Peru. Although the Higher Regional Court of Hamm ultimately dismissed the claim on the merits, it did give a ruling on the applicable law. Since the Rome II Regulation applies only to events giving rise to damage occurring from 11 January 2009 onwards, the court first examined the law applicable to earlier

¹² See *supra*, *Vedanta, Okpabi and Akpan* cases.

¹³ District Court of The Hague, 26 May 2021, *ECLI:RBDHA:2021:5337*, *English translation*, *ECLI:RBDHA:2021:5339*.

¹⁴ It is unclear whether Article 14 of the Rome II Regulation was actually applied.

¹⁵ Court of Appeal Amsterdam, *ECLI:NL:GHDHA:2024:2099*, *English translation*, *ECLI:NL:GHDHA:2024:2100*.

periods. It held that German law governed the claim for conduct occurring before that date on the basis of the German conflict-of-laws rules then in force, relying on the place of action and on the parties' agreement to apply German law. For facts occurring after 11 January 2009, the court applied Article 7 of the Rome II Regulation and again concluded that German law was applicable as the law of the place where the event giving rise to the damage – i.e. the defendant's emitting activities – took place¹⁶.

3.2. *No applicable law provisions in the CSDDD.*

The CSDDD does not include any rules on applicable law. The original EP's JURI Committee's *Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020) included a proposal for an amendment to the Rome II Regulation by inserting a new Article 6a concerning "Business-related human rights claims", that read: "In the context of business-related civil claims for human rights violations within the value chain of an undertaking domiciled in a Member State of the EU or operating in the EU within the scope of [the Directive], the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates". However, the final version of the Commission's proposal did not accept this suggestion, and no rules on the applicable law were included, notwithstanding academic criticism and a proposal by GEDIP/EGPIL¹⁷.

Instead, a different solution was inserted at Article 29 CSDDD dedicated to "Civil liability of companies and the right to full compensation", providing as follows: "1. Member States shall ensure that a company can be held liable for damage caused to a natural or legal person, provided that (a) the company intentionally or negligently failed to comply with the obligations laid down in Articles 10 and 11, when the [obligations are] aimed at protecting the [person], and (b) damage to the [person's] legal interests that are protected under national law was caused. 2. ... a [person] shall have the right to full compensation for

¹⁶ Court of Appeal Hamm, *Lliuya v RWE*, (fn 6).

¹⁷ See below at § 3.3.

the damage in accordance with national law”, but full compensation “shall not lead to overcompensation” (punitive damages etc.). “6. The civil liability rules under this Directive shall not limit companies’ liability under EU or national legal systems and shall be without prejudice to EU or national rules on civil liability related to adverse human rights ... or ... environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive. 7. Member States shall ensure that the *provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State*” (emphasis added).

How would Article 29(7) operate? It appears that applicable law rules are still needed to determine:

- (a) the law applicable to a non-contractual obligation arising out of damage (including rules on causality, and on liability for the conduct of suppliers acting on their own responsibility, which the Directive does not determine and leaves to national law) as a result of noncompliance in respect of matters covered by the Directive (as implemented in national law), on the understanding that the victim is always entitled to full compensation (excluding overcompensation) (Article 29(2) in conjunction to (7);
- (b) the law providing for liability in situations not covered by the Directive. If the applicable law rules designate a law providing for civil liability for adverse human rights or environmental impacts not covered by the Directive, that law will (in addition) apply;
- (c) the law providing for stricter liability than the Directive. If the applicable law rules designate a law providing for stricter liability for adverse human rights or environmental impacts than the Directive, that law will apply.

Therefore, notwithstanding Article 29(7) – postulating the overriding mandatory application of the provisions of Article 29 as transposed into national law – Article 29 also requires uniform EU applicable law rules. Thus, Articles 4, 7, 14 and 17 of the Rome II Regulation will continue to apply, subject to:

- (a) CSDDD Article 29(1) *in fine*: a company is not liable if the damage is caused only by its business partners in the chain of activities, but
- (b) CSDDD Article 29(5): a company’s liability is without prejudice to that of its subsidiaries and business partners, and when damage was caused jointly by company and subsidiaries/business partners, they are jointly and severally liable, subject to national law;
- (c) CSDDD Article 29(3)(a): restrictions of limitation rules of the applicable law;

- (d) CSDDD Article 29(3)(b), (c) and (d): rules on costs of proceedings, injunctive measures, representative organisations;
- (e) CSDDD Article 29(3)(e): courts may order disclosure of additional evidence.

However, the problem remains that Article 7 of the Rome II Regulation is limited to environmental damage and does not extend to adverse impacts on human rights. Moreover, Article 17 (rules of safety and conduct) might unduly restrict company's liability.

3.3. *How to fill the gap?*

The GEDIP/EGPIL proposed to add two provisions to the draft Directive in relation to applicable law torts/delicts¹⁸.

First, a special conflict rule should be created for rules relating to civil liability, both those established by the Directive, and those that not appear in the Directive but will be governed by national law and are therefore outside the provisions of the instrument: "The law applicable to a non-contractual obligation arising out of damage as a result of noncompliance in respect of matters falling within the scope of this [Directive] is the law determined by virtue of Article 4, paragraph 1 of the Rome II Regulation, unless the plaintiff chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred".

The proposed rule extended the protection offered by Article 7 of the Rome II Regulation so that it would cover, in addition to non-contractual obligations arising out of environmental damage, those arising out of the other due diligence obligations leading to civil liability under the instrument. The plaintiff would thus be given the option of choosing the law of either the country in which the damage occurred, or the country in which the event giving rise to the damage occurred. The event giving rise to the damage includes decisions taken by a company at the place where it is established in violation of its due diligence obligations under the instrument¹⁹.

Secondly, GEDIP/EGPIL proposed that "Article 17 of the Rome II Regulation cannot be invoked by the defendant to exclude or limit its liability". This proposal was aimed at putting beyond doubt that defendants would not be

¹⁸ See fn 11 for reference to the proposal.

¹⁹ Cf. in the context of defamation, CJEU, 7 March 1995, C-68/93, *Fiona Shevill a.o. v Presse Alliance SA*.

excused from liability for noncompliance with their due diligence obligations under the Directive simply by invoking Article 17 of the Regulation. Otherwise, the rules of safety and conduct in force at the place and time of the event giving rise to the liability might replace the legal duties established by the Directive and be used to evade the application of Articles 4 and 7 of the Regulation to those duties.

How would the GEDIP/EGPIL proposal work? An example: a claim for damage is brought on behalf of a worker in an African country before an EU court against an EU based company, or a third country company referred to in CSDDD Article 2(2) – e.g., the UK –, based on alleged failure by that company to prevent or bring to an end forced labour in that African country (CSDDD Annex Part I, 1.11).

- (a) The claimant may base his/her claim on the law of that African country (Article 4(1) of the Rome II Regulation) or may choose the law of the company's EU Member State/third country place of establishment (e.g., English law) (Article 7 Rome II Regulation, GEDIP/EGPIL proposed extension), as the law of place where the company has intentionally or negligently failed to decide to take any measure to prevent/stop the forced labour as required by Articles 10/11 CSDDD. The law of the African country, EU Member State, or third country (UK) should not lead to overcompensation (Article 29(2) CSDDD).
- (b) Local safety or conduct rules in the African country shall not limit the company's liability (Article 17 Rome II Regulation, GEDIP/EGPIL proposed addition).
- (c) If the law of the African country, the law of the EU Member State, or the law of the third country (UK) provides for liability beyond the forced labour provisions of the ILO as implemented under the applicable law according to the CSDDD (Annex Part I, 1.11), the company will in addition be held liable to that extent (Article 29(6) CSDDD).
- (d) If the law of the African country, the law of the EU Member State, or the law of the third country (UK) provides for stricter liability regarding matters covered by the CSDDD, the company will in addition be held liable to that extent (Article 29(6) CSDDD).

4. Postscriptum: *the Commission's Omnibus I proposal.*

On 26 February 2025, the European Commission published a set of proposals "to simplify EU rules, boost competitiveness, and unlock additional

investment capacity”, the “First Omnibus Package”²⁰. The package includes, among other things, the radical proposal to abolish the uniform liability regime of the CSDDD (Article 29(1)), thus deferring it to the various Member State’s national civil liability regimes (*Loi sur le devoir de vigilance*, *Lieferkettengesetz*, etc.), and, consequently, to delete, among other things, Article 29(7) CSDDD.

If this proposal is accepted by the EP and the Council, as now seems likely, not only will the comments *supra* on jurisdiction (§ 2) remain essentially valid, but they will become even more relevant, because failing a uniform EU liability regime, the (divergent) national provisions on ESG civil liability will once again apply.

The same applies to the GEDIP/EGPIL proposals to amend Articles 7 and 17 Rome II Regulation (§ 3). However, the comments made in § 3 concerning Article 29 CSDDD will no longer be relevant.

²⁰ See eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025PC0081; the political agreement was reached on 9 December 2025, see https://ec.europa.eu/commission/presscorner/detail/de/ip_25_2981.

JURISDICTION OF EU COURTS IN ENVIRONMENTAL DAMAGE CLAIMS AGAINST NON-EU DOMICILED DEFENDANTS

Michele Grassi

SUMMARY: 1. Introduction. – 2. The lack of a uniform EU framework and the possible extension of the Brussels Ia regime to third-State defendants. – 2.1. The extension of the existing uniform jurisdictional rules of Brussels Ia to environmental damage claims against third-State defendants. – 2.2. The possible new criteria of jurisdiction for disputes against third-State defendants. – 3. The persistent practical relevance of jurisdictional diversity in environmental litigation.

1. *Introduction.*

Jurisdiction over environmental damage claims has become an increasingly salient issue in the broader debate on the transnational litigation of ESG-related disputes. This development reflects both the growing capability to trace the environmental consequences of multinational corporate activities and the increased public awareness of the need for effective environmental protection. The topic has also been the subject of particular attention during the adoption of Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence (“CSDD Directive”), through which the European Union has introduced several obligations for companies operating in the internal market to identify, prevent, mitigate, and bring to an end actual and potential adverse human rights and environmental impacts arising from their own operations, as well as those of their subsidiaries and business partners, wherever located ¹.

¹ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. See, *ex multis*, N. BUENO-N. BERNAZ-G. HOLLY-O. MARTIN-ORTEGA, *The EU Directive in Corporate Sustainability Due Diligence (CSDDD): the final political compromise*, in *Business and Human Rights Journal*, 2024, 294; L. VENTURA, *Corporate*

Given that environmental damage is frequently capable of producing effects in several different States, such situations often raise complex questions regarding which courts have jurisdiction to adjudicate the resulting claims.

The doctrinal and judicial discussion on this topic is already vast. The purpose of this short contribution is not to revisit the entire debate, but rather to focus on a specific and complex aspect from the perspective of the European Union: jurisdiction over environmental damage claims against defendants domiciled outside the EU (the so-called third-State defendants). The following pages will consider how the current regime – marked by the absence of uniform EU rules – functions in practice and whether this lack of harmonisation is detrimental to the parties' interests or if it might carry certain benefits, particularly in terms of judicial flexibility and access to justice.

2. *The lack of a uniform EU framework and the possible extension of the Brussels Ia regime to third-State defendants.*

At present, Regulation (EU) No 1215/2012 ("Brussels Ia") provides the rules for the allocation of jurisdiction in EU Member States for disputes on civil and commercial matters against EU-domiciled defendants, but it largely leaves disputes involving third-State defendants to national law. According to Article 6 of the Regulation, where the defendant is not domiciled within the Union, jurisdiction shall be determined in accordance with the domestic rules of the forum².

With respect to our topic, the limited scope of application of the jurisdictional rules laid down by Brussels Ia implies that, where the defendant is not domiciled in the EU, the special heads of jurisdiction provided for in Article 7(2) (matters relating to tort, delict or quasi-delict) and Article 8(1) (multiple defendants in closely connected claims) do not apply.

This apparent shortcoming of the system may result in an undesirable

Sustainability Due Diligence and the New Boundaries of the Firms in the European Union, in *European Business Law Review*, 2023, 239; A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, in *Jus*, 2022, 295.

² With the relevant exception of Article 18(1), for disputes concerning consumer contracts, Article 21(2), in matters concerning individual contracts of employment, Article 24, in matters falling within the exclusive jurisdiction of Member States' courts, and Article 25, in case of prorogation of jurisdiction.

fragmentation that undermines legal certainty and coherence³. In recent years, several reform proposals have been advanced – both in academic literature⁴ and within EU institutions⁵ – advocating for a harmonization of the jurisdictional rules applicable to third-State defendants, particularly in cases involving trans-national environmental or human rights violations.

Such a reform would undoubtedly reduce the existing fragmentation and ensure greater coherence in the allocation of jurisdiction, irrespective of the defendant's domicile. Yet, as widely acknowledged, it would not represent a merely technical adjustment⁶.

On the one hand, although the introduction of uniform jurisdictional rules for disputes involving third-State defendants would represent a significant step towards broader jurisdictional harmonisation, it would also substantially alter the established balance between uniformity and procedural autonomy within the EU judicial area. Indeed, such an extension would displace national jurisdictional rules based on exorbitant *fora*, which, pursuant to Article 6(2) of the Regulation, are currently integrated into the Brussels Ia system and may be relied upon by any person domiciled in the respective Member State, irrespective of nationality. This, in turn, would raise complex questions as to

³ As clarified by the Court of Justice of the European Union, although national provisions are merely referred to by (the then applicable) Regulation (EC) n. 44/2001 ("Brussels I"), they must nonetheless be regarded as forming an integral part of the broader "Brussels regime", see Court of Justice, opinion no. 1/03 of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The coexistence of EU and national rules on jurisdiction, therefore, is not an anomaly or a deficiency, but rather a deliberate and structural feature of the system.

⁴ Recently on this topic, E. BENVENUTI, *Giurisdizione in materia civile e commerciale nei confronti di convenuti domiciliati in Stati terzi e interessi materiali dell'Unione europea*, Milan, 2025, spec. 329.

⁵ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM(2025) 268 final, 2 June 2025, spec. 4.

⁶ The extension of the scope of application of the uniform jurisdiction rules provided for under the Brussels system had already been proposed and extensively discussed at the time of the recasting of Brussels I and gave rise to a broad debate, see, *ex multis*, A. BORRÁS, *Application of the Brussels I Regulation to External Situations: from Studies Carried Out by the European Group for Private International Law (EGPIL/GEDIP) to the Proposal for the Revision of the Regulation*, in *Yearbook of Private International Law*, XII, 2010, 333; A. DICKINSON, *Surveying the Proposed Brussels I bis Regulation – Solid Foundations but Renovation Needed*, *ibid.*, 270.

both the feasibility and the desirability of such an extension. On the other hand, if the extension of the uniform jurisdictional rules' personal scope of application were confined exclusively to environmental or human rights-related claims, the outcome might paradoxically accentuate inconsistency and fragmentation in the allocation of jurisdiction within the EU.

In either scenario, the crucial question with respect to our topic is whether and to what extent such a reform could effectively enhance access to EU courts for victims of transnational environmental damage. The following analysis will therefore examine, first, the implications of a simple transposition of the uniform jurisdictional rules provided by Brussels Ia to environmental disputes involving third-State defendants and, second, the possible additions or amendments that might be necessary to ensure effective access to justice in relation to environmental litigation.

2.1. The extension of the existing uniform jurisdictional rules of Brussels Ia to environmental damage claims against third-State defendants.

A first head of jurisdiction that would become available in case of an extension of the Brussels regime to defendants domiciled outside the European Union in environmental damage claims is the ground of jurisdiction in tortious matters provided by Article 7(2). Pursuant to this provision, "in matters relating to tort, delict or quasi-delict", a person may be sued "in the courts for the place where the harmful event occurred or may occur". According to well-established case-law, under the Brussels Ia regime the notion of "place where the harmful event occurred or may occur" includes both the place where the harmful act or conduct was carried out (*locus commissi delicti*) and the place where the damage was suffered (*locus damni*)⁷. With respect to claims brought before the courts of the place where the damage was suffered, the extension of the Brussels Ia regime would reasonably also entail the application of the "mosaic" approach developed by the Court of Justice with respect to plurilocalized tort claims, which restricts jurisdiction to the portion of damage occurring within the forum State⁸.

⁷The ubiquity approach was first articulated in CJEU, 30 November 1976, Case 21/76, *Mines de potasse d'Alsace*. This approach has since been maintained and refined by later case-law, including CJEU, 19 September 1995, Case C-364/93, *Marinari*; 10 June 2004, Case C-168/02, *Kronhofer*; 25 October 2011; 28 January 2015, Case C-375/13, *Kolassa*; 16 June 2016, Case C-12/15, *Universal Music International Holding*.

⁸The mosaic approach under Article 7(2) of Brussels Ia was first developed in CJEU, 7 March 1995, Case C-68/93, *Shevill*, where the Court held that in cases of multi-state

Should this rule be extended to environmental claims against third-State defendants, it would, of course, operate only on the premise that at least one of the connecting factors (*locus commissi delicti* or *locus damni*) is situated within the Union. Yet its practical reach would remain significant, as it would allow the jurisdiction of the courts of the Member States to be asserted in all cases where the conduct giving rise to environmental harm, or its direct harmful effects, are located within the Union – that is, whenever the factual situation presents a strong and objective connection with the territory of the Union.

However, a comparative examination of the national rules applicable in the absence of Article 7(2) of Brussels Ia reveals that the vast majority of the Member States already provide for procedural rules enabling their courts to assert jurisdiction whenever the harmful event occurred within the forum. According to a recent comparative study of the domestic procedural rules on jurisdiction, most Member States replicate the ubiquity criterion embodied in Article 7(2) Bruxelles Ia. Only Greece and Spain depart partially from this model, the former limiting jurisdiction to the place of the event giving rise to the damage and the latter to the place where the damage occurs⁹. In practical terms, this suggests that an extension of Article 7(2) to disputes involving defendants domiciled in third States would not substantially broaden the reach of Member States' jurisdiction, as similar results are already achieved under national procedural rules.

The second major head of jurisdiction that would become available in case of an extension of the Brussels regime to third-State defendants derives from Article 8(1) of the Regulation, which allows closely connected claims against multiple defendants to be heard together. This provision, which serves the dual objectives of procedural efficiency and of avoiding irreconcilable judgments, might play a crucial role in transnational environmental litigation, where

dissemination of harmful acts – such as defamation through the press – the claimant may sue either for the entirety of the damage before the courts of the defendant's domicile, or for the damage sustained in each Member State before the courts of that State. This approach has since been reaffirmed and adapted to the online environment in later case-law, including CJEU, 25 October 2011, Joined Cases C-509/09 and C-161/10, *eDate Advertising*; 17 October 2017, Case C-194/16, *Bolagsupplysningen*; and 21 December 2021, Case C-251/20, *Gtflif Tv*.

⁹ Malta stands as the sole outlier, adopting a different approach, based on the place where the obligation (contractual or non-contractual) is assumed or to be performed; yet the practical impact of this rule is largely mitigated by the availability of general jurisdiction grounded on the defendant's mere presence on the territory, see T. LUTZI-E. PIOVESANI-D. ZGRABLIĆ ROTAR, *Comparative Report*, in T. LUTZI-E. PIOVESANI-D. ZGRABLIĆ ROTAR (eds.), *Jurisdiction Over Non-EU Defendants: Should the Brussels Ia Regulation be Extended?*, Oxford, 2023, spec. 21.

harmful conduct often involves both EU-based companies and non-EU subsidiaries, suppliers, or contractors¹⁰. A prominent example arises under the CSDD Directive, which imposes due diligence obligations on EU companies with respect to human rights and environmental impacts throughout their global value chains. In such cases, the EU-based company could serve as the “anchor defendant”, providing a jurisdictional link that would allow proceedings to be brought within the EU against both domestic and foreign non-EU parties¹¹.

Nonetheless, as for the special head of jurisdiction in tortious claims, most EU Member States already provide for a similar mechanism. More specifically, most Member States recognise some form of jurisdiction based on a close connection between defendants, either through rules mirroring or incorporating by referral Article 8(1) Brussels Ia (Croatia, Hungary, Italy) or through provisions functionally akin to it (Austria, Belgium, Bulgaria, France, the Netherlands, Poland). A minority lack an equivalent rule (Germany, Lithuania, Malta, Sweden), while Greece anchors jurisdiction not on a connection between defendants but rather between claims¹². Also in this case, therefore, the possibility to assert jurisdiction on the basis of Article 8(1) does not seem to substantially broaden the reach of Member States’ jurisdiction.

A further point deserves consideration. Differently from cases involving defendants domiciled within the Union, in proceedings against defendants domiciled in third States the jurisdictional heads set out in Articles 7(2) and 8(1) of the Regulation would constitute the only grounds on which Member States courts could assert their jurisdiction. Indeed, by definition, in such circumstances the general forum of the defendant’s domicile under Article 4 of the Regulation would not apply. This is a factor of no minor importance, as it substantially alters the nature of Articles 7(2) and 8(1), which are in themselves conceived as *alternative* grounds of jurisdiction, and, as such, shall be restrictively construed. Within the current framework of Brussels Ia, the potential shortcomings inherent in these special fora are largely mitigated by the existence

¹⁰ See *Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability]* (“GEDIP Recommendation”), available online, 2.

¹¹ From a strategic perspective, however, in most cases it might be sufficient to obtain compensation from the EU-based defendant alone. In fact, such compensation could meet the claimant’s objectives while indirectly promoting compliance among non-EU partners through contractual and reputational channels.

¹² See T. LUTZI-E. PIOVESANI-D. ZGRABLIĆ ROTAR, *Comparative Report*, cit., spec. 22.

of the general forum of the defendant's domicile, which ensures that a claim may in any event be brought before the courts of a Member State, thereby safeguarding the right of access to justice. By contrast, if the applicability of Articles 7(2) and 8(1) were extended to actions against third-States defendants, the impossibility to establish jurisdiction on the basis of these criteria would entail the exclusion of the jurisdiction of the courts of the European Union¹³.

These considerations suggest that a simple transposition of the existing uniform jurisdictional rules of Brussels Ia to environmental proceedings against defendants domiciled in third States would not be satisfactory. At best, such an extension would add little to what is already achievable under national jurisdictional regimes, and, in several instances, it could even result in a narrowing of the jurisdiction of Member State courts.

2.2. *The possible new criteria of jurisdiction for disputes against third-State defendants.*

A first possible head of jurisdiction, whose introduction has been suggested in the context of extending the reach of the uniform rules provided by the Brussels regime to claims against defendants domiciled in third States, is the *forum necessitatis*, or forum of necessity¹⁴.

This exceptional basis of jurisdiction is designed to safeguard access to justice when no other forum is effectively available¹⁵. While Brussels Ia does not provide for it, similar provisions are already enshrined in other EU

¹³ For similar considerations, see R. LUZZATTO, *On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants*, in F. POCAR-I. VIARENGO-F.C. VILLATA (eds.), *Recasting Brussels I*, Padua, 2012, 111.

¹⁴ See GEDIP Recommendation, cit., 5. The introduction of such a head of jurisdiction had also been suggested in the broader context of the recast of Brussels I, but it was eventually abandoned; see *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, COM(2010) 748 of 14 December 2010, Article 26.

¹⁵ See P. FRANZINA, *Sul forum necessitatis nello spazio giudiziario europeo*, in *Rivista di diritto internazionale*, 2009, 1121; G. ROSSOLILLO, *Forum necessitatis e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea*, in *Cuadernos de derecho transnacional*, 1, 2010, 403; R. CAFARI PANICO, *Forum necessitatis. Judicial Discretion in the Exercise of Jurisdiction*, in F. POCAR-I. VIARENGO-F.C. VILLATA (eds.), *Recasting Brussels I*, cit., 127; F. MARONGIU BONAIUTI, *Art. 4 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: il forum necessitatis come strumento volto a garantire il diritto di accesso alla giustizia*, in *Diritti umani e diritto internazionale*, 2022, 307.

instruments. In particular, Article 7 of Regulation (EC) No 4/2009 of 18 December 2008 on matters relating to maintenance obligations, Article 11 of Regulation (EU) No 650/2012 of 4 July 2012 on matters of succession, Article 11 of Regulation (EU) 2016/1103 of 24 June 2016 on matters of matrimonial property regimes, and Article 11 of Regulation (EU) 2016/1104 of 24 June 2016 on matters of the property consequences of registered partnerships allow courts of the Member States to assume jurisdiction where no other court has jurisdiction under the other provisions of the respective Regulation, if proceedings cannot reasonably be brought or conducted, or would be impossible, in a third State with which the dispute is closely connected, and provided that the dispute has a sufficient connection with the Member State of the court seised.

In the context of environmental damage claims, however, the key difficulty lies in defining what would constitute “impossibility”¹⁶. In such matters, proceedings before third States’ courts are rarely strictly impossible. More commonly, such proceedings are possible in a formal sense but may not be practically effective. Procedural differences, the substantive environmental standards applied, and the scope of available compensatory mechanisms all contribute to this gap between formal possibility and effective access to justice. In this sense, while the *forum necessitatis* represents a valuable tool to safeguard the full right of access to a court and its introduction would therefore represent a positive development for the system, it does not appear to offer a fully satisfactory solution in the context of environmental litigation, nor would it compensate for the loss of the ex-orbitant fora currently available under national rules. In other words, its utility seems indeed quite limited, as it addresses only the most extreme cases where no other effective forum exists, rather than providing a comprehensive framework for environmental claims against defendants domiciled in third States¹⁷.

A second potential head of jurisdiction could be grounded in material considerations linked to the European Union’s policy choices on environmental protection. Within the EU, environmental issues are heavily regulated, reflecting society’s strong expectations for safeguarding these sensitive interests. Yet, this high level of regulatory detail does not always translate into directly enforceable rights for affected individuals. This gap becomes particularly evident when a company established in a third State operates within the internal market but cannot be sued before the courts of a Member State because the applicable

¹⁶ On the notion of “impossibility” for the purposes of *forum necessitatis*, see CJEU, 1 August 2022, Case C-501/20, points 79 ff.; 27 March 2025, Case C-67/24, points 61 ff.

¹⁷ For similar considerations, see EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice and Effective Remedies*, 2022, available online, spec. 53.

domestic procedural rules lack any ground that would allow those courts to retain jurisdiction. Without addressing here the separate issue of applicable law, it is indeed plausible that a court in a third State may be less inclined to apply the strict environmental standards set out in EU law than a court within the Union; in any event, it can certainly be excluded that such standards could operate as overriding mandatory provisions before the courts of a third State. Such discrepancies risk creating a competitive disadvantage for European based companies, which – being subject to the jurisdiction of Member State courts of their domicile – are more likely to be held accountable for their environmental practices.

In light of these considerations, the introduction of a head of jurisdiction allowing proceedings to be brought against foreign companies that engage in significant commercial operations within the EU internal market – the so-called “doing-business” forum¹⁸ – could effectively contribute to restoring equilibrium in the Union by ensuring that all companies operating within the same market, regardless of whether they are established inside or outside the EU, may be held accountable for environmental harm resulting from their activities¹⁹. In practical terms, this jurisdictional head would rely on a given threshold of turnover generated in the internal market, rather than on the place of establishment alone, thereby extending the reach of EU courts’ jurisdiction to undertakings whose operations exert a tangible impact on the EU market.

¹⁸ The doing-business forum was developed in US case-law as a ground for exercising personal jurisdiction over foreign corporations whose commercial activities within a State were sufficiently continuous and systematic to justify treating them as present within the territory. American courts originally relied on the legal fiction that a corporation consented to jurisdiction by conducting business locally, see Supreme Court of the United States, 10 December 1917, *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*; R.A. CASE, *Conflict of Laws – Jurisdiction over Foreign Corporations*, in *North Dakota Law Review*, 1949, 111. The doctrine later evolved into a factual inquiry focused on whether the defendant’s in-forum activities constituted “minimum contacts” of such nature that the assertion of jurisdiction did not offend “traditional notions of fair play and substantial justice”, see Supreme Court of the United States, 3 December 1945, *International Shoe Co. v. Washington*; P.R. DUBINSKY, *The Reach of Doing Business Jurisdiction and Transacting Business Jurisdiction Over Non-U.S. Individuals and Entities*, available online. The Supreme Court’s recent revival of consent-based jurisdiction suggests that a State may construe registration to do business in a state as a valid consent of the concerned company to general jurisdiction, thereby preserving an alternative route, alongside minimum-contacts analysis, for asserting jurisdiction over companies whose commercial presence renders litigation in the forum fair and predictable, see Supreme Court of the United States, 27 June 2023, *Mallory v. Norfolk Southern Railway Co.*

¹⁹ See also EUROPEAN LAW INSTITUTE, *Business and Human Rights: Access to Justice and Effective Remedies*, cit., spec. 54.

Notwithstanding the significant expansion of EU courts' jurisdiction that would result from its application, the provision a "doing business" forum would not amount to an illegitimate exercise of civil jurisdiction under international law, since the foreign company's substantial commercial activity within the internal market would in any event provide a sufficient territorial connection with the Union. However, the political feasibility of such a criterion seems far from attainable. Indeed, its adoption might represent an uncomfortable choice for the European Union, that has generally refrained from adopting unilateral solutions in the field of civil jurisdiction. This caution seems might appear even more justified today, in an era of heightened tensions in international commercial relations, where the introduction of such a mechanism could risk straining its ties with key trading partners²⁰.

The European Union would, in fact, have had a suitable opportunity to introduce a "doing business" head of jurisdiction in the context of the CSDD Directive, where the applicability of certain obligations concerning environmental and human rights adverse impact to non-EU companies depends precisely on meeting specific turnover thresholds within the internal market. Despite several proposals pointing in this direction, the final text of the Directive contains no provisions on jurisdiction. This outcome suggests that the legislative process was not yet sufficiently advanced to address, let alone strengthen, access-to-justice mechanisms in environmental and human rights-related disputes²¹. This choice is unfortunate, considering that, as already noted, it may

²⁰ See, more generally on the topic, N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *Diritti umani e diritto internazionale*, 2023, 661.

²¹ Some authors have argued that the obligations laid down in the CSDD Directive could justify the emergence of a so-called *forum legis*, i.e. a head of jurisdiction for EU courts over disputes against non-EU domiciled companies based on the mere applicability of the Directive, see O. BOSKOVIC, *Extraterritoriality and the Proposed Directive on Corporate Sustainability Due Diligence, a Recap*, in *Journal of Private International Law*, 2024, 117, spec. 123; R. MICHAELS-A. SOMMERFELD, *The EU Sustainability Directive and Jurisdiction*, in *EAPIL Blog*, available online; N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza*, cit. *De lege ferenda*, nothing would prevent (or, rather, would have prevented) the European Union from providing that the courts of the Member States have jurisdiction whenever the Directive is applicable; that said, such a solution would be, at best, innovative, as there are no other EU acts establishing a principle whereby the courts of a Member State would have jurisdiction solely on the basis of the applicability of EU law. Some authors, however, have suggested the possibility of deriving a *forum legis* from the current state of law. In particular, according to these authors, given the absence of any specific jurisdictional rules in the CSDD

place European companies at a competitive disadvantage. Yet, a reform that would ensure the full justiciability of the rights enshrined in the CSDD Directive by allowing proceedings to be brought also against companies domiciled in third States does not appear likely in the near future, especially in light of the recent trend towards significantly reducing the Directive's scope²².

3. The persistent practical relevance of jurisdictional diversity in environmental litigation.

As things currently stand, environmental claims against third-State defendants fall outside the scope of the Brussels regime and are therefore governed by national jurisdictional provisions. While the absence of a harmonised EU framework in this area is often criticised as a regulatory gap, it can serve as a strategic asset that expands the potential for bringing environmental litigation.

While harmonisation enhances predictability, it carries the risk of oversimplifying a field inherently marked by complexity. Legal certainty is undeniably a core principle of any jurisdictional system, but in practice, the availability of diverse national rules can be advantageous for strategic litigation. The coexistence of multiple jurisdictional bases under the domestic laws of EU Member States provides claimants with various procedural avenues, including, in some instances,

Directive, the jurisdiction of Member States' courts could be inferred by the characterization of the substantive rules included in the Directive as overriding mandatory rules. This line of reasoning appears, with respect, conceptually misplaced, as it presupposes a conflation between jurisdiction and applicable law that is foreign to the structure of the European system. This is not to deny that rights conferred by EU law must, in order to be meaningful, be capable of being asserted before a court, failing which the protection afforded and the right to an effective judicial remedy would be undermined. Yet, within the EU framework – rooted in the civil-law distinction between jurisdiction and applicable law – it is not possible to infer a court's power to adjudicate from the mere existence of substantive rights or obligations, including those imposed by the CSDD Directive on companies operating within the internal market: jurisdiction depends on procedural rules laid down in general and abstract terms and cannot be derived implicitly from substantive regulatory provisions. See, on this point, also O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, spec. 157-158.

²² A series of subsequent measures have postponed or mitigated the application of CSDD Directive. In particular, Directive (EU) 2025/794 (the so-called "Stop-the-Clock" Directive) deferred both the transposition deadline and the entry into application of several due-diligence obligations, while the EU Commission's 2025 "Omnibus I" package proposed further adjustments to reporting and due-diligence timelines and thresholds under the CSDD Directive framework.

jurisdiction based on exorbitant criteria, thereby potentially increasing the likelihood of obtaining effective remedies. As a matter of fact, while the European Union has traditionally been reluctant to assert extraterritorial or exorbitant jurisdiction due to the political implications of doing so, Member States often assert broader jurisdictional claims with relatively limited repercussions on international relations. Furthermore, national courts may play a pivotal role in shaping access to justice under domestic law, possibly enjoying greater flexibility and a wider margin of judicial discretion than that afforded by uniform rules of jurisdiction, particularly in complex cross-border environmental disputes.

From this perspective, a degree of jurisdictional variability can be seen as an acceptable trade-off for the practical possibility of pursuing claims, even when national rules might appear exorbitant from a strictly EU-centric viewpoint²³.

As a matter of fact, traditional connecting factors – such as the place where the harmful event occurred (*locus commissi delicti*) and the place where damage manifests (*locus damni*) – are in most instances satisfactory. As seen, several domestic procedural rules applicable in the Member States continue, to varying extents, to rely on these heads of jurisdiction, allowing courts to hear claims for environmental harm objectively linked to their territory, even when the defendant is domiciled outside the Union. However, contemporary environmental disputes increasingly involve harm occurring beyond EU borders, frequently connected to the operations of corporations that do business within the European single market. In such situations, reliance solely on the *locus commissi delicti* or *locus damni* principles is often insufficient, prompting recourse to alternative grounds of jurisdiction provided by national rules.

In conclusion, in an era of global environmental challenges involving multiple actors and transnational harms, the preservation of jurisdictional pluralism should not be necessarily interpreted as a shortcoming of EU integration. On the contrary, it might represent an opportunity to pursue effective transnational justice, providing claimants with flexible avenues to hold responsible parties accountable.

²³ For similar considerations, see A. PETERS-S. GLESS-C. THOMALE-M. WELLER, *Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law*, in *MPIL Research Paper Series*, 2020-06, available online, spec. 25.

HUMAN RIGHTS AND THE CSDD DIRECTIVE: JURISDICTION IN CONTRACTUAL CLAIMS WITHIN THE VALUE CHAIN

Anna Liebman

SUMMARY: 1. Introduction and scope of investigation. – 2. The European Directive on Corporate Sustainability Due Diligence. – 3. The absence of a provision on jurisdiction and its possible implications. – 4. Jurisdiction in ESG-related human rights disputes: the contractual dimension. – 5. The reach and effectiveness of the CSDDD in cross-border contractual disputes. – 6. Concluding remarks.

1. Introduction and scope of investigation.

For more than a decade, companies' responsibility to respect human rights and the environment has occupied a central place in international political, economic, and legal debate, increasingly attracting the attention of both national and international courts. As is well known, this growing sensitivity forms part of the broader framework of ESG (Environmental, Social and Governance) policies – a notion referring to the principles aimed at integrating environmental protection, respect for human rights and ethical corporate governance into business activities.

Against this background, the European legislator has embarked on a regulatory path aimed at strengthening corporate social and environmental responsibility¹, culminating, on 13 June 2024, in the adoption of the Corporate

¹ Examples of EU instruments aimed at strengthening the commitment of European companies to conduct their activities respecting human rights and the environment include Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards the disclosure of non-financial and diversity information by certain large undertakings and groups, and Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937.

Sustainability Due Diligence Directive². The final text, which represents a compromise between the positions of the European Parliament and the Council, reveals the difficulty of reconciling the protection of human rights and the environment with the political will to foster the Union's competitiveness in global markets³.

² Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (hereinafter also "CSDD Directive", "CSDDD" or "Corporate Sustainability Due Diligence Directive"). On the Directive, see, *inter alia*, N. BUENO-N. BERNAZ-G. HOLLY-O. MARTIN-ORTEGA, *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, in *Business and Human Rights Journal*, 2024, 1; E. KOJO NARTEY, *Addressing Corporate Human Rights Violations and Environmental Harm: Advancing a Holistic Remedial Framework through Tort Law and the EU Corporate Sustainability Due Diligence Directive (CSDDD)*, in *Athens Journal of Law*, 2024, 345; T. MORGANE-B. NADIA-O. HOSPES, *Advocating for the EU Corporate Sustainability Due Diligence Directive Against the Odds: Strategies and Legitimation*, in *Journal of Common Market Studies*, 2025, 606; A. BONFANTI, *Corporate Sustainability Due Diligence Directive: A Human Rights-Based Assessment*, in *Riv. comm. int.*, 2024, 857; R. GRECO, *Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection?*, in *Dir. umani e dir. int.*, 2023, 5. See also earlier works published after the Commission's proposal but before the Directive's entry into force, including O. BOSKOVIC, *Extraterritoriality and the Proposed Directive on Corporate Sustainability Due Diligence: A Recap*, in *JPIL*, 2024, 117; A. BONFANTI, *Global Value Chains, Human Rights and the Environment from the Perspective of Private International Law: Towards a European Directive on Corporate Sustainability Due Diligence*, in *JUS*, 2023, 295; N. BOSCHIERO, *The Extraterritoriality of the Future EU Directive on Corporate Sustainability Due Diligence between Public and Private International Law*, in *Dir. umani e dir. int.*, 2023, 661; G. CARELLA, *The Civil Liability of Transnational Corporations for Environmental and Human Rights Violations: The Contribution of the Proposed Directive on Corporate Sustainability Due Diligence*, in *Freedom, Security & Justice*, 2022, 10; N. PERRONE, *Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence*, in *It. Rev. Int. and Comp. Law*, 2023, 389.

³ In the same vein, the Directive has undergone significant downsizing following the most recent initiatives of the Commission. Directive (EU) 2025/794 of 14 April 2025 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain obligations related to corporate sustainability reporting and corporate sustainability due diligence (the so-called stop-the-clock Directive) postponed the transposition deadline for the Corporate Due Diligence Directive from 26 July 2026 to 26 July 2027. Moreover, the Commission has adopted a proposal for a directive, now under consideration by the European Parliament and the Council, aimed at amending, *inter alia*, Directive (EU) 2024/1760 with respect to certain obligations concerning corporate sustainability due diligence – COM(2025) 81 final (the so-called *Omnibus Package* proposal). The proposed amendments include the limitation of due diligence obligations to direct suppliers only, higher size and turnover thresholds for inclusion within the scope of application, the removal of a uniform EU-level regime of civil liability, and further simplifications aimed at reducing compliance costs. On this matter see, A. BONFANTI,

One of the main shortcomings of the new EU framework is the absence of a jurisdictional provision, which raises serious doubts about the enforceability of the European regime and risks undermining its overall effectiveness. This is particularly true given that corporate accountability litigation is, by its very nature, transnational. Indeed, such disputes typically involve multiple legal systems, reflecting the modern model of corporate organization based on the so-called global value chain. As a result, the State in which proceedings take place is seldom the one in which all the parties are established, or where the facts giving rise to the dispute occurred, or even where the harm was entirely suffered. In this setting, it is therefore quite likely that proceedings will not be brought before a court of a Member State, even when the parent company is domiciled within the European Union ⁴.

This article explores the challenges arising from the lack of a jurisdictional provision in the new Directive on corporate due diligence. Following a brief overview of the CSDDD's key innovations and of the provisions most relevant to the present analysis (2), it examines how the absence of a rule on jurisdiction may affect the concrete application of the uniform regime (3). The perspective adopted departs, at least in part, from the traditional doctrinal focus on victims' access to justice. Instead the article examines how compliance with ESG standards – as provided for by the EU Directive – may translate into contractual relations among companies operating along the global value chain (4, 5). Some concluding remarks will follow (6).

2. *The European Directive on Corporate Sustainability Due Diligence.*

The CSDD Directive, which represents one of the most recent applications of the concept of human rights due diligence ⁵, has introduced, for the first

EU Corporate Sustainability at a Crossroads: The Omnibus Proposal to Amend the EU Directive on Corporate Sustainability Due Diligence and Its Ongoing Negotiations, in *Dir. umani e dir. int.*, 2025, 532.

⁴ The term “global value chain” refers to a production system in which the various stages of design, manufacture, distribution and marketing are outsourced to legally autonomous entities located in different States, yet functionally integrated into a single economic process. See, P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *Riv. dir. int. priv. proc.*, 2022, 831 ff.; C. TUO, *Rimedi per abusi di diritti umani da parte delle imprese: profili di diritto internazionale privato*, in F. MARELLA-C. MASTELLONE (eds.), *Contratti del commercio internazionale e sostenibilità*, Pisa, 2024, 101 ff.

⁵ As stated in Principle 17 of the UN Guiding Principles on Business and Human Rights

time at the global level, a binding legal framework for Member States aimed at ensuring respect for human rights and environmental protection by both companies falling within the thresholds laid down in the Directive (whether European or non-European) and the companies participating in their value chains. In particular, it requires Member States to adopt legally binding legislation translating into concrete corporate obligations the duties to identify, prevent, and mitigate adverse impacts on human rights and the environment throughout the entire value chain. In doing so, it establishes a new harmonized regime of private enforcement, allowing victims to bring civil liability claims against companies that fail to comply with their due diligence obligations.

One of the most significant innovations introduced by the CSDDD is its extraterritorial scope: the Directive applies not only to EU-based undertakings, but also to non-European companies conducting stable business within the EU internal market, even where the relevant events occur outside the territory of the Union ⁶.

A second significant aspect of the new EU legislation lies in the fact that the obligations imposed by the Directive are not confined to impacts directly caused by, or to which, the company concerned contributes. Rather, they extend to those connected with operations, products, or services throughout the

(UNGPs), corporate due diligence (in the field of human rights or, more broadly, for sustainability purposes) means “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”. Article 5 of the Directive sets out the scope of the due diligence obligation imposed on companies, which consists in integrating due diligence into corporate policies and monitoring its effectiveness; identifying actual and potential adverse impacts on human rights and the environment arising from corporate activities; preventing and mitigating potential adverse impacts and bringing to an end or remediating actual ones; establishing an internal complaints mechanism; and publicly communicating on due diligence.

⁶O. BOSKOVIC, *Extraterritoriality and the Proposed Directive*, cit., 118. The Directive therefore applies, pursuant to Article 2, also to companies incorporated under the law of a third country (and thus lacking a registered office, central administration, or principal place of business within the territory of a Member State) but commercially present in the Union’s market, namely those with a net turnover in the EU exceeding EUR 450 million. The rationale for such extraterritorial application lies, on the one hand, in the European Union’s ambition to act as a global standard-setter in the field of corporate sustainability, and, on the other, in the need to ensure a level playing field among companies operating within its market. According to Boschiero, moreover, this extraterritorial feature of the EU legislation would be fully justified under international law, as it concerns the conduct of third-country entities connected to the Union’s territory through an objective criterion, namely their turnover. See also, N. BOSCHIERO, *L’extraterritorialità della futura direttiva europea*, cit., 664 ff.

entire chain, thereby involving not only subsidiaries but also direct and indirect business partners, regardless of whether such entities are established within or outside the European Union ⁷. Rather, one of the Directive's objectives is precisely to prevent European companies from using outsourcing or relocation as a means to circumvent its scope of application.

This feature reveals a second, markedly extraterritorial dimension of the uniform regime, materialized in the due diligence obligations imposed on undertakings falling within the thresholds set out in Article 2 of the Directive, and indirectly affecting all entities integrated into the value chain of a company subject to the Directive's scope of application ⁸.

Finally, a further aspect worth mentioning – although only tangentially related to the present topic – is that Article 29(7) of the Directive expressly provides that national provisions transposing the civil liability of companies for breaches of their due diligence obligations shall be considered overriding mandatory rules ⁹. While this provision – the only one in the Directive addressing a private international law issue – appears particularly relevant to ensuring the effectiveness of the uniform regime, its impact is substantially undermined by the absence of a rule on jurisdiction.

3. *The absence of a provision on jurisdiction and its possible implications.*

While the Directive represents a significant step towards integrating ESG concerns into corporate governance, its effective implementation raises important challenges. Article 29(7), is, by itself, insufficient to achieve the Directive's intended extraterritorial reach or to ensure the full effectiveness of the

⁷ See Articles 10 and 11 of the CSDDD. However, while the current version of the text extends corporate liability to indirect business partners, one of the Commission's proposals contained in the *omnibus* package aims to limit such liability to direct business partners only.

⁸ As noted by Boschiero, this does not amount to a direct territorial extension of EU rules to third-country companies, but rather to an indirect form of pressure exerted on such companies – in order to ensure full compliance with the obligations laid down by the uniform framework – by those undertakings falling within the Directive's scope of application. N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea*, cit., 671.

⁹ Article 9(1) of Regulation (EC) No 593/2008 (Rome I) defines overriding mandatory provisions as “provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract”.

due diligence obligation. Such effectiveness presupposes, on the one hand, that the courts of the Member States have jurisdiction over disputes arising from breaches of that obligation and, on the other hand, that the law of a Member State governs those disputes.

As regards the first aspect, the main difficulty lies in the absence of jurisdictional provisions in the Directive¹⁰. This omission is hardly compatible with the legislator's ambition to ensure broad and consistent application across borders, and risks preventing the Directive from operating as intended.

In practice, this omission leaves the determination of jurisdiction to the general framework established by the Brussels Ia Regulation, which continues to apply where the defendant company is domiciled in a Member State.

Conversely, where the claim is brought against a company domiciled in a third State, or where a non-EU company is joined as co-defendant, jurisdiction is determined according to the national rules of the forum, pursuant to Article 6 of the Regulation. While the Brussels regime distributes jurisdiction among Member State courts, the application of national jurisdictional rules may not necessarily result in the assertion of jurisdiction by an EU court, particularly where the defendant and other relevant elements of the dispute are more closely connected with third States¹¹.

In such cases, where proceedings are brought before a non-EU court, the application of the Directive's regime cannot be guaranteed. It will depend

¹⁰ Coupled with the failure to amend the Brussels Ia Regulation, as many had advocated. For instance, both the European Parliament and the Groupe européen de droit international privé (GEDIP) had proposed that the Directive be accompanied by an extension of the *ratione personae* scope of the jurisdictional rules under the Brussels Ia Regulation. See European Parliament, Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Committee on Legal Affairs, Rapporteur: Lara Wolters; Recommendation of the European Group for Private International Law (GEDIP/EG-PIL) to the European Commission concerning the private international law aspects of the future instrument of the European Union on [Corporate Due Diligence and Corporate Accountability], 8 October 2021; and Recommendation of the European Group for Private International Law (GEDIP) concerning the Proposal for a Directive of 23 February 2022 on Corporate Sustainability Due Diligence, following up on its Recommendation to the Commission of 8 October 2021.

¹¹ Most national private international law rules do not, in fact, allow EU courts to exercise jurisdiction over a defendant domiciled in a third State for damage also occurring in a third State, albeit with some exceptions – such as Article 14 of the French Civil Code. See, in this regard, M. LA MANNA, *Residual Jurisdiction under the Brussels I bis Regulation. An Unexpected Avenue to Address Extraterritorial Corporate Human Rights Violations*, in P. FRANZINA-S. FORLATI (eds.), *Universal Civil Jurisdiction. Which Way Forward?*, Leiden-Boston, 2020, 140 ff.

instead on the conflict-of-law rules of the foreign forum, on whether those rules recognize the CSDDD's provisions as applicable, and on the forum court's attitude towards foreign mandatory rules – all inherently uncertain factors.

Therefore, this is, arguably, the Directive's main vulnerability. By imposing due diligence obligations on companies within its *ratione personae* scope without establishing jurisdictional criteria, the Directive risks depriving its liability regime of practical effect.

Moreover, even if a non-EU court were to apply the uniform EU sustainability standards as a result of its own conflict-of-law rules, further concerns would arise. Submitting questions of interpretation and application of EU law to a judicial authority external to the Union – one neither bound by EU law nor by the case law of the Court of Justice of the European Union ("Court of Justice" or "CJEU"), and unable to request a preliminary ruling – could undermine the coherence of the EU legal system, as underlined by the CJEU, notably in its case law on arbitration. Indeed, as the Luxembourg Court has repeatedly emphasized, non-EU tribunals are not required to apply the principles of EU public policy and cannot make a preliminary reference, thereby jeopardizing the system established by the Treaties¹².

Similar concerns may arise where issues relating to the interpretation and application of the CSDDD are submitted to the courts of third States, which would likely fail to apply the European regime (or interpret it in a manner not fully aligned with EU law principles and CJEU case law), thereby frustrating its purpose¹³.

¹² This concern emerged, for instance, in relation to an arbitral award rendered by the Court of Arbitration for Sport (CAS) and subsequently challenged before the Swiss Federal Tribunal. See CJEU, 21 December 2023, *International Skating Union v Commission*, C-124/21 P. The Court held that where, as in the case before it, the arbitral proceeding – although seated in a third State – concerned commercial and economic activities also taking place within the Union, the judicial authority reviewing the award was required, on the one hand, to apply the public policy principles of EU law and, on the other, to belong to a Member State. Only in this way can the uniform application of EU law be ensured, since a judicial authority of a Member State – and only such an authority – may, where necessary, make a preliminary reference under Article 267 TFEU. On this point, see more recently CJEU, 1 August 2025, *Royal Football Club Seraing SA v Fédération internationale de football association (FIFA) and Others*, C-600/23.

¹³ Indeed, this argument could also be supported by reference to the judgment CJEU, 9 November 2000, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, C-381/98, where the Court emphasized the need to prevent the circumvention, through a choice-of-law agreement, of the EU rules protecting commercial agents carrying out their activities within the Union. See also, *infra*, para. 5.

4. *Jurisdiction in ESG-related human rights disputes: the contractual dimension.*

Academic discussion has so far largely focused on the implications of the omission of a provision on jurisdiction for access to justice of victims of human rights violations¹⁴. It has been observed that, in the absence of a specific jurisdictional rule, such victims may face a denial of justice or be forced to litigate before courts in third States, where legal frameworks concerning ESG standards are weaker or even non-existent, thereby reducing the likelihood of obtaining effective redress. In this sense, jurisdiction in ESG-related disputes has traditionally been conceived as an instrument to secure victims' access to justice and to facilitate the attribution of non-contractual liability to multinational enterprises operating across borders¹⁵.

Beyond this perspective, however, the CSDDD also introduces a contractual dimension. As already noted, the Directive applies not only to parent companies and their subsidiaries but also to any undertaking directly or indirectly connected through contractual relationships within the value chain. Articles 10 and 11 require companies falling within the scope of the Directive to obtain contractual assurances from their business partners to ensure compliance with the company's code of conduct and the relevant international human rights standards. Where adverse human rights impacts occur, such companies may be required to suspend – or, as a last resort, terminate – the business relationship, failing which they may incur liability for conduct committed by entities operating within their supply chain.

Against this background, while the inclusion of ESG clauses in contracts with suppliers, contractors, and other business partners was already a widespread practice, the introduction of a legal duty to that effect is likely to lead to a considerable increase in contractual provisions addressing human rights. Consequently, actual or potential adverse impacts may increasingly be characterised as breaches of contractual obligations.

¹⁴ Even though, by introducing largely uniform substantive rules on corporate due diligence obligations, the Directive is expected to enhance protection in two main ways. First, it facilitates victims' ability to establish corporate liability by expressly recognizing the responsibility of parent companies for the conduct of their subsidiaries and of other business partners. Secondly, it promotes greater legal certainty for companies operating in the European market, both as to the content of the obligations imposed and as to the potential liability arising from their breach.

¹⁵ See for example O. LOPES PEGNA, *Accesso alla giustizia e giurisdizione nel contenzioso transfrontaliero*, Bari, 2022; R. BRAY-I. PRETELLI-D. WALLIS, *Access to Justice in the EU for Victims of Socio-environmental Damages Occurring in non-EU Countries: the Proper Law of Torts in the Value Chain*, in *Yearbook of Private International Law*, 2021/2022, 211.

Like any other contractual provision, the interpretation and application of human rights-related clauses may be contested and give rise to disputes. The parties may, for instance, disagree on whether entities in the supply chain have effectively complied with the code of conduct, or on the accuracy of ESG information provided to the parent company in fulfilment of its due diligence obligations. Similarly, a company whose reputation has been harmed by events within the value chain – leading to a loss of clients or business opportunities – may claim compensation for lost profits; conversely, another company may suffer production delays due to the need to replace suppliers, subcontractors, or to suspend projects to conduct investigations.

Such situations are likely to generate disputes concerning the interpretation and application of ESG clauses, as well as the effects of the CSDDD as an overriding mandatory provision.

Likewise, as with victims seeking redress, identifying the competent forum in these cases – which concern the ‘horizontal’ relationships among companies operating within the same global value chain – becomes crucial. Indeed, only if the dispute is brought before a court of a Member State the uniform application of the Directive will be ensured. By contrast, where a third-State court or an arbitral tribunal is called upon to determine autonomously the scope and effects of such contractual clauses, it is far less likely that the Directive – and EU law more broadly – will be considered. This, in turn, may allow companies within the scope of the Directive to evade its liability regime, while depriving other entities within the value chain of the compliance “pressure” that parent companies are expected to exert through their codes of conduct¹⁶.

5. The reach and effectiveness of the CSDDD in cross-border contractual disputes.

By way of illustration, consider a simple case involving a clothing manufacturer falling within the personal scope of the Directive that purchases materials from another company. In compliance with the Directive, the buyer includes in the

¹⁶ Such “pressure” derives from the fact that, as already noted, the parent company is responsible for ensuring that its business partners comply with specific ESG standards. However, if the Directive is not applied, parent companies may escape the liability regime and therefore have little incentive to require contractual assurances from their partners regarding compliance with their codes of conduct. In such circumstances, even where those partners fail to comply, the parent company would not incur any liability.

sales contract a clause requiring adherence to its code of conduct, aimed at ensuring respect for human rights and environmental standards throughout the supply chain. Suppose that, during the performance of the contract, it emerges that the seller has organised production using underpaid local labour. In response, the parent company first suspends its orders and subsequently brings proceedings against its contractual partner, seeking termination of the contract and compensation for the reputational damage and supply chain delays incurred. The seller, however, contests the allegations and opposes termination, claiming to have complied with the ESG clause contained in the sales contract between the parties.

In such a situation, the outcome may vary significantly depending on where the proceedings are instituted.

If both companies are domiciled within a Member State, no difficulties arise with respect to the effective application of the CSDDD. The jurisdictional rules of the Brussels Ia Regulation would apply, and a Member State court would have jurisdiction under Articles 4 and 63, or, assuming that delivery of the goods is to take place within a Member State, also under Article 7(1)(a) of the Regulation.

A second plausible scenario is one in which the defendant seller is domiciled outside the European Union. In that case, jurisdiction would be governed by national rules, which serve as the residual basis of jurisdiction under Article 6 of the Brussels Ia Regulation. In the absence of a choice-of-court agreement, domestic solutions may diverge. In countries such as Italy and Spain, whose national rules mirror the Brussels regime even for matters falling outside its personal scope, EU courts would still retain jurisdiction in contractual matters. However, not all Member States have enacted similar provisions. In such cases, a non-EU court could be deemed competent, with the consequent risk of undermining the Directive's effectiveness. A court of a third State may display limited sensitivity to ESG-related issues and, as already noted, the conflict rules it applies might result in the non-application of the Directive. As a result, a contractual clause requiring compliance with specific human rights and environmental standards may be rendered ineffective. In practical terms, a third-State court might refuse to declare the contract terminated, on the ground that breach of the parent company's code of conduct does not constitute non-performance. From a broader perspective, this could lead to a systemic disregard of corporate codes of conduct and human rights standards within complex contractual networks along the global value chain, thus weakening the guarantees envisaged by the Corporate Sustainability Due Diligence Directive.

A third hypothesis is one in which neither contracting party is domiciled within the European Union, yet one of them nonetheless falls within the scope

of the CSDDD pursuant to the thresholds set out in Article 2(2) of the Directive. In the absence of a jurisdiction clause in favour of a Member State court – which is highly unlikely – jurisdiction would be determined according to the applicable domestic private international law rules. Given the non-EU domicile of both companies and the probable extraterritorial localisation of contractual performance, it would be rather unlikely for a European court to assert jurisdiction. Therefore, in such cases too, the application of the Directive would be difficult to ensure.

A fourth scenario, which is particularly relevant in contractual matters given the weight accorded to party autonomy, also deserves attention. In any of the situations described above, the parties might include in their contract an exclusive choice-of-court clause in favour of a third-State court or an arbitration clause referring disputes to an arbitral tribunal¹⁷.

As regards the first hypothesis, such an agreement – even where concluded between EU-domiciled parties – falls outside the scope of the Brussels Ia Regulation, and its effects are governed by the applicable national law. Neither EU law nor the CSDDD expressly precludes this possibility.

With respect to the second hypothesis, while the case law of the Court of Justice has shown reluctance to allow arbitration in disputes involving the application of EU law, practice demonstrates that it will be difficult to prevent parties from including arbitration clauses in their contracts and arbitral tribunals from asserting jurisdiction¹⁸.

¹⁷ R. MICHAELS-A. SOMMERFELD, *The EU Sustainability Directive and Jurisdiction*, in *EAPIL blog*, 2023, available at <https://eapil.org/2023/08/03/the-eu-sustainability-directive-and-jurisdiction/>. Choice-of-court agreements may be inserted into contracts along the value chain alongside ESG clauses. By contrast, it is difficult to envisage such an agreement where the dispute is non-contractual in nature and involves victims of human rights violations seeking compensation for damage suffered. In such cases, as noted by Feraci with respect to actions concerning climate change – an observation that equally applies to human rights litigation – the unpredictability of the parties involved and the high degree of contentiousness of such disputes preclude any convergence on jurisdiction in the form provided for by Article 25 of the Regulation. O. FERACI, *Contenzioso climatico e diritto internazionale privato*, Turin, 2025, 125. In support of the use of arbitration in this context, see M. FOGDESTAM AGIUS, *Arbitrating contractual disputes over corporate sustainability*, in *Global Arbitration Review*, 2024, available at <https://globalarbitrationreview.com/review/the-european-arbitration-review/2025/article/arbitrating-contractual-disputes-over-corporate-sustainability>.

¹⁸ Indeed, arbitral tribunals are not bound to apply EU law. In investment arbitration, for instance, despite the Court repeatedly emphasizing the incompatibility of intra-EU investment arbitration with EU law, arbitral tribunals have rarely declined jurisdiction, with only one

In both cases, the inclusion of such clauses could allow companies to circumvent the guarantees established by the Directive, even where both the parent company and the seller are domiciled within the European Union. Forum selection clauses in favour of third States could therefore become a strategy for undertakings falling within the Directive's scope to avoid liability under the uniform regime, while benefitting from reduced costs by engaging, within their value chain, partners that fail to comply with ESG standards, for instance by exploiting low-cost labour.

According to Michaels and Sommerfeld, allowing the parties to evade the application of the CSDDD would be inconsistent with its effective implementation and thus contrary to the principle of *effet utile*. Accordingly, an exclusive jurisdiction agreement in favour of a third State, or an arbitration clause, should be regarded as invalid unless the CSDDD would remain applicable or that the law governing the contract ensures an equivalent level of protection¹⁹.

This reasoning follows the approach already set out by the CJEU in *Ingmar*²⁰ and further developed in legal scholarship and in the case law of certain Member States. In fact, drawing on *Ingmar* and in line with subsequent decisions of German, Austrian and English courts, some authors have argued that a choice-of-court or arbitration clause in favour of a third-State forum may be denied effect where there is a reasonable likelihood that the chosen forum would not apply the relevant mandatory provisions of EU law²¹.

known exception (*Green Power and SCE v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022). See, more recently, N. LAVRANOS-G. CASTAGNA, *Investment Arbitration and EU Law*, Cheltenham, 2024, and the essays on the subject published in *Dir. comm. int.*, 2024, 3 ff., introduced by E. MINERVINI-L. MOLA-F. ORTINO-L. PALOMBINO-G. ZARRA, *The European Union in International Investment Law: Perspectives and Challenges*.

¹⁹ R. MICHAELS-A. SOMMERFELD, *The EU Sustainability Directive*, cit., 8.

²⁰ Cf. *supra*, note 11. In addition to that judgment, see *Mahamdia* (CJEU, 19 July 2012, *Ahmed Mahamdia v Repubblica algerina democratica e popolare*, C-154/11) e *Taser* (CJEU, 17 March 2016, *Taser International Inc. v SC Gate 4 Business SRL, Cristian Mircea Anastasiu*, C-175/15) in which the Court emphasised the need to avoid a situation where adherence to a choice-of-court clause in favour of third-State courts would undermine the *effet utile* of the Brussels I Regulation – a line of reasoning that could arguably be extended to the effective application of EU law more generally.

²¹ See C. KOHLER, *L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatismes*, in *Recueil de Cours*, 2013, 391 ff.; H. MUIR WATT, *Party Autonomy in international contracts: from the making of a myth to the requirements of global governance*, in *European Review of Contract Law*, 2010, 267 ff.; For German case law, Oberlandsgericht

However, this view is not universally shared. Other scholars – as well as the national courts of France and Italy – have rejected this approach, maintaining that questions of jurisdiction and applicable law must remain distinct. According to this approach, a preventive review of compliance with overriding mandatory provisions is unnecessary, since, where appropriate, the resulting foreign judgment may simply be denied recognition as being contrary to the public policy of the forum²².

This is not the place to explore this complex issue in detail, as it raises broader questions concerning the effectiveness of EU law, particularly when the latter purports to apply to extraterritorial situations. What clearly emerges, however, is that the parties' ability to choose a non-EU forum – a possibility not excluded by EU law or by the CSDDD – may give rise to serious concerns regarding the Directive's effective application, not only in disputes involving non-EU undertakings but also in relations between EU-domiciled companies operating within the same global value chain.

In conclusion, given the absence of a jurisdictional provision, situations may arise in which EU courts are not deemed competent – for instance, when one or both of the companies is not domiciled in the EU or when the parties choose to submit their disputes to a non-EU forum – thereby undermining the effective implementation of the Directive.

6. Concluding remarks.

The contractual perspective reveals a less explored dimension of the Directive's implementation, one in which the interaction does not occur between

München, 17 May 2006, 7 U 1781/06, in *IPRax*, 2007, 322 ff.; Oberlandsgericht Stuttgart, 29 December 2011, 5 U 126/11, in *Internationales Handelsrecht*, 2012, 123 ff.; Bundesgerichtshof, 5 September 2012, VII ZR 25/12. Similar reasoning has been adopted by Austrian case law, in Oberster Gerichtshof (OGH), 1^o March 2017, 50 OB 72/16, and, by English case-law, in High Court of Justice Queen's Bench Division, 30 October 2009, [2009] EWHC 2655 (QB), 2009 WL 3441737.

²² Cfr. G. RUHL, *Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents*, in *European Review of Private International Law*, 2007, 901 ff.; H. GAUDEMET-TALLON, *La clause attributive de Jurisdiction, un moyen d'échapper aux lois de police?*, in K. BOELE-WOELKI et al. (eds.), *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr*, Zurich, 2010, 719. See also, Cass. s.u., 20 February 2007, n. 3841, in *Riv. dir. int. priv. proc.*, 2008, 160 ff.; Cass. s.u., 12 July 2019, n. 18831, in *Trust e attività fiduciarie*, 2020, 182 ff. e Cour de Cassation, 22 October 2008, n. 07-15.823, in *Rev. critique dr. int. privé*, 2009, 1 ff.

companies and victims, but rather among undertakings operating within the same value chain. In this context, the parties' shared economic interests may at times translate into contractual strategies or forum choices which, although formally legitimate, may in practice diminish the impact of obligations arising under EU law.

From this angle, several scenarios emerge in which the Corporate Sustainability Due Diligence Directive may, in practice, fail to apply to disputes concerning contractual guarantees embedded within the network of relationships along the value chain. This risk materialises, given the absence of any jurisdictional provision in the CSDDD, whenever a dispute is brought before the courts of a third State – a situation that may arise where one or both companies involved are domiciled outside the European Union, or where the parties have agreed on an exclusive choice-of-court or arbitration clause. In such cases, the effectiveness of the safeguards provided by the Directive appears potentially undermined.

Scholarly proposals have been advanced to address these challenges²³, yet none appears truly conclusive. It seems clear that the tension between, on the one hand, the Directive's claim to mandatory application and, on the other, the absence of a rule on jurisdiction, must ultimately be resolved at the level of the European institutions.

These difficulties form part of the broader question of the effectiveness of EU law, particularly where it seeks to produce effects beyond the Union's borders and to influence economic relationships involving actors or conduct situated in third States. The issue has long attracted attention at the EU level, as demonstrated by the ongoing debate on a possible revision of the Brussels Ia Regulation, aimed, *inter alia*, at enhancing the coherence and extraterritorial applicability of EU civil and commercial law.

What is certain is that the extension of the reach of EU law raises broader questions as to the extent to which the Union may legitimately project itself beyond its natural sphere of application. In an increasingly interconnected economic context, and having achieved a significant degree of internal integration, it is understandable that the Union seeks to ensure the coherence and effectiveness of its policies also beyond its borders – or, at least, in relation to all those situations which, while formally concerning actors established in third States, nonetheless produce effects within the European territory.

²³ See for instance the proposal of a *forum legis*. Cf. N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea*, cit., 688 ff.; R. MICHAELS-A. SOMMERFELD, *The EU Sustainability Directive*, cit., 12 f.

However, this dynamic calls for careful reflection on how the expansion of the scope of EU law may be reconciled, on the one hand, with the plurality of legal systems involved and, on the other, with the risk that the extraterritorial projection of EU law may not be taken seriously in practice, thereby, in a sense, undermining the credibility and authority of the Union's legal order. In other words, the challenge is twofold. It lies, first, in the Union's ambition to act as a global regulatory actor and to export its normative model beyond its borders; and, second, in ensuring that such ambition does not come at the expense of the genuine effectiveness of EU law. In this context, it can be said that striking this balance may well prove crucial to the credibility of the Union's legal project in the years to come.

JURISDICTION IN CLIMATE CHANGE LITIGATION

Eduardo Álvarez-Armas *

SUMMARY: 1. Introduction. – 2. The complex nature of climate change phenomena and the notion of “environmental damage” in the EU’s system of private international law. – 3. Relevant rules of international jurisdiction within the EU system of private international law. – 4. General appraisal of the rules. – 5. *De lege ferenda*: cumulating jurisdiction at a given victim’s place of damage. – 5.1. On the appropriateness of the ground of jurisdiction of the place where the damage occurs. – 5.2. On foreseeability, generally. – 6. *De lege lata*: on Article 30 Brussels Ia and the mandatory respect for a plaintiff’s choice of forum. – 7. Conclusions.

1. *Introduction.*

In recent years, climate risks have become a significant component of ESG assessments¹, to the point that, although they are often classified as a sub-group within environmental risks², they are also often elevated to an independent

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¹ As acknowledged by C. LI-W. TANG-F. LIANG-Z. WANG, *The impact of climate change on corporate ESG performance: The role of resource misallocation in enterprises*, in *Journal of Cleaner Production*, 445, 2024, 141263: “climate change significantly inhibits corporate ESG performance”.

² K. KEDWARD-J. RYAN-COLLINS-H. CHENET, *Biodiversity loss and climate change interactions: financial stability implications for central banks and financial supervisors*, in *Climate Policy*,

standing within a broader label of “environmental and climate risks”³. From the perspective of the transnational enforcement of ESG-related rights and, specifically, from the perspective of the assertion of international jurisdiction by courts over ESG-related claims, climate litigation (between private parties) is very closely connected to litigation over priorly-discussed environmental damage claims and human rights claims. Notably, within the European Union, international jurisdiction of courts over all these “civil or commercial matters” is sustained by the same set of rules, whose application is just adapted, as appropriate, to the specificities of each of these contexts.

In order to explore the distinctive aspects of the assertion of international jurisdiction *vis-à-vis* transnational climate change litigation, this chapter introduces the core climate-relevant provisions of the so-called “Brussels Ia” Regulation⁴ (Section 3) and delivers a general appraisal thereof (Section 4), notably on the basis of the practical results that the relevant rules yield in climate change litigation. Subsequently, it presents a potential *de lege ferenda* development (Section 5), and defends a specific *de lege lata* aspect of the current framework (Section 6). Before doing so, however, the question as to whether “climate damage” is to be understood as “environmental damage”, or as an independent category within the system of private international law of the European Union (hereinafter “EU”) is to be addressed (Section 2).

2. *The complex nature of climate change phenomena and the notion of “environmental damage” in the EU’s system of private international law.*

Climate change and its related phenomena are complex from a scientific perspective, and this may entail difficulties regarding how legal systems apprehend them. Using the United Nations Framework Convention on Climate Change as a starting point,

2023, vol. 23, no. 6, 763-781, 766: “*The ECB’s concrete policy developments regarding environmental risk – namely, the strategy review for monetary policy, the economy-wide climate stress test, and the supervisory climate risk stress test – focus on climate change and do not mention the potential relevance of [Biodiversity-related financial risk]*”.

³ M. OLIVER YÉBENES, *Climate change, ESG criteria and recent regulation: challenges and opportunities*, in *Eurasian Economic Review*, 2024, 89, 93, 94.

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1.

“‘Climate change’ means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”⁵

and,

“‘Adverse effects of climate change’ means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare”⁶.

Accordingly, (anthropogenic) climate change is per essence a global phenomenon i) that knows no geographic limitation (as it is linked to the “composition of the [...] atmosphere”); ii) to which multiple emitters contribute (as it connected, without further qualification, to “human activity”), and iii) that may potentially impact a very significant number of victims, anywhere in the world (for its “deleterious effects” may manifest, amongst others, on “ecosystems”, “socio-economic systems” and on “human health and welfare”, without further qualification).

The global and unrestricted nature of climate change should not make us lose sight, however, of the fact that inasmuch as an individual victim may identify individual damage that they have suffered as a consequence of climate-change-related phenomena their situation may be “translated” into private law, and they would be *prima facie* entitled to use private law tools (where available) to bring to justice a greenhouse gas emitter of their choosing on the basis of the best available science. Amongst emitters, carbon Majors are to be highlighted: these are 90 corporations which, according to scientific evidence, are responsible for “63 % of cumulative worldwide emissions of industrial CO₂ and methane between 1751 and 2010”⁷.

Beyond the spill-over effects that scientific complexity may have *vis-à-vis*

⁵ United Nations, *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107 (opened for signature 4 June 1992; entered into force 21 Mar. 1994) (UNFCCC), Article 1 definitions.

⁶ *Ibid.*

⁷ R HEEDE, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers*, in *Climatic Change*, 2014, 229. For updated data: <https://climateaccountability.org/carbon-majors/> accessed 8 October 2025.

establishing legal definitions, difficulties in apprehending climate change ramify through substantive law, notably in the realm of substantive tort law. The latter is the branch of the law that will be most frequently resorted to in what could be labelled as “private international climate change litigation” (hereinafter “PICCL”): private party versus private party cross-border climate litigation. This is to be understood as litigation: i) amongst private parties only⁸; ii) of a private-law (generally, tort-law) nature; iii) conducted on the basis of private-international-law foundations; iv) over damage threatened or caused by climate-change-derived phenomena.

Amongst the aforementioned difficulties encountered in (comparative) tort law, it is notable that establishing causal links between action (greenhouse gas emission) and result (climate-related damage) may prove to be challenging. Specifically, the traceability of “non-degradable, anthropogenic” surpluses of greenhouse gases to any specific emitter (and hence “selecting the liable debtor”) is complicated at least by two factors: on the one hand, “the greenhouse effect also takes place without human intervention and is subject to natural fluctuations that vary in space and time”; on the other hand, anthropogenic greenhouse gas emissions are absorbed by so-called (natural) “CO₂ sinks” (such as land surface or water)⁹. Moreover, reportedly, establishing a causal link in respect of material or financial damage attributable to global warming is further complexified by the fact that the specific material or financial damage suffered by a person is preceded by impacts on two “environmental goods”: first,

⁸ It is common to refer to public versus private climate litigation depending on whether the defendant is a public entity or a private person. However, it may be more appropriate to differentiate along two axes of coordinates: domestic versus international litigation, and public versus private litigation, further restricting the latter to situations where both claimant and defendant are private parties, and the relevant cause of action is of a private law nature. Although it may be difficult to draw clear-cut distinctions (notably as climate change is, by definition, an ‘international’/global phenomenon), differences in legal and non-legal stakes along both axes justify the classification effort. The presence of a public entity on either side of the legal relationship will frequently bring various complexities into the picture: potential international law immunities and doctrines such as the ‘act of state’ when litigation targets a public defendant; questions as to whether the lawsuit is grounded on public prerogatives/State authority when litigation is brought by a public plaintiff, etc. Moreover, (domestic) political and (international) diplomatic dynamics differ widely in function of the public or private nature of the parties involved.

⁹ The entirety of the paragraph is a translation/paraphrase of M LEHMANN-F EICHEL, *Globaler Klimawandel und Internationales Privatrecht – Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2019, 79-80.

changes in the atmosphere (greenhouse gases not “absorbed” by water or soil intensify the natural greenhouse effect, leading to increases in the mean temperature on Earth); second, changes in the environment that result from the latter, as for instance, rising sea levels, severe droughts or the melting of glaciers. Therefore, overall,

“the damage suffered by the plaintiff is not directly and monocausally attributable to an act of the defendant, but is mediated through general global warming. This distinguishes it from actions for directly caused environmental disasters [...]”¹⁰.

The ensuing question would be, then, whether these specificities entail characterizing climate-related damage as a self-standing category, or whether, to the contrary, it needs to be considered as a sub-species of environmental damage. In other words, are the scientific and structural complexities described above potentially sufficient to be used by defendants to try to contest the characterization of climate-change-derived damage as “environmental damage” caused by a tortfeasor to a victim? The answer, within the EU system of PIL needs to be found in the so-called Rome II Regulation¹¹, even if we are discussing the point with a view to establishing jurisdiction. In the EU, due to the principle of consistent interpretation of European instruments of private international law¹², it is possible (and even necessary) to resort to the definition found in Rome II already at the stage of establishing international jurisdiction of courts under the Brussels Ia Regulation. Thus, according to Recital 24 of the Rome II Regulation:

“‘Environmental damage’ should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms”.

Moreover, Article 7 Rome II, on the law applicable to (non-contractual obligations arising from) “environmental damage” establishes that, beyond damage

¹⁰ *Ibid.*

¹¹ Regulation (EC) 864/2007, of the European Parliament and of the Council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), O.J. L 199, 31 luglio 2007, 40.

¹² *Ibid.*, recital 7: “*The substantive scope and the provisions of this Regulation should be consistent with [the Brussels Ia Regulation] and the instruments dealing with the law applicable to contractual obligations*”.

as described in recital 24 (i.e. *stricto sensu* environmental damage, ecological damage, damage to nature as such) it also covers “damage sustained by persons or property as a result of such damage” (i.e. *lato sensu* environmental damage)¹³.

Consequently, the characterization of climate-related damages as environmental damages within the system of private international law of the European Union cannot be contested: climate-related damages are indeed environmental damages for the purposes of Rome II and Brussels Ia, inasmuch as anthropogenic GHG emissions constitute an “adverse change in a natural resource, such as [...] air [*inter alia*]” and the damages “sustained” by the relevant victims are “a result” thereto.

This understanding is moreover supported by academia¹⁴ and by the District Court of The Hague in the trial level decision in *Milieudefensie v Shell* 2019¹⁵, where seven Dutch NGOs and over 17,000 individuals brought Royal Dutch Shell before the District Court of The Hague (The Netherlands), on the basis of both EU and Dutch rules of private international law (Royal Dutch Shell had at the time its registered office in the United Kingdom and its principal place of business in the Netherlands). The claimants sought to obtain the transposition of the legal reasoning of the historic *Urgenda* case¹⁶ to private subjects (corporations). Specifically, they sought to obtain, *inter alia*, an order that Shell limits “the joint volume of all CO₂ emissions associated with its business activities and fossil fuel products [in a certain proportion]”¹⁷. When the

¹³ On the *stricto sensu-lato sensu* distinction, F. MUNARI-L. SCHIANO DI PEPE, *Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity*, in A. MALATESTA (ed.), *The unification of choice of law rules on torts and other non-contractual obligations in Europe. The “Rome II” proposal*, Padova, 2006, 176.

¹⁴ See amongst others O. BOSKOVIC, *La localisation du dommage en matière d’atteinte à l’environnement*, in *Int’l Bus. L.J.*, 2022, 697; Y. NISHITANI, *Localization of Damage in Private International Law and Challenges of Climate Change Litigation*, in *Int’l Bus. L.J.*, 2022, 707; E.M. KIENINGER, *Conflicts of jurisdiction and the applicable law in domestic courts’ proceedings*, in W. KAHL-M.P. WELLER (eds.), *Climate Change Litigation. A Handbook*, München, 2021, 119.

¹⁵ <https://en.milieudefensie.nl/climate-case-shell/climate-case-against-shell> (not to be confused with the 2008 *Milieudefensie v Shell* ‘common’ environmental litigation <https://en.milieudefensie.nl/shell-in-nigeria>) both accessed 10 October 2025.

¹⁶ The Urgenda foundation successfully conducted litigation against the Government of the Netherlands for its lack of efforts to combat climate change. For a description and timeline: <https://www.urgenda.nl/en/themas/climate-case/climate-case-explained/> accessed 10 October 2025.

¹⁷ Page 205 of the unofficial translation of the court summons, which can be found under the ‘summons’ link at <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 10 October 2025. Claimants sustained their claim on Dutch tort law, under

trial level decision was issued on 26 May 2021, the District Court of The Hague

“[o]rder[ed] [Shell], both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts [...] to limit or cause to be limited the aggregate annual volume of all CO₂ emissions into the atmosphere [...] due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels”¹⁸.

This outcome was reached from the understanding that

“[t]he parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO₂ emissions constitutes environmental damage in the sense of Article 7 Rome II”¹⁹.

The trial decision was celebrated as a “turning point”, since “[f]or the first time in history”²⁰ a court had ruled in the referred sense against a corporation within the climate change litigation context. However, after an appeal lodged by Shell, the decision was overturned on the 12 November 2024²¹: notwithstanding the acknowledgement that companies may have an obligation to reduce their GHG emissions, the Court of Appeal of The Hague considers that it cannot establish a specific percentage of reduction for Shell²². Although at the time of

which Shell would have “*a duty of care towards the claimants to contribute to preventing [climate-change-derived] danger and to act in line with [...] Paris climate target[s]*” (paras. 38-39). Their position was further argued, amongst other grounds, on a claim to indirect horizontal effect of Articles 2 (“Right to life”) and 8 (“Right to respect for private and family life, home and correspondence”) of the European Convention of Human Rights (ECHR) (ibid paras 40, 50-55).

¹⁸ Point 5.3 of the Court-issued English translation of the District Court Judgment https://www.climatecasechart.com/documents/milieudefensie-et-al-v-royal-dutch-shell-plc-judgment_4679 accessed 10 October 2025.

¹⁹ Milieudefensie 2019 judgement, *op. cit.*, point 4.3.2.

²⁰ Statements of Milieudefensie representatives <https://en.milieudefensie.nl/news/historic-victory-judge-forces-shell-to-dramatically-reduce-co2-emissions> accessed 15 October 2025.

²¹ The English translation of the decision can be found in https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20241112_8918_judgment.pdf accessed 15 October 2025.

²² Para. 7.111 of the judgment: “*While it follows from the foregoing that Shell may have obligations to reduce its scope 3 emissions, this cannot lead to the award of Milieudefensie et al.’s claims on this point. The court of appeal has come to the conclusion that Shell cannot be bound by a 45% reduction standard (or any other percentage) agreed by climate science because this percentage does*

writing (October 2025) the final outcome of the case in terms of substance is not known (as the case is pending before the Dutch Supreme Court)²³ the characterization point is clear: there was no contestation of private-international-law aspects at appeal level, and so, that part of the trial decision would stand²⁴.

From this position, it is possible to explore the relevant EU rules on international jurisdiction (3), and their general virtues and shortcomings (4) before engaging with further considerations.

3. Relevant rules of international jurisdiction within the EU system of private international law.

As it was announced in the introduction, the relevant rules in order for EU courts to assert international jurisdiction over PICCL are the same that have been identified in prior chapters of this book: clearly, just like human rights claims and environmental claims, climate-related claims come within the label “torts, delicts, quasi-delicts” within the system of private international law of the European Union. Even more so, as climate-damage is environmental damage, it is arguable that both are human-rights-related kinds of damage²⁵, not

not apply to every country and every business sector individually. The court has answered in the negative the question whether a sectoral standard for oil and gas can be established on the basis of scientific consensus. This entails that based on the available climate science, it cannot be said that a 45% reduction obligation (or any other percentage) applies to Shell in respect of scope 3. In addition, it could not be established that an obligation on Shell to reduce its scope 3 emissions by a certain percentage is effective, so that, at any rate, Milieudefensie et al. have no interest in their scope 3 claim”.

²³ At the time of writing, the text of the appeal to the Dutch Supreme Court is not available at the Sabin Center’s climate litigation database, but Milieudefensie’s press release (in the form of a Q&A) can be found under the following link: https://www.climatecasechart.com/documents/milieudefensie-et-al-v-royal-dutch-shell-plc-appeal_a555 accessed 15 October 2025.

²⁴ *Vid.* para. 5.2 of the appeals decision, which is the only point that may be considered as properly pertaining to private international law aspects: “*In the document for a change of claim on appeal Shell has indicated that it no longer maintains its objections to the application of Dutch law to the claims brought by Milieudefensie et al. This concerns the (sub) grounds for appeal developed under the umbrella of ground for appeal IV against the district court’s decisions that led to the ruling that Dutch law applied. Shell does uphold the part of ground for appeal IV in which it is argued that account must be taken of local safety regulations and rules of conduct in all countries where the conduct in question takes place (statement of appeal, nos. 10.5.2(d) and 10.5.18)*”.

²⁵ For a more developed explanation, E. ÁLVAREZ-ARMAS, *Rome II in the face of human-rights challenges: the law applicable to SLAPPs and to human-rights-related torts*, CeDIE Working Papers, no. 2021/01, 2021, 12-13.

the least because of the recognition by the United Nations' General assembly of the existence of "a right to a clean, healthy and sustainable environment as a human right"²⁶.

In the light of these ideas, the relevant grounds of jurisdiction, within the so-called Brussels Ia Regulation, are to be found specifically in Article 4, the general rule of the system, conferring jurisdiction to the courts of the country of the domicile of the defendant; and Article 7(2), a special rule of jurisdiction in matters relating to tort, delict or quasi-delict, conferring jurisdiction to the courts of the place where the "harmful event occurred or may occur". The latter provision is to be interpreted in accordance with the *Mines de Potasse* judgment²⁷ of the Court of Justice of the European Union (hereinafter CJEU), which reflects the so-called "ubiquity principle": in a nutshell, in cases of complex non-contractual obligations (i.e. when an action/omission in country A gives rise to a damaging result in country B), the plaintiff may freely choose to submit their claim in the place where the event giving rise to damage occurred or may occur, or else in the place where the damage occurred or may occur.

The relevant heads of jurisdiction will always and necessarily be Articles 4 and/or 7(2), irrespective of the nature of the underlying action under the applicable (domestic private) law (i.e. irrespective of whether the applicable legal system downstream in the conflict-of-laws reasoning considers the relevant action to stem out from tort law or from the realm of rights in rem). This conclusion arises from the CJEU's decision in *ČEZ*²⁸: on 31 July 2001 the Province of Upper Austria brought an action against ČEZ (a Czech energy-supplier in which the Czech State had 70% ownership), before the Landesgericht Linz (Austria). Upper Austria, acting in its capacity as owner of several pieces of land used, amongst others, for agriculture, sought, inter alia, an order to ČEZ to put an end to the influences on the province's land caused by ionising radiation emanating from the Temelín nuclear power station, "in so far as they exceeded those to be expected from a nuclear power station operated in accordance with current generally recognised technological standards"²⁹. The case reached the Oberster Gerichtshof (Austrian Supreme Court)

²⁶ UN General Assembly, *The human right to a clean, healthy and sustainable environment*, Res. A/RES/76/300, 76th sess., adopted 28 July 2022, UN Doc. A/RES/76/300 (28 July 2022), para. 1.

²⁷ CJEU, case 21-76, *Handelskwekerij G.J. Bier B.V. & the Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*, ECLI:EU:C:1976:166.

²⁸ CJEU, C-343/04, *Land Oberösterreich v Čez*, ECLI:EU:C:2006:330.

²⁹ *Ibid.*, para. 13.

as, in order to establish jurisdiction over the matter, there was a controversy as to whether the underlying action was covered by (what currently is) Article 24(1)(a) Brussels Ia, or else by (what currently is) Article 7(2) of the same text. The Province of Upper Austria defended the first option, as it considered that the ionising radiation emitted by the Temelín power station or, in any case the risk arising from its operation, constituted a nuisance within the downstream applicable law, “exceed[ing] the usual local level and caus[ing] a lasting interference with the normal use of the land belonging to the province [...]”³⁰. ČEZ, in turn, sustained the second option, as it considered that the underlying “action for prevention of a nuisance [...] is compensatory in nature and falls within [current Article 7(2) of Brussels Ia]”³¹. The Oberster Gerichtshof decided to submit a request for a preliminary ruling on the matter to the CJEU, which ruled that

“[Current] Article [24(1)(a) of the Brussels I bis Regulation], must be interpreted as meaning that an action which [...] seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision”³².

In other words, the referred action does not belong in the “category of ‘proceedings which have as their object rights in rem in immovable property’ within the meaning of that provision”³³. Hence, the exclusive rule of jurisdiction in Article 24 is only relevant where the very substance of a right in rem is in question. This will typically not be the case in climate litigation.

An illustration of the operation of the principles just described within climate litigation may be found in *Lliuya v. RWE*: the plaintiff, Mr. Saúl Lliuya, lives in Huaraz, a city in Perú situated on the Andes mountains, at the feet of a glacier that global warming is melting, increasing the water volume of a lake (Palcacocha) that will eventually overflow and flood Mr. Lliuya’s property³⁴. Backed-up by German NGO Germanwatch, Mr. Lliuya sued German electricity-provider RWE in order to avoid damage to his property. He contended,

³⁰ Para. 14.

³¹ Para. 15.

³² Operative part.

³³ Para. 20.

³⁴ <https://rwe.climatecase.org/en/background#palcacocha> accessed 18 October 2025.

on the basis of scientific data/evidence, that, as RWE has contributed to 0.47% of all GHG emissions since the beginning of the industrial era³⁵, it was liable to contribute to 0.47% of the costs of the preventative measures (building/construction works) required to prevent his property from being flooded³⁶. Under the law applicable to this dispute, the relevant action stems out from the realm of rights in rem: the plaintiff chose German law per virtue of Article 7 of the Rome II Regulation and, by basing his action on Article 1004 of the German BGB, framed the dispute in terms of impairment on his property. However, upstream, at the stage of establishing international jurisdiction, Article 24 of the Brussels Ia Regulation had no role to play, and so the plaintiff was free to resort to Article 4, the general rule providing jurisdiction to the courts of the country of the domicile of the defendant (i.e. Germany)³⁷. Despite not succeeding at trial level before the District Court in Essen (Germany), due to issues of causality, the case proceeded promisingly in appeal to the Higher Regional Court in Hamm, which accepted, in principle, the causal link, and opened the evidentiary phase³⁸. After a long hiatus due to the fact that the Higher Regional Court wanted to take evidence in situ in Peru, and the COVID pandemic hindered this possibility³⁹, a court-appointed expert delivered a report on the flood risk in August 2023, both parties submitted their responses thereto by September 2024, and a decision by the Hamm Higher Regional Court was issued in May 2025⁴⁰. In the said decision the court

³⁵ *Lliuya v. RWE*, Statement of claim, point 8.2, 19. <https://www.germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf>.

³⁶ *Ibid.*, 2 (idea adapted from the petitum) accessed 18 October 2025. The case's approach was undoubtably creative: by focusing on the claimant's aspiration to protect his own property from future damage, the case tried to circumvent several classic difficulties in environmental litigation (*locus standi* in respect of diffuse interests, etc). Despite this focus on private rights and interests, the case, had it been successful, would have indirectly produced climate-beneficial results.

³⁷ *Lliuya v. RWE*, Statement of claim, 20-23; accessed 18 October 2025 <https://www.germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf>.

³⁸ <https://www.germanwatch.org/en/15999> accessed 18 October 2025 (“*The decision by the Higher Regional Court Hamm to enter into the evidentiary stage is a historic breakthrough: it is the first time that a court has recognised that a private company is in principal [sic] responsible for its share in causing climate damages in other countries*”).

³⁹ <https://rwe.climatecase.org/en/legal#timeline> accessed 18 October 2025.

⁴⁰ “Current status of the lawsuit” in <https://rwe.climatecase.org/en> accessed 18 October 2025.

“[...] confirmed that major emitters can be held liable under German civil law for the consequences of climate change.

Although the court dismissed the specific claim – finding the flood risk to Luciano Lliuya’s home was not sufficiently high – it confirmed for the first time that major emitters can be held liable under German civil law for risks resulting from climate change. This sets a legal precedent with far-reaching implications, potentially influencing similar cases [...]”⁴¹.

4. *General appraisal of the rules.*

EU rules on international jurisdiction relevant to private international climate change litigation are thought to be the “gold standard”⁴² of rules of international jurisdiction over human-rights-related torts (a broader category, in which, as mentioned, both private international environmental litigation and PICCL belong).

This is largely due to two core reasons: firstly, the relevant rules on international jurisdiction are generally available for any potential plaintiff anywhere in the world, irrespective of their nationality, domicile, habitual residence, place of harm, or any other possible characteristic, as long as the defendant is domiciled in a Member State of the European Union⁴³. Secondly, legal mechanisms, such as the Anglo-Saxon doctrine of *forum non conveniens*, that would restrict access to existing and available grounds of jurisdiction on the basis of expediency or convenience of having cases tried elsewhere in the world are not acceptable within the EU system of international jurisdiction⁴⁴. These two considerations entail that, generally, provided that the relevant GHG emitter is domiciled in the EU, access to justice is unrestrictedly available for any potential climate-change-related tort victim anywhere in the world.

⁴¹ This is the interpretation that Lliuya’s legal team makes of the court decision in the following press release: <https://rwe.climatecase.org/en/presse-releases/article/groundbreaking-climate-ruling-against-rwe-major-emitters-can-be-held-liable>. The English translation of the decision may be found under: <https://rwe.climatecase.org/en/material/verdict-climate-case-saul-luciano-lliuya-vs-rwe>.

⁴² E. Álvarez-Armas has not coined the referred expression (with which he strongly agrees) but cannot recall in which conference he heard it used, or who the author was. E. Álvarez-Armas apologizes to the author of the expression for this memory lapse.

⁴³ CJEU, case C-412/98, *Group Josi Reinsurance Company SA*, ECLI:EU:C:2000:399.

⁴⁴ CJEU, case C-281/02, *Andrew Owusu v N. B. Jackson, trading as “Villa Holidays Bal-Inn Villas” and Others*, ECLI:EU:C:2005:120.

The openness of the EU system and its various positive features, as just described, in terms of facilitating access to justice do not mean, however, that the system does not feature limitations, both structural and practical.

Structurally, relevant EU rules on international jurisdiction have a limited reach (can be used against EU-domiciled defendants only), entailing the need to resort to domestic rules on international jurisdiction for third-country defendants. Domestic rules, however, may not exist or may not be adequate. Classically, this has been problematic, for instance, when trying to bring a third-country subsidiary to court alongside the parent company, notably in respect of conventional environmental torts and/or human-right-related torts. Per its typical structure, however, climate litigation tends to target parent companies directly, so difficulties regarding bringing to court third-country subsidiaries are unlikely to be relevant. This point is raised, then, because, significantly, many carbon majors are domiciled outside of the EU, and as trying to bring a non-EU-domiciled carbon major before an EU court is currently outside the scope of the Brussels Ia regime, it is, therefore, not a given: such possibility is fully dependent on domestic rules of international jurisdiction, and not every EU Member State has got rules that may adequately allow tackling the situation. In other words, the geographical restriction on the application of the Regulation's rules⁴⁵ is not an issue in those Member States where domestic rules based on the crystallization of damage exist⁴⁶. But it is a very significant shortcoming where there is a lack of jurisdictional criteria based on the impact of the tort/the materialisation of the result, and several EU countries have rules based only on the place of action or do not have domestic rules on jurisdiction over torts at all⁴⁷.

Beyond this, there are practical limitations that may arise from the application of the current provisions or their interaction with other rules. Amongst these, two examples deserve to be mentioned.

Firstly, there is a relative risk of fragmentation of jurisdiction in cases where the latter is based on the notion of the place of action/event giving rise to the

⁴⁵ Article 4 and Article 6(1) of the Brussels Ia Regulation.

⁴⁶ European Commission, *Green paper on the review of council regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2009] COM(2009) 175 final, 3.

⁴⁷ A. NUYTS-K. SZYCHOWSKA, *Study on residual jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)* – General report, European Commission JLS/C4/2005/07-30-CE, 2007, 32-33.

damage. An example of this can be easily built by transposing to the realm of jurisdiction certain considerations put forward by the claimant when discussing choice of law in the *Lliuya* case: in respect of the determination of the place of acting for the purpose of the victim's choice of the applicable law, the claimant establishes in his statement of claim that "two thirds of the greenhouse gas emissions occur within Germany"⁴⁸, which is likely related to the fact that RWE has premises in other countries⁴⁹. On a purely technical level, this should have likely entailed that German law could not be applied to the full extent of the dispute and the need to apply on a distributive basis the law of the place(s) where the remaining third of GHG emissions originates. It is however likely that the point was not raised as such in order not to further complexify an already technically complex case. If one was to transpose this choice of law reasoning to the realm of jurisdiction, taking into account the fact that RWE has emitting structures both in Germany and other countries, the ensuing outcome would be somewhat of a "reverse mosaic" situation, where jurisdiction could not have been asserted in a single place on the basis of Article 7(2). However, this fragmentation risk at the level of jurisdiction is merely potential, on two accounts: firstly, the domicile of the EU-domiciled defendant will likely allow averting the issue; secondly, as will be seen *infra*, the trial-level *Milieudefensie* 2019 decision opened the door to interpreting that the place of action is the place where the decision-making process took place (hence potentially allowing the understanding that there may be a single place of action in situations like *Lliuya*)⁵⁰.

Secondly, the lack within the Brussels Ia Regulation, of a ground of international jurisdiction allowing the cumulation of related actions may be a practical obstacle to NGO-driven climate change litigation, environmental litigation, and business and human rights litigation more generally. Bringing to court this kind of claim requires having the capacity to face significant costs, even when a party litigates within their own jurisdiction. Moreover, the increase on costs associated with conducting proceedings outside of one's own jurisdiction may entail a very substantial hindrance in accessing justice in certain cases, even within the European Union. As a consequence, the significant volume of the expenses is more easily dealt with if potential plaintiffs can concentrate their resources by building a joint case out of their related actions. However, Brussels

⁴⁸ *Lliuya v RWE* (n 26), 21.

⁴⁹ RWE, "Around the World with RWE" www.rwe.com/en/the-group/countries-and-locations/?locationType=0b515186-8541-45fa-8de3-50a449c731cc accessed 18 October 2025.

⁵⁰ Para. 4.3.6 of the decision, specifically (but *vid.*, in general, 4.3.1 and following).

Ia does not facilitate this. The Regulation approaches the topic of related claims from a very specific and limited angle only. Article 30 Brussels Ia establishes that when “related actions” (i.e. actions “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”) are “pending in the courts of different Member States, any court other than the court first seised may stay its proceedings”. The article moreover establishes that “[w]here the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof”. As it may be seen, Article 30 is a provision that only facilitates the coordination of pending proceedings on related actions. Hence, there is no provision in the Regulation that would “create” jurisdiction as such on the basis of connections between claims, as it is the case in the domestic procedural law of certain countries, with respect to internal/domestic jurisdiction. Therefore, the only possibilities for plaintiffs to cumulate their claims would be to try to build a joint case, if possible at all, before the courts of the domicile of the GHG emitter, on the basis of Article 4 Brussels Ia Regulation, or else, potentially, before the courts of the place where the event giving rise to the damage occurred, on the basis of Article 7(2). It would not be possible, however, to cumulate related actions by various victims at any given place where damage occurred or would have occurred for a given specific victim (Article 7(2), first option per *Mines de potasse*, as described above).

This second practical shortcoming is the starting point of two sets of considerations. Firstly, that the said shortcoming may be dealt with via legislative amendment (Section 5). In other words, *de lege ferenda*, the possibility of drafting a rule that would create jurisdiction in the sense described for climate litigation cases (or environmental cases, or even, more broadly human-rights-related cases) could be explored. However, any proposal in such sense would likely find contestation, notably as certain authors call into question the very appropriateness of the existence of the ground of jurisdiction of the place where the damage occurs (Section 5.1.). This stems out of certain concerns regarding the foreseeability of such ground for jurisdiction, which may actually be countered (Section 5.2.). Secondly, that, in any case, as the said ground of jurisdiction (Article 7(2), first option per *Mines de potasse*) does exist, *de lege lata* Article 30 cannot be used to try to annihilate a victim’s jurisdictional choice, exerted on the basis thereof.

5. De lege ferenda: *cumulating jurisdiction at a given victim's place of damage.*

The possibility of drafting a rule that would create jurisdiction in the sense described could be explored, even if in doing so very careful consideration would need to be given to factors that may determine the appropriateness and logic of allowing the cumulation, such as the nature of the actions to be cumulated – compensatory, injunctive, etc – and the influence of various other concerns. Indeed, proximity, proper administration of justice, easy access to evidence, etc. would need to be factored in; moreover, allowing the cumulation of actions aiming at injunctive relief would not be the same as allowing the cumulation of actions aiming at compensation, etc.

Arguably, as the positions of all victims aiming at injunctive relief in climate litigation may align (especially when they all choose the same applicable law), inasmuch as actions have such nature, a new ground of jurisdiction allowing “cumulating” jurisdiction at the place of damage for any of the relevant climate victims would not be inappropriate (and would facilitate concentrating economic resources to build the case). As opposed to these considerations, the importance of safeguarding (the already mentioned) principles of proximity, ease in access to evidence and proper administration of justice in respect of the concept of the “place of damage” may justify maintaining the status quo of the EU’s system of international jurisdiction (i.e. the referred principles are not necessarily present in the place of damage of victim A *vis-à-vis* the damages of victims B and C, whom have suffered climate-derived damage in other countries).

Thoroughly analysing all elements at stake and suggesting a precise wording for a carefully drafted rule along the lines provided is beyond the scope of (and the extension allowed for) this chapter. But the potential of the suggested jurisdictional addition to facilitate litigation and enhance access to justice is not to be neglected, and would deserve to be weighed against the repeatedly mentioned classic private international law principles. Nevertheless, as the basic proposal hereby sketched will likely face substantial contestation let us focus on two significant grounds of opposition that may arise, and the arguments that may allow countering them, for the latter may have wider significance in environmental and climate litigation.

5.1. *On the appropriateness of the ground of jurisdiction of the place where the damage occurs.*

Before even considering whether to amend the current legal framework to better adapt it to the potential needs of climate justice, it becomes necessary to acknowledge that certain authors question the very appropriateness of the ground of jurisdiction of the place where the damage occurred, notably as regards actions aiming at the reduction of greenhouse gas emissions⁵¹. They consider that proximity concerns recommend that the action be tried by a court close to the greenhouse gas emitter's headquarters, as the relevant court may potentially issue orders that are aimed at the modification of the general policy of the whole company. As against this stance, proximity concerns alone, but potentially and significantly in cumulation with the points on costs (as raised since Article 30 was presented), also sustain that the case be heard by a court that is close to the materialization of the damage, to facilitate obtaining evidence (still relevant in cases on injunctive relief). In this respect, one of the key elements in *Mines de Potasse* in relation to proximity and proper administration of justice in respect of the jurisdiction of the court of the place where the damage occurred is the ease with which evidence can be obtained, which is indisputable. As an illustration of the importance of this point, and of the difficulties that may ensue if a "remote" court hears a case, in *Lliuya* the Court of Appeal of Ham (Germany) was forced to seek permission from Ecuadorian authorities to travel physically to the Andes in order to examine and obtain evidence of the claimant's precise situation, thus delaying the procedure significantly⁵².

Moreover, critically, the court of the place of damage is not necessarily unable to issue injunctive relief, if necessary: the "sic utere tuo ut alienum non laedas" principle, that constraints States under public international law in such a way that "no State has the right to use or permit the use of its territory in such a manner as to cause injury [...] in or to the territory of another or the properties or persons therein [...]"⁵³ should be conceived as framing the understanding and the exercise of international jurisdiction by courts in these matters.

⁵¹ O. BOSKOVIC (with whom I have respectful and amicable disagreements) in E. ÁLVAREZ-ARMAS-O. BOSKOVIC, *op. cit.*

⁵² <https://theconversation.com/a-peruvian-farmer-is-trying-to-hold-energy-giant-rwe-responsible-for-climate-change-the-inside-story-of-his-groundbreaking-court-case-218408> accessed 18 October 2025.

⁵³ Trail Smelter award (*United States of America v Canada* (Award) (1941) 3 RIAA 1905) para. 1965.

Specifically, this obligation on States should be understood as not rendering inappropriate or inadequate the assertion of jurisdiction over actions aiming at the reduction of greenhouse gas emissions (and the potential subsequent issuance of an order) by the courts of the place of damage. In other words, an assumption of jurisdiction with a view to potentially issuing an order would not entail an inappropriate assertion of sovereign authority by one State over the territory of another (especially within the EU) because, ultimately, the State of the action does not have “the right to use or permit the use of its territory in such a manner as to cause injury”.

Overall, calling into question the appropriateness of the ground of jurisdiction of the place where the damage arises entails calling into question *Mines de Potasse* and the effect utile of Article 7(2) that the referred case preserves. Sovereignty and proximity concerns do not suffice to justify doing so (they were already factored into the CJEU’s decision back in 1976, the latter very explicitly). Nevertheless, one further aspect deserves to be analysed: foreseeability, which also runs transversally through concerns on the appropriateness of the application of the law of the place where the damage occurs.

5.2. *On foreseeability, generally.*

There is a further concern underpinning the referred contestation of the suitability of the place of materialization of damage as a ground of jurisdiction: its potential lack of foreseeability, arising from climate change’s above-referred global and geographically unlimited nature (a phenomenon to which multiple emitters contribute and that may potentially impact a very significant number of victims, anywhere in the world). This concern is extended to its suitability as a connecting factor in choice of law: reportedly, the referred absence of foreseeability as regards the place of materialization of damage would disqualify the latter as a connecting factor, for it would render the applicable law equally unforeseeable. This is taken as far as questioning the adequacy of the legislative policy behind Article 7 Rome II in PICCL, for, allegedly, the fact that damage may arise anywhere in the world may lead to the application of the law of any potential place of damage anywhere, which would run against the “legitimate expectation of companies”⁵⁴. These considerations would be taken even one step further as regards injunctive relief for the curbing down of GHG emissions: in parallel to arguments already referred regarding jurisdiction, the law of the place of damage would allegedly be even less adequate to issue orders aiming at

⁵⁴ Y. NISHITANI, *Localization of Damage in Private International Law*, cit., 707.

the modification of the general policy of the relevant corporation, since that would raise concerns in terms of proximity⁵⁵.

These arguments can be countered on several accounts⁵⁶. Firstly, regarding the assertion of jurisdiction specifically: the CJEU already had “atmospheric pollution”⁵⁷ and its geographically unrestricted nature in mind when it decided *Mines de potasse*. Hence, other than considering sovereignty and proximity (as mentioned), it also factored foreseeability into the solution provided in the decision. This, therefore, makes *Mines de Potasse* a perfect precedent to the above-referred climate cases that needs to stand. The ensuing conclusion, that in matters of climate-related damage the courts of each EU Member State could potentially have jurisdiction over the same Carbon Major inasmuch as damage is suffered within their jurisdiction, is further comforted by *Shevill*⁵⁸ and *eDate*⁵⁹: although it is true that those decisions deal with “mosaic” situations, it is equally true that the potential geographically unrestricted reach of the underlying defamatory acts, and the ensuing lack of jurisdictional foreseeability, did not put into question the solutions enshrined therein. Since such jurisdictional results are deemed to be acceptable in terms of foreseeability in defamation cases, they ought to be acceptable in PICCL too.

Secondly, neither the assertion of jurisdiction nor the identification of the applicable law on the basis of the place of materialization of damage are to be approached from the standpoint of the potential geographically unrestricted scope of the impact of the tortfeasor’s activities. Instead, they need to be approached from two interlinked standpoints: i) for each victim, their damage is not global or diffuse, but identifiable, specific and geographically limited; and ii) save where collective redress is available, each individual victim brings an action in respect of their own individual damage. Consequently, jurisdiction and applicable law need to be framed within the individual procedural relationship

⁵⁵ O. BOSKOVIC (with whom I have respectful and amicable disagreements) in E. ÁLVAREZ-ARMAS-O. BOSKOVIC, *op.cit.* Similar considerations are presented by other authors when analysing permits/authorizations: as the emitter “[...] could not foresee the effects of his actions in other countries, he should be able to rely on the permissibility of his activities at the place of action [...]” (M LEHMANN-F EICHEL, *op. cit.*, 100-101).

⁵⁶ For further arguments, see E. ÁLVAREZ-ARMAS, *Le contentieux*, cit., 136-138.

⁵⁷ *Mines de Potasse*, *op. cit.*, para. 13.

⁵⁸ CJEU, case C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61.

⁵⁹ CJEU, joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*, ECLI:EU:C:2011:685.

built between victim and tortfeasor, as parties to the proceedings (i.e. independently from the damage suffered by other potential victims).

Thirdly, if a lack of foreseeability remains for the defendant within the referred framing, then it stems from the very nature of their activities and the way in which they carry them out, which they control and may thus potentially change. Reportedly, certain Carbon Majors have known about the impact of their activities since the early 1970's⁶⁰ and *Mines de Potasse* dates back to 1976. Hence, at the very least in terms of jurisdiction, but also in terms of choice of law, it has been foreseeable for Carbon Majors for almost 50 years now that, as their activities have a wider impact than the country where they are established, they could be taken to court elsewhere and see a foreign legal system applied to their liability. They could have even tried to avoid liability by changing their behaviour over the last 5 decades.

Finally, and critically, the above-referred academic opinions do not consider that foreseeability (in all environmental torts, not only in climate-related ones) is a two-way street that concerns victims as well: if defendants are supposed to lack sufficient foreseeability as to where damage may arise, victims are "weak parties" that have no foreseeability at all as to the fact that a damage may arise to begin with. Defendants, however, by being engaged in industrial activities, have at least the understanding that should anything go wrong with respect to their business, they are exposed to lawsuits.

6. De lege lata: on Article 30 Brussels Ia and the mandatory respect for a plaintiff's choice of forum.

It was referred above that, as the law stands nowadays, NGOs will not necessarily have it easy to try to cumulate climate-cases against a given same Carbon Major. The opposite, however, is also true: NGOs should not be forced to cumulate different proceedings against a single given Carbon Major by the latter, notably to the detriment of their jurisdictional choices. In other words, the above-referred Article 30 Brussels Ia on "related actions" cannot be used to try to short-circuit a plaintiff's choice of a forum whenever they start litigation against a given Carbon Major and there was another "related" climate lawsuit pending in a different Member State against the same defendant but by a different claimant.

⁶⁰ C. BONNEUIL-P.L. CHOQUET-B. FRANTA, *Early warnings and emerging accountability: Total's responses to global warming, 1971-2021*, in *Global Environmental Change*, 2021.

Let us illustrate this point through an example: CarbonMajor1 is a corporation with its domicile in Spain, and NGO1 and NGO2, both established in the Netherlands, submit a lawsuit to Dutch courts on the basis of Article 7(2) Brussels Ia, since their climate-related damage materializes in the Netherlands. In their law suit they request injunctive relief (i.e. that CarbonMajor1 be ordered to curb down its GHG emissions in accordance with the best available science to a level that will contribute to not surpassing 1.5 degrees Celsius of increase in global average temperature) and monetary compensation (i.e. recovery of damages to then invest them in reforestation, for instance, or other carbon offset projects), both under Dutch law (including International and European law as embedded in the Dutch legal order). When NGO1 and NGO2 submit their lawsuit, NGO3, established in Spain, had already started climate-change litigation in Spain against CarbonMajor1, also on an injunctive and on a compensatory basis (both under Spanish law, including International and European law as embedded in the Spanish legal order). In this scenario, CarbonMajor1 could not use Article 30 Brussels Ia to contest the jurisdictional choice by NGO1 and NGO2 and force a cumulation of proceedings in Spain. Firstly, because Article 30 does not impose an obligation on any court to stay proceedings or decline jurisdiction (the latter possibility being moreover dependent on whether “court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof”); obligations of such nature would only exist in situations leading to *lis pendens* (which is not the case). But secondly, and more significantly, because the purpose of Article 30 is “to avoid the risk of irreconcilable judgments resulting from separate proceedings” and there is no true risk of irreconcilable judgments: i) CarbonMajor1 may be ordered to pay damages to NGO1 and NGO2 but not NGO3; or viceversa; or to all or to none of the claimants; none of those possibilities entails any sort of contradiction, as the Dutch decision will depend on the subjective situation of NGO1 and NGO2 and the applicable Dutch private law, while the Spanish decision will depend on the subjective situation of NGO3 and the applicable Spanish private law. ii) CarbonMajor1 may be ordered to curb down its emissions by the Dutch decision and not by the Spanish one or viceversa; or by both or by none; and, again, none of those possibilities entails any sort of contradiction, as each decision will depend on the application of a different legal order. If both decisions order a curbing down of GHG emissions but by different percentages, by respecting the most restrictive percentage CarbonMajor1 will be also respecting the most lenient one (i.e. if you comply with an order to curb down by 50% you are simultaneously also complying with an order to curb down by 30%).

7. *Conclusions.*

These pages have presented the European Union's rules on international jurisdiction over liability and/or injunctive relief for climate-change-related damage. This kind of damage falls into the category of environmental damage within the EU's system of private international law. This environmental characterization may not seem to have any practical consequence for jurisdiction purposes, as Article 7(2) of the Brussels Ia Regulation has got a wide scope covering all non-contractual obligations, whichever the sort. However, beyond being relevant downstream in choice-of-law terms (as it may have practical consequences in certain scenarios) it has great policy symbolism, and should further reinforce the idea that, under the current *de lege lata* framework (despite potential contestation) the choice of forum performed by a climate victim-plaintiff needs to be mandatorily respected. Moreover, this chapter: i) has further explored how, despite contestation, the place where the damage occurs is an appropriate ground of jurisdiction in climate litigation and ii) has countered some transversal concerns about foreseeability for the greenhouse gas emitter regarding the potential assertion of jurisdiction over and the law applicable to climate litigation. This has been done on the basis of various arguments, including, critically, the fact that foreseeability is bilateral, and if defendants are supposed to lack sufficient foreseeability as to where damage may arise, victims are "weak parties" that have no foreseeability at all.

In sum, EU rules on international jurisdiction relevant to private international climate change litigation are indeed the "gold standard" of rules of international jurisdiction over human-rights-related torts.

LITIGATING CLIMATE CHANGE IN THE EU: A NEW CHALLENGE FOR THE JURISDICTIONAL RULES IN THE BRUSSELS IA REGULATION?

Lenka Válková

SUMMARY: 1. Introduction: background to transnational climate claims. – 2. From strategic and routine actions to compensation, adaptation, and mitigation claims: classifications and implications for tort law. – 3. *Forum shopping* between litigation strategy and access to justice. – 4. Determining competent courts in climate change litigation under the Brussels Ia Regulation. – 4.1. Principle of *actor sequitur forum rei*. – 4.2. Jurisdiction for climate torts under Article 7(2) Brussels Ia Regulation. – 4.2.1. Identifying the place of the event giving rise to the damage. – 4.2.1.1. Corporate decision-making as the *locus actus*? – 4.2.1.2. Alternative Approach: place of emissions. – 4.2.2. Identifying *locus damni*. – 4.2.2.1. “Direct” damage and the *locus damni*: from individual to collective harm. – 4.2.2.2. Proof of causation. – 4.2.2.3. *Locus Damni* challenge: predictability. – 5. Concluding remarks.

1. *Introduction: background to transnational climate claims.*

Climate change litigation – a shorthand expression encompassing a broad spectrum of claims, including both traditional tort-based compensation actions and proceedings aimed at compelling adaptation measures – has, particularly in recent years, also emerged as an increasingly significant instrument of mitigation. Climate change litigation serves not only to advance accountability but also to exert pressure on the so-called “carbon majors”, which are hydrocarbon producers deriving substantial economic benefit from the extraction and commercialization of goods, identified as primary contributors to anthropogenic climate change¹. In particular, the climate change proceedings seek to attribute legal responsibility to such entities for their contribution to CO₂ emissions that intensify the global warming, to which each of the 180 identified carbon majors has played a quantifiable role.

¹ R. HEEDE, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010*, in *Climatic Change*, 2014, 229-241.

The phenomenon is not confined to domestic jurisdictions but extends across national boundaries, reflecting the inherently transboundary character of greenhouse gas emissions. Such emissions may give rise to harm in multiple States, involve events and damage occurring across borders (cross-border element as effect of harm), or result in proceedings directed against transnational corporations (cross-border element as corporate legal structure)². To date, climate change litigation has been predominantly concentrated in the Global North, mirroring the geographic distribution of transnational corporate actors principally responsible for greenhouse gas emissions. By contrast, claimants situated in the Global South – although often bearing a disproportionate share of the adverse consequences of climate change – tend to encounter greater procedural, evidentiary, and enforcement obstacles in pursuing redress³. The United States no longer constitutes the quasi-automatic forum of choice for climate-related litigation: a development has prompted a marked strategic shift towards proceedings before EU courts against EU-based corporate defendants, including in respect of activities conducted beyond the territory of the EU⁴.

For the purposes of the present analysis – as far as limited to the jurisdictional grounds established under the Brussels Ia Regulation – it is noteworthy that, to date, 206 intra-EU climate change cases have been registered⁵. Of these, 118 have been initiated against governmental authorities, while 84 have targeted corporations or private individuals, with 65 of the latter filed within the past five years. These figures underscore two salient points⁶. First, the volume of climate litigation is increasing at a rapid pace, a trend mirrored globally: in 2024 alone, 226 new cases were filed worldwide, out of a total of 2,967, reflecting an approximate 10% rise within a single year⁷. Second, it is possible to distinguish between two principal categories of climate claims. *Vertical actions*, or *public* climate change litigation, concern the relationship between individuals

² H. VAN LOON, *Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters*, in *Uniform Law Review*, 2018, 305.

³ *Ibidem*.

⁴ *Ibidem*.

⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20 December 2012.

⁶ On the figures see The Climate Litigation Database by Sabin Center for Climate Change Law, available at <https://www.climatecasechart.com/>.

⁷ Global trends in climate change litigation: 2025 snapshot at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2025-snapshot/>.

and the state and are typically adjudicated by administrative or constitutional courts, which assess the adequacy of state climate policies, as exemplified by the landmark *Urgenda Foundation v. The Netherlands* case⁸. By contrast, *horizontal actions*, or *private* climate change litigation – the primary focus of the present analysis – are brought before civil courts by individuals against corporations responsible for greenhouse gas emissions. Such claims are generally grounded in tort law, with international law obligations exerting only indirect horizontal effects on corporate actors⁹.

This chapter examines additional categories of horizontal climate claims, with particular emphasis on the distinction between strategic and routine actions, analysed in light of their respective characteristics and underlying objectives. It further considers compensation, adaptation, and mitigation claims, as conventionally classified within the framework of tort law, with the aim of elucidating the difficulties inherent in determining “the place where the harmful event occurred or may occur” under Article 7(2) of the Brussels Ia Regulation, which forms the focus of the second part of this chapter. The subsequent analysis turns to the significance of the place of venue within the EU judicial space and the claimant’s ability to choose among multiple jurisdictions, which, as will be shown, is not merely a matter of procedural strategy but stems primarily from the divergent approaches adopted by Member States concerning the admissibility of climate change actions and legal standing in such claims. In the absence of harmonisation at the EU level, these divergences continue to reflect the exercise of national autonomy, thereby

⁸ Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, 13 January 2020. Among many see L. MAXWELL-S. MEAD-D. VAN BERKEL, *Standards for adjudicating the next generation of Urgenda-style climate cases*, in *Journal of Human Rights and the Environment*, 2022, 35-63; M. MEGURO, *State of the Netherlands v. Urgenda Foundation*, in *American Journal of International Law*, 2020, 729-735; M. WEWERINKE-SINGH-A. MCCOACH, *The State of the Netherlands v Urgenda Foundation: distilling best practice and lessons learnt for future rights-based climate litigation*, in *Review of European, Comparative & International Environmental Law*, 2021, 275-283; O. SPIJKERS, *The influence of climate litigation on managing climate change risks: the pioneering work of the Netherlands Courts*, in *Utrecht Law Review*, 2022; CH. BAKKER, *Climate change litigation in the Netherlands: The Urgenda case and beyond*, in *Climate change litigation: Global perspectives*, 2021, 199-224; B. MAYER, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague*, in *Transnational Environmental Law*, 2019, 167-192; V. JACOMETTI, *La sentenza Urgend del 2018: prospettive di sviluppo del contenzioso climatico*, in *Riv. giur. ambiente*, 2019, 121.

⁹ M.P. WELLER-M.L. TRAN, *Climate Litigation against companies*, in *Climate Action*, 2022, 2-4; G. GANGULY-J. SETZER-V. HEYVAERT, *If at First You Don’t Succeed: Suing Corporations for Climate Change*, in *Oxford Journal Legal Studies*, 2018, 844-845.

influencing both access to justice and the effectiveness of transnational environmental litigation. Building on this delineation of the principal categories of climate claims and the implications of venue within the EU judicial area, the chapter proceeds to a systematic examination of the jurisdictional framework established under the Brussels Ia Regulation. Special attention is devoted to the general forum of the defendant's domicile and to the special jurisdiction in matters relating to tort, delict, or quasi-delict under Article 7(2). The discussion focuses on the dual connecting factors embodied in that provision – the event giving rise to the damage (*locus actus*) and the place where the damage occurs (*locus damni*) – as applied in the specific context of climate change litigation. This inquiry seeks to uncover the methodological, doctrinal, and interpretative challenges associated with the individualisation and localisation of these jurisdictional connecting factors in complex, transnational climate disputes. It further evaluates emerging interpretative trends and potential solutions aimed at reconciling the principles of proximity, foreseeability, and sound administration of justice within the existing jurisdictional architecture of EU private international law.

2. *From strategic and routine actions to compensation, adaptation, and mitigation claims: classifications and implications for tort law.*

Beyond the vertical and horizontal categorization, scholarly literature further distinguishes between *strategic* cases and *non-strategic* or *routine* cases, depending on their objectives and intended effects¹⁰. The latter category is characterized by a comparatively limited scope, as it primarily seeks monetary compensation or reimbursement of expenses arising from damage to the claimant's property or personal injury resulting from climate change or climate-related events, and is generally pursued without activist intent (climate liability actions)¹¹. Illustrative

¹⁰ Among many see C.V. GIABARDO, *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, in *Diritto e processo*, 2021, 363; V. JACOMETTI, *Climate Change Litigation: Global Trends and Critical Issues in the Light of the Urgenda 2018 Decision and the IPCC Special Report "global Warming of 1.5°C"*, in *Global Jurist*, 2020, 2-3; G. GANGULY-J. SETZER-V. HEYVAERT, *If at First You Don't Succeed: Suing Corporations for Climate Change*, cit., 844; K. BOUWER, *The Unsexy Future of Climate Change*, in *Journal of Environmental Law*, 2018, 483; J. SETZER-R. BYRNES, *Global Trends in Climate Change Litigation: 2019 snapshot*, 2, available at: <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/>.

¹¹ C.V. GIABARDO, *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, cit., 363; V. JACOMETTI, *Climate Change Litigation: Global Trends and Critical Issues in the*

examples include U.S. litigation linked to Hurricane Katrina¹², claims concerning progressive erosion and heightened flood risk in Kivalina¹³, as well as the German case *Lliuya*¹⁴. While such actions are predominantly motivated by the claimant's financial self-interest and do not explicitly aim to influence state climate policies, they may, over time, function as a *de facto* regulatory mechanism, exerting bottom-up pressure on carbon majors to reduce their CO₂ emissions¹⁵.

By contrast, strategic cases – sometimes referred to as the “holy grail” of climate litigation or as “climate protection litigation” – are specifically designed to compel governments (strategic vertical litigation) or corporations (strategic horizontal litigation) to implement, enhance, or accelerate measures for the reduction of CO₂ emissions¹⁶, employing a mechanism of “regulation through litigation”¹⁷. Even where immediate judicial relief is uncertain, such litigation seeks to influence policy and corporate behavior indirectly, including by stimulating public debate beyond the courtroom¹⁸. Strategic climate litigation

Light of the Urgenda 2018 Decision and the IPCC Special Report “global Warming of 1.5°C”, cit., 2-3; G. GANGULY-J. SETZER-V. HEYVAERT, If at First You Don't Succeed: Suing Corporations for Climate Change, cit., 844-845; K. BOUWER, The Unsexy Future of Climate Change, cit., 485; A.C. HERNÁNDEZ, International Climate Litigation against Companies: Issues of Applicable Law, in Spanish Yearbook of International Law, 2025, 364.

¹² United States Fifth Circuit (5th Cir.), *Comer v Murphy Oil USA*, 14 May 2013, No 12-60291; S.D. Miss., *Comer v Murphy Oil USA*, 20 March 2012, No 1:11-cv-00220.

¹³ United States Ninth Circuit (9th Cir.), *Native Village of Kivalina v ExxonMobile*, 21 September 2012, No 09-17490.

¹⁴ Higher Regional Court of Hamm, *Luciano Lliuya v. RWE AG*, 28 May 2025. For the English translation see https://rwe.climatecase.org/sites/default/files/2025-06/Judgement%20OLG%2028_05_2025.pdf.

¹⁵ C.V. GIABARDO, *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, cit., 363.

¹⁶ K. BOUWER, *The Unsexy Future of Climate Change*, cit., 489; G. GANGULY-J. SETZER-V. HEYVAERT, *If at First You Don't Succeed: Suing Corporations for Climate Change*, cit., 843; V. JACOMETTI, *Climate Change Litigation: Global Trends and Critical Issues in the Light of the Urgenda 2018 Decision and the IPCC Special Report “global Warming of 1.5°C”, cit., 2; A. FOERSTER, Climate Justice and Corporations, in King's Law Journal, 2005, 305; A.C. HERNÁNDEZ, International Climate Litigation against Companies: Issues of Applicable Law, cit., 364.*

¹⁷ T. LYTTON, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, in *Texas Law Review*, 2008, 1837.

¹⁸ This was also the case in the context of U.S. “tobacco litigation” and asbestos-related claims; see, in this regard, C.V. GIABARDO, *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, cit., 373.

frequently advances normative principles such as distributive justice (determining who should bear responsibility for reducing emissions or financing adaptation measures), compensatory justice (assessing how historical contributions to climate change should be accounted for), and intergenerational justice (evaluating the extent to which future generations should bear the burdens and costs of climate change mitigation and adaptation)¹⁹. Within this framework, strategic horizontal climate litigation – the primary focus of the present analysis – aims to influence corporate conduct and decision-making by attributing responsibility to carbon majors for damages resulting also from extreme weather events, and by prompting them to transition away from carbon-intensive business models, invest in clean energy practices, and allocate capital and resources toward climate mitigation measures. In this respect, strategic horizontal litigation may prove to be a more effective instrument than public litigation or other policy strategies in driving systemic change²⁰.

The first wave of climate litigation, spanning approximately 2005 to 2015 and primarily concentrated in the United States, encompassed both strategic and routine cases. This period was largely characterized by the failure of claims, most of which were dismissed on grounds of non-justiciability – principally under the political question and displacement doctrines, rooted in the separation of powers – as well as on procedural grounds such as *res judicata*, lack of legal standing²¹, or substantive issues concerning causation and quantification of damages²².

¹⁹ A. FOERSTER, *Climate Justice and Corporations*, cit., 305.

²⁰ R. HEEDE, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010*, cit.

²¹ See Article III of the US Constitution on legal standing, where one of the conditions for admissibility of an action is causation. This procedural causation requirement is distinct from the “proximate causation” or “causation in fact” requirements under the tort of negligence and must be satisfied by the plaintiff before the court can proceed to determine causation at the merits stage. The causation requirement entails the “fairly traceable” test, which includes considerations of whether the harm was “substantially probable”; see G. GANGULY-J. SETZER-V. HEYVAERT, *If at First You Don’t Succeed: Suing Corporations for Climate Change*, cit., 847; D.G. PULEIO, *Rimedi civilistici e cambiamento climatico antropogenico*, in *Persona e mercato*, 2021, 202.

²² In the United States, public nuisance claims related to global warming were dismissed on the ground of non-justiciability, as climate change controversies were deemed matters for the political branches of government. See, e.g., United States Fifth Circuit (5th Cir.), *Comer v Murphy Oil USA*, 14 May 2013, No 12-60291; S.D. Miss., *Comer v Murphy Oil USA*, 20 March 2012, No 1:11-cv-00220; United States Ninth Circuit (9th Cir.), *Native Village of Kivalina v ExxonMobile*, 21 September 2012, No 09-17490. On the political question and displacement doctrines, see, among others, R. MAY, *Climate Change, Constitutional Consignment, and the*

Despite the limited success of these early cases, a “second wave” of climate litigation has emerged, facilitated by advances in climate attribution science²³. These scientific developments now enable plaintiffs to link specific climate impacts to greenhouse gas emissions and to identify and quantify the emissions attributable to particular corporate actors²⁴. For example, in July 2025, after a decade of proceedings, the Higher Regional Court even ultimately dismissed the claim in *Lliuya*, holding that the specific flood risk faced by Luciano Lliuya did not meet the requisite legal threshold, nonetheless, the judgment represents a significant milestone, acknowledging that major emitters may be held accountable for their measurable contributions to climate-related harm²⁵. The court emphasized that the risks associated with global warming have been publicly recognized since at least the mid-20th century, and that advances in attribution science now allow for the establishment of a causal link between a company’s emissions and specific climate impacts.

Building on the distinctions between strategic and routine climate litigation, a central question arises as to whether traditional private tort law – primarily

Political Question Doctrine, in *Denver Law Review*, 958; J. ADLER, *Displacement and Preemption of Climate Nuisance Claims*, in *Journal of Law, Economics and Policy*, 2022, 217-262; G.M. PARSONS, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, in *Indiana Law Journal*, 2020, 1295-1364; M. SPITZER-B. BURTSCHER, *Liability for climate change: cases, challenges and concepts*, in *Journal of European Tort Law*, 2017, 137-175.

²³ See, among others, D.A. KYSAR-I. SOPARKAR, *Applying Attribution: Impacts of Climate Attribution Science on Tort Litigation*, 2023, available at: <https://cjp.eli.org/curriculum/applying-attribution-impacts-climate-attribution-science-tort-litigation>; Y. QUILCAILLE-L. GUDMUNDSSON-D.L. SCHUMACHER, *Systematic attribution of heatwaves to the emissions of carbon majors*, in *Nature*, 2025, 392-398; C.W. CALLAHAN-J.S. MANKIN, *Carbon majors and the scientific case for climate liability*, in *Nature*, 2025, 893-901; R.F. STUART-SMITH-F.E.L. OTTO-A.I. SAAD *et al.*, *Filling the evidentiary gap in climate litigation*, in *Nat. Clim. Change*, 2021, 651-655; T. PFROMMER-T. GOESCHL-T.-A. PROELSS *et al.*, *Establishing causation in climate litigation: admissibility and reliability*, in *Climatic Change*, 2019, 67-84; B. EKWURZEL-J. BONEHAM-M.W. DALTON *et al.*, *The rise in global atmospheric CO₂, surface temperature, and sea level from emissions traced to major carbon producers*, in *Climate Change*, 2017, 579-590; F. OTTO-R. SKEIE-J. FUGLESTVEDT *et al.*, *Assigning historic responsibility for extreme weather events*, in *Nature Clim Change*, 2017, 757-759; F.C. LOTT *et al.*, *Quantifying the contribution of an individual to making extreme weather events more likely*, in *Environ. Res. Lett.*, 2021.

²⁴ On the second wave lawsuits see A. FOERSTER, *Climate Justice and Corporations*, cit., 309; G. GANGULY-J. SETZER-V. HEYVAERT, *If at First You Don’t Succeed: Suing Corporations for Climate Change*, cit., 849.

²⁵ Higher Regional Court of Hamm, *Luciano Lliuya v. RWE AG*, 28 May 2025. For the English translation see https://rwe.climatecase.org/sites/default/files/2025-06/Judgement%20OLG%2028_05_2025.pdf.

designed to protect individual rights and obligations and dependent on proof of causation, now increasingly supported by advances in scientific evidence – may legitimately accommodate broader societal objectives, such as promoting social justice or shaping normative frameworks for future conduct, as is often the aim in strategic climate litigation²⁶. While many principles of tort law are not readily adaptable to the objectives of climate change litigation, the evolving realities of global environmental harm suggest that tort law must be interpreted and applied in ways that respond comprehensively to these challenges²⁷.

In the context of tort law, it is necessary to distinguish among three types of claims. Compensation claims seek redress for harm caused by climate change; adaptation claims, which may take the form of preventive or remedial measures, aim either to establish obligations to adopt adaptation strategies (proactive adaptation) or to obtain reimbursement for expenses incurred in implementing such measures (reactive adaptation); and mitigation claims pursue the reduction or omission of CO₂ emissions²⁸. Climate change litigation has nowadays

²⁶ The “but-for” test is commonly applied in many Member States, where the defendant’s conduct must be a *conditio sine qua non* for the plaintiff’s damage, see H. KOZIOL, *Comparative Conclusions*, in H. KOZIOL (ed.), *Basic Questions of Tort Law from a Comparative Perspective*, Wien, 2015, 773; J. SPIER-O.A. HAAZEN, *Comparative Conclusions on Causation*, in *Unification of Tort Law: Causation*, J. SPIER (ed.), 2000, 127. For example, under German and Austrian law the plaintiff must prove with high probability that the defendant’s conduct caused the harm, whereas under common law the defendant’s conduct must have more likely than not caused that harm, see M. SPITZER-B. BURTSCHER, *Liability for climate change: cases, challenges and concepts*, cit., 166. Some scholarship has further suggested the potential applicability of causation criteria developed in mass-tort litigation, such as asbestos liability cases (presumption of joint and several liability) and cases concerning diethylstilbestrol (“market-share liability”); see J. STAPLETON, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*, in *Brook. L. Rev.* 2009, 1011. In fact, D.A. KYSAR, *What Climate Change Can Do About Tort Law*, in *Environmental Law*, 2011, 30, argues that the traditional “but-for” test is largely unsuitable in the context of climate litigation, and advocates a “market-share liability” approach, under which a defendant’s proportional contribution to climate change would be assessed by its share of the relevant market rather than direct causal responsibility. This doctrinal reasoning has, in practice, been invoked in the case of Higher Regional Court of Hamm, *Luciano Lliuya v. RWE AG*, 28 May 2025. For the English translation see https://rwe.climatecase.org/sites/default/files/2025-06/Judgement%20OLG%2028_05_2025.pdf.

²⁷ See D.A. KYSAR, *What Climate Change Can Do About Tort Law*, cit., who, instead of asking what tort law can do about climate change, reformulates the inquiry as “What can climate change do for tort law?”.

²⁸ M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, in *Japanese Yearbook of Private International Law*, 2024, 7-8; J.B. RUHL, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, in *Environmental Law*, 2010, 383.

predominantly tend to pursue mitigation objectives, whereas the Global South – already disproportionately affected by climate change – requires measures oriented toward reparation and adaptation, including compensation for the most impacted communities²⁹. Across all categories, an integrated, globally coordinated approach is essential, recognizing the impact of individual and collective actions on climate change³⁰. Rather than treating mitigation, adaptation, and compensation as conflicting objectives, attention should focus on how they may be coherently combined to advance transformative climate policy³¹.

3. Forum shopping *between litigation strategy and access to justice*.

Careful consideration of the implications of even seemingly minor climate change-related cases may enhance the understanding of how litigation may, directly or indirectly, contribute to – or impede – the attainment of broader climate policy objectives. Adopting such a perspective allows for a more strategic assessment of where and how future climate litigation may prove most effective. Within this context, the determination of adjudicative authority constitutes a threshold issue with far-reaching (not only) procedural consequences. It affects, *inter alia*, the admissibility of the action, questions of legal standing, the availability and modalities of collective redress litigation, the collection and evaluation of evidence, the types of damages that may be awarded – whether punitive or compensatory – as well as the allocation of costs³². Each of these aspects may be crucial to a claimant's procedural strategy and, in turn, may incentivise *forum shopping*³³. Jurisdiction necessarily also bears upon the determination of the applicable law. Within the European Union, however, such matters are primarily governed by the uniform conflict-of-laws rules laid down in the Rome II

²⁹ C.G. GONZALEZ, *The Sacrifice Zones of Carbon Capitalism: Race, Expendability, and Loss and Damage*, in M. DOELLE-S.L. SECK (eds.), *Research Handbook on Climate Change Law and Loss and Damage*, Cheltenham, 2021.

³⁰ K. BOUWER, *The Unsexy Future of Climate Change*, cit., 485.

³¹ J. SMITHERS-B. SMIT, *Human Adaptation to Climatic Variability and Change*, in *Global Environmental Change*, 1997, 18; J.B. RUHL, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, cit.

³² In similar vein see H. VAN LOON, *Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters*, cit., 305-306.

³³ O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, 115.

Regulation³⁴. Nevertheless, the location of venue remains of particular importance also within the unified conflict-of-laws framework, notably in light of the potential application by the court seized of public policy considerations or overriding mandatory provisions³⁵.

The issue of legal standing is of central importance in the context of *forum shopping* and poses particular challenges in climate litigation, as such actions may implicate an exceptionally broad range of affected parties – potentially extending to humanity as a whole³⁶. The responsibility for climate-related harm is inherently diffuse: each individual may, to some degree, bear responsibility toward all others, irrespective of spatial separation – reflecting the transnational character of greenhouse gas emissions – or temporal distance, as the consequences of climate-related conduct may manifest decades or even centuries

³⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31 July 2007.

³⁵ It is worth noting that, pursuant to Article 29(7) of Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, 5 July 2024, – which entered into force on 25 July 2024 and establishes a new standard for responsible corporate conduct – the national provisions transposing the rules on corporate civil liability are to be regarded as overriding mandatory provisions when the law applicable to disputes concerning corporate non-contractual obligations is that of a non-EU State. However, in February 2025 the European Commission tabled a proposal amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements (COM(2025) 81 final, 26 February 2025, 2025/0045(COD), the so-called “Omnibus” proposal). Among other amendments, the proposal provides for the deletion of Articles 29(1) and (7) in order to preserve the “diversity of Member States’ liability regimes”. As a result, Member States would retain discretion as to whether to characterise their implementing provisions as overriding mandatory rules. In the absence of such express characterisation, courts would revert to the general conflict-of-laws framework of the Rome II Regulation and might attempt to invoke Articles 16, 17 or 26 thereof – an approach that would, however, introduce a significant degree of legal uncertainty. For critique of this new proposal see G. VAN CALSTER, *Legal opinion: how the Omnibus creates uncertainty on civil liability for companies*, 2025, available at https://gavclaw.com/wp-content/uploads/2025/06/legal_opinion_gvc.pdf; A. BONFANTI, *EU Corporate Sustainability at a Crossroads: The Omnibus Proposal to Amend the EU Directive on Corporate Sustainability Due Diligence and Its Ongoing Negotiation*, in *Diritti umani e diritto internazionali*, 2025, 8-9.

³⁶ See The Hague District Court, *Milieudefensie et al. v. Royal Dutch Shell plc.*, 26 May 2021, No C/09/571932, para. 4.2.3, where the District Court of The Hague held that the admissibility of the action was limited to claims seeking to protect the interests of individuals residing in the Netherlands and the inhabitants of the Wadden region, thereby excluding actions brought on behalf of the global population.

later³⁷ and affect future generations³⁸. The protection of the *general* interest in environmental restoration, conceived as the common heritage of the nation, introduces a distinct political dimension to strategic climate actions that seek to compel corporate actors to achieve specific environmental outcomes. Thus, in legal systems that condition standing upon a direct and personal interest, claims advancing general, public, or diffuse interests face substantial barriers³⁹.

Such comprehension may often contrast with the individualised nature of litigation, which primarily seeks the vindication of personal rights through judicial determination. Even collective actions remain largely oriented toward the protection of individual interests and are not even available under domestic law of all Member States⁴⁰. Early climate litigation reflected this individualised approach, being predominantly composed of compensation claims initiated by private victims. Such a traditional tort law framework on individual legal standing, however, increasingly appears in tension with more recent strategic litigation claims, in which courts have interestingly denied standing to individual plaintiffs for lack of a “sufficiently concrete individual interest”, a threshold that non-governmental organisations have been, contrarily, able to satisfy, particularly when the claimed interest “cannot be individualized because it accrues to a much larger, undefined, and unspecified group of persons”⁴¹.

The current EU legal framework does not provide explicit rules governing

³⁷ C.V. GIABARDO, *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, cit., 377.

³⁸ On general comments regarding standing of future generations see B. MANK, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, in *Faculty Arts and Other Publications*, 2009, 1-97; R. JOHNSTON, *Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation*, 2016, 31-51. On national case-law concerning standing on behalf of future generations in the vertical actions see e.g., Lahore High Court, Green Bench, Pakistan, *Asghar Leghari v. Federation of Pakistan*, 25 January 2018, No. 25501/2015; National Green Tribunal, India, *Ridhima Pandey v. India* (appeal filed 5 December 2024, pending). See also The Hague Court of Appeal, *Urgenda Foundation v. State of the Netherlands*, 9 October 2018, where the Court held that it was unnecessary to determine whether the NGO could act on behalf of future generations, since the alleged human rights infringements were already imminent for the present generation.

³⁹ M. ELIANTONIO-CH.W. BACKES-C.H. VAN RHEE, *Standing up for your right(s) in Europe. A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, 2012, 60, available at [https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET\(2012\)462478](https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2012)462478).

⁴⁰ *Ibidem*, 57.

⁴¹ R. FORNASSARI, *The Legal Form of Climate Change Litigation: An Inquiry into the Transformative Potential and Limits of Private Law*, in *Journal of Law and Political Economy*, 2024, 844.

the standing of entities representing both collective individual and general interests in climate litigation – neither under Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers⁴², Directive 2003/87/EC establishing a greenhouse gas emissions trading scheme, Directive 2004/35/EC on environmental liability⁴³, nor Directive (EU) 2024/1760 on corporate sustainability due diligence⁴⁴. Consequently, the matter remains largely regulated by national law, which may, in some cases, omit provisions enabling such claims to proceed, leading courts to dismiss actions for lack of standing⁴⁵. In this context, the plaintiff's ability to choose among multiple jurisdictions is not merely a matter of strategic advantage, but it is intrinsically rather linked to questions of access to justice, requiring careful identification of a

⁴² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4 December 2020. This Directive lays down rules on the mutual recognition of the legal standing of qualified entities across Member States. However, pursuant to Article 2(1), it applies only to representative actions brought against infringements by traders of the provisions of Union law listed in Annex I, which does not include climate-related legal acts.

⁴³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25 October 2003, establishes a scheme for greenhouse gas emission allowance trading within the European Union and lays down rules on the allocation, monitoring, and trading of such allowances, rather than on judicial remedies or procedural rights before courts. Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30 April 2004, implicitly promotes the principle of public participation – particularly the rights of non-governmental organisations and other civil society actors – in environmental decision-making. However, this participatory right is not absolute and does not confer a general standing to bring legal proceedings, see F. MUNARI-L. SCHIANO DI PEPE, *Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law and the Case for Pursuing Effective Legal Uniformity*, in RDIPP, 2005, 607-642; V. VUJOVIĆ-N. OJDANIĆ-M. ADEMOVIĆ, *Environmental Protection in Disputes with a Foreign Element*, 2019, 6, available at: <https://portal.ejtn.eu/PageFiles/17915/TH%202019%2003%20TEAM%20MONTENEGRO.pdf>.

⁴⁴ Proposal for a Directive amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, 26 February 2025, COM(2025) 81 final, 20, where it is proposed to delete the specific requirement set out in the CSDDD allowing representative action, “in view of the different rules and traditions that exist at national level”.

⁴⁵ O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 116.

forum where the claim is likely to be admitted. Moreover, although standing is generally associated with the *lex fori processualis*, not all Member States treat it purely as a procedural matter. Its classification often lies at the intersection of procedural and substantive law – governed, respectively, by the *lex fori* or the *lex causae* – thereby generating additional legal uncertainty⁴⁶.

4. *Determining competent courts in climate change litigation under the Brussels Ia Regulation.*

Following the examination of the types of cases, forms of action, and the strategic importance of venue selection in climate change litigation – which, as noted, plays a decisive role also in the admissibility of claims – it is necessary to consider which courts within the Member States may be available to prospective plaintiffs with the aim to gain objectives outlined in the previous Sections.

Focusing on the European Union, where the Brussels Ia Regulation applies, claimants may invoke the general forum based on the defendant's domicile within the EU, pursuant to Article 4 in conjunction with Article 63 of the Regulation, potentially engaging three distinct connecting factors. In addition, Article 7(2) provides for a special jurisdiction in matters relating to tort, delict, or quasi-delict, allowing actions to be brought either at the *locus damni* (the place where the damage occurred) or the *locus actus* (the place of the event giving rise to the damage)

⁴⁶ On the questions surrounding whether legal standing should be assessed under the *lex fori processualis* or the substantive law, see B. WOŁODKIEWICZ, *Erosion of the Lex Fori Processualis Principle: A Comparative Study*, in *RDIPP*, 2025, 649; C. ZIMMER, *Der richtige Kläger im internationalen Zivilprozess*, Heidelberg, 2021; M. ELIANTONIO-CH.W. BACKES-C.H. VAN RHEE, *Standing up for your right(s) in Europe. A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, cit., 28. See also Court of Appeal of The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3588, para. 3.2; Court of Appeal of The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3586, para. 3.2; Court of Appeal of The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3587, M & R 2016/29, para. 3.2, where the Court held that admissibility requires a direct interest in the claim and affirmed that a class action encompasses both substantive and procedural dimensions. As regards the substantive aspect, the Court observed that it is necessary to determine whether a material entitlement arises from the infringement of the (environmental) interests pursued by the foundation or association – for instance, through an action based on an unlawful act – which must be assessed in accordance with the law governing the claim (*lex causae*). Conversely, the question of whether such a right of action may be exercised by means of a class action, and by whom and under what conditions, is characterised under Dutch private international law as a procedural matter governed by the *lex fori processualis*.

in the light of *Mines de Potasse d'Alsace*⁴⁷. These two additional jurisdictional grounds will be examined in detail below, taking into account the specific characteristics of climate change litigation and the considerations developed in the first Section of this Chapter. The analysis will further address the extent to which these fora may “expand” the range of jurisdictional options available to claimants beyond the general rule under Article 4, potentially enabling them to select a more advantageous forum in terms of the admissibility of the action, for instance where the standing requirements in a given Member State are more favourable.

By contrast, jurisdiction based on a choice-of-court agreement under Article 25 of the Brussels Ia Regulation is unlikely to be frequently invoked in climate litigation, given the inherent unpredictability and multiplicity of parties involved. In such cases, satisfying the requirement of mutual consent for the designation of a particular forum may prove challenging. Similarly, tacit prorogation of jurisdiction, arising from the defendant’s appearance in proceedings, is expected to occur only in exceptional circumstances, unless the court seised is strategically convenient for the defendant, who may then opt not to challenge jurisdiction⁴⁸. In practice, defendants – typically large corporate actors or “carbon majors” – are well positioned to contest jurisdictional claims, given their substantial legal and financial resources.

4.1. *Principle of actor sequitur forum rei.*

Article 4 of the Brussels Ia Regulation codifies the classical principle of *actor sequitur forum rei*, according to which a defendant is generally required to be sued before the courts of his or her domicile⁴⁹. This principle is reinforced in Recital 15, which underscores that the rules on jurisdiction should be “highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile”. In the case of legal persons, and consistently with Article 54 TFEU, the concept of domicile is to be interpreted autonomously under Article 63 of the Regulation, which identifies three alternative connecting factors: the statutory seat, the central administration, and the principal place of

⁴⁷ CJEU, 30 November 1976, 21/76, *Handelskwekerij Bier v Mines de Potasse d'Alsace*, ECLI: EU:C:1976:166.

⁴⁸ In similar vein, O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 124.

⁴⁹ On application of this principle see S. DOMINELLI, *Regolamento Bruxelles I bis e US jurisdiction in personam: riflessioni e proposte su condivisioni valoriali, influenze e osmosi di metodi*, Napoli, 2025.

business. The statutory seat corresponds to the State of incorporation and is comparatively stable, being recognised in most Member States except Cyprus and Ireland⁵⁰. By contrast, the central administration and principal place of business are fact-dependent criteria, susceptible to variation over time, and therefore more difficult to ascertain⁵¹. This flexibility may create opportunities for *forum shopping*, this time even by corporate defendants, enabling them to structure their organisational arrangements in light of the procedural and substantive characteristics of Member State legal systems⁵².

The combined operation of Articles 4 and 63 may also benefit claimants by potentially opening up to three jurisdictional avenues, taking into account the organisational configuration of the defendants – namely carbon majors – which typically operate through multiple establishments within the Union. Such option under Article 63 may permit plaintiffs to direct proceedings to fora that provide availability and more robust mechanisms for collective redress in climate-related claims⁵³.

The forum of the defendant's domicile also mitigates the so-called mosaic approach, which risks the fragmentation of adjudicatory authority at the place of the *locus damni*, thereby ensuring consolidation of jurisdiction in a single competent court⁵⁴. Thus, under the defendant's domicile, plaintiffs may concentrate claims alleging liability “for global activities and for the global damages caused by them” in a single venue, without requiring a direct connection between the subject matter of the dispute and the forum, or consideration of the place where the company acted or where the damage occurred⁵⁵. Moreover, this jurisdictional ground is able to facilitate access to justice even for claimants from third countries, enabling actions against companies domiciled within the Union for damage occurring outside its territory. When considered alongside the passive *litisconsortium* under Article 8(1) and the reference to

⁵⁰ P. VLAS, *Article 63*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, Köln, 2023, 960-961.

⁵¹ *Ibidem*.

⁵² In this vein, E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea. Quale spazio per la tutela collettiva?*, in RDIPP, 2023, 866.

⁵³ In this regard O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 127.

⁵⁴ CJEU, 7 March 1995, C-68/93, *Shevill and Others v Presse Alliance*, ECLI:EU:C:1995:61, para. 25 ff.

⁵⁵ E.M. KIENINGER, *Conflicts of jurisdiction and the applicable law in domestic courts' proceedings*, in W. KAHL-M.P. WELLER (eds.), *Climate Change Litigation*, Wien, 2021, 128.

domestic law in Article 6(1), this jurisdictional ground has proven particularly efficacious in addressing environmental harm caused outside the Union by local (non-EU) subsidiaries of multinational corporations domiciled within the Brussels Ia framework⁵⁶.

⁵⁶The problem connected with the identification of jurisdiction in relation to defendants domiciled in third States falls outside the scope of this contribution. It should nevertheless be recalled that Article 8(1) of the Brussels Ia Regulation, on passive *litisconsortium*, allows for the concentration of jurisdiction before the courts of the domicile of one of the defendants, “provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. This mechanism, however, presupposes that all defendants are domiciled within the European Union, unless the domestic law of the Member State seised provides otherwise; see, among others, M. REQUEJO ISIDRO, *Access to remedy: abusos contra Derechos Humanos en terceros estados, justicia civil en Europa?*, in F.J. ZAMORA-J.G. CÍVICO-L.S. PALLARÉS (eds.), *La responsabilidad de las multinacionales por violaciones de derechos humanos*, Alcalá, 2013, 79-107; and, with reference to the application of national (Dutch) law regarding Articles 6 and 8 in the field of climate change, H. VAN LOON, *Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters*, cit., 311-313. In the Dutch case-law see Court of Appeal of The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3588; Court of Appeal of The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3586; Court of Appeal of The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3587, M & R 2016/29, where, in proceedings against SPDC (the subsidiary domiciled in Nigeria), the Court of Appeal of The Hague, deriving the jurisdiction of the Dutch courts from Article 7(1) of the Dutch Code of Civil Procedure read in conjunction with Article 6(1) of the Council Regulation (EC) No 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16 January 2001 (now substituted by Articles 8(1) of the Brussels Ia Regulation), held that Dutch courts had jurisdiction over multiple defendants where an anchor claim existed and where both the requirements of a “close connection” and the “expediency of joint consideration” were satisfied; see in this regard, C. DE GROOT, *The ‘Shell Nigeria Issue’: Judgments by the Court of Appeal of The Hague, The Netherlands*, in *European Company Law*, 2016, 98-104. In English case law, a similar mechanism operates through the “real issue” requirement between the claimant and the anchor defendant, which necessitates, at the jurisdictional stage, a substantive preliminary assessment of the claim. See, for example, *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC 3, concerning environmental damage sustained in Nigeria and brought against a corporation domiciled in England; see in this regard J. BEETON, *Supreme Court rules in Okpabi v Royal Dutch Shell plc and SPDC*, in *International and Travel Law Blog*, 2021, at <https://internationalandtravellawblog.com/2021/02/12/supreme-court-rules-in-okpabi-v-royal-dutch-shell-plc-and-spdc/>; S. HOPKINS-C. O’KELLY-C. HACKETT-C. PATTON, *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC 3, in *Legal Quarterly Spring*, 2021, 148-159; E. ARISTOVA, *Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction*, in *Utrecht Law Review*, 2018, 6-21.

In light of the foregoing, it is unsurprising that jurisdiction based on the defendant's domicile has been invoked in a number of cases, most notably, for example in *Lliuya*⁵⁷, *Greenpeace e v. Eni*⁵⁸, and, arguably, in *Milieudefensie*⁵⁹.

4.2. Jurisdiction for climate torts under Article 7(2) Brussels Ia Regulation.

By way of exception to the general jurisdictional rule founded on the defendant's domicile, the Brussels Ia Regulation establishes an exhaustive catalogue of alternative heads of jurisdiction under which a defendant may be sued before the courts of a Member State other than that of his domicile⁶⁰. Within this framework, the jurisdiction in matters relating to tort, delict or quasi-delict, enshrined in Article 7(2), may assume particular relevance for climate change litigation. This rule does not derogate from the *actor sequitur forum rei* principle but rather complements it, granting the claimant a degree of discretion in selecting the court before which to bring proceedings. The rationale underlying such flexibility lies in the existence of a particularly close connection between the court seised and the dispute, a connection deemed to favour the sound administration of justice and procedural efficiency, while preserving a degree of foreseeability⁶¹.

⁵⁷ See also Higher Regional Court of Hamm, *Luciano Lliuya v. RWE AG*, 28 May 2025. For the English translation see https://rwe.climatecase.org/sites/default/files/2025-06/Judgement%20OLG%2028_05_2025.pdf, I.1(a), referring to the international jurisdiction was examined in the appeal instance under Articles 4(1) and 63(1) of the Brussels Ia Regulation.

⁵⁸ Italian Court of Cassation, 21 July 2025, n. 20381. The Italian Supreme Court affirmed the jurisdiction of domestic courts relying on Articles 4(1) and, predominantly, 7(2) of the Brussels Ia Regulation. However, as noted by A. MOLFETTA, *Eppur [qualcosa] si muove: Considerazioni a prima lettura intorno all'ordinanza sul regolamento di giurisdizione nella vertenza climatica Greenpeace et al. v. Eni et al.*, in *Corti supreme e salute*, 2025, 7, a condition for the applicability of Article 7(2) is lacking, since it applies only where proceedings are brought before the courts of a Member State *other* than that in which the defendant is domiciled. This condition was not met in the case at hand, as Eni S.p.A. is domiciled in Italy. Accordingly, it would have been sufficient to rely solely on the general forum under Article 4, without invoking Article 7.

⁵⁹ G. TE WINKEL-X.P.A. VAN HEESCH, *The Shell judgment – a bombShell in private international law?*, in *Nederlands Internationaal Privaatrecht*, 2021, 535, noting that, since jurisdiction was not contested by the parties, the Court did not expressly determine its jurisdiction. However, as RDS's headquarters and principal place of business (as stated in its Articles of Association) are located in the Netherlands, jurisdiction was presumed to rest on Article 4 of the Brussels Ia Regulation in conjunction with Article 63(1)(b), or possibly on Article 26 of the same Regulation.

⁶⁰ Among many see CJEU, 7 March 2018, C-560/16, *E.ON Czech Holding*, ECLI:EU:C:2018:167, para. 26; 12 September 2018, C-304/17, *Löber*, ECLI:EU:C:2018:701, para. 18.

⁶¹ Recital 16 of the Brussels Ia Regulation. On the case law relating to the principles of

As emphasised in the CJEU jurisprudence *Mines de Potasse d'Alsace*, the “place where the harmful event occurred or may occur” under Article 7(2) embodies the so-called *principle of ubiquity*, encompassing both the place of the event giving rise to the damage (*locus actus*) and the place where the damage materialised (*locus damni*)⁶². By conferring equal relevance upon these two connecting factors, the Regulation indirectly institutes a form of *favor actoris*, broadening the claimant’s procedural latitude in selecting the competent forum and thereby expanding available procedural avenues⁶³. Nevertheless, in practice, this advantage may be limited, as the place of the event giving rise to the damage often coincides with the defendant’s domicile, thereby leading to reduction of the practical effectiveness of Article 7(2)⁶⁴.

Against this background, the so-called mosaic principle developed in *Shevill* serves as a “corrective mechanism” to the claimant’s broad discretion in selecting the forum in cases of “multi-located damages” or “dispersed losses”⁶⁵. In such situations, the single place of the event giving rise to the damage – situated in one Member State – may produce harmful effects in several other Member States. Under this approach, the claimant may bring an action only in respect of the damage sustained within the territory of the court seised, rather than for the entirety of the harm suffered worldwide⁶⁶. This limitation moderates the

the sound administration of justice and the efficient conduct of proceedings, see, *inter alia*: CJEU, 30 November 1976, 21/76, *Handelskwekerij Bier v Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166, para. 11; 11 January 1990, C-220/88, *Dumez France and Others v Hessische Landesbank and Others*, ECLI:EU:C:1990:8, para. 17; 7 March 1995, C-68/93, *Shevill and Others v Presse Alliance*, para. 19; 19 September 1995, C-364/93, *Marinari v Lloyd's Bank*, ECLI:EU:C:1995:289, para. 10; 1 October 2002, Case C-167/00, *Henkel* ECLI:EU:C:2002:555, para. 46. On the requirement of predictability, see, among many, CJEU, 28 January 2015, C-375/13, *Kolassa*, ECLI:EU:C:2015:37, para. 56; 12 September 2018, C-304/17, *Löber*, para. 35.

⁶² See also CJEU, 30 November 1976, 21/76, *Handelskwekerij Bier v Mines de Potasse d'Alsace*, confirmed, *inter alia*, in CJEU, 10 June 2004, C-168/02, *Kronhofer*, ECLI:EU:C:2004:364, para. 16; 28 January 2015, C-375/13, *Kolassa*, para. 45; 21 May 2015, C-352/13, *CDC Hydrogen Peroxide*, EU:C:2015:335, para. 38; 16 June 2016, C-12/15, *Universal Music International Holding*, EU:C:2016:449, para. 28.

⁶³ P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 259.

⁶⁴ CJEU, 30 November 1976, Case 21/76, *Handelskwekerij Bier v Mines de Potasse d'Alsace*, para. 20.

⁶⁵ P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 261.

⁶⁶ CJEU, 7 March 1995, C-68/93, *Shevill and Others v Presse Alliance*, paras. 28-33. See also

risk of excessive *forum shopping*: if the contrary were accepted, a claimant could pursue full recovery before any court where even a fragment of the damage had occurred⁶⁷. At the same time, the mosaic principle preserves the claimant's ability to seek compensation for the entirety of the harm before either the courts of the defendant's domicile or those of the place where the wrongful conduct occurred.

Although most commentators suggest that the *Shevill* interpretation should not be confined to personality rights infringements – such as defamation, libel, or slander⁶⁸ – academic debate still persists as to whether the approach may be transposed to other torts⁶⁹, and particularly to climate change litigation⁷⁰.

CJEU, 3 October 2013, C-170/12, *Peter Pinckney*, ECLI:EU:C:2013:635; 3 April 2014, C-387/12, *Hi Hotel HCF SARL*, ECLI:EU:C:2014:215.

⁶⁷ P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 259.

⁶⁸ P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 261; see also A. DICKINSON-E. LEIN-A. JAMES (eds.), *The Brussels I Regulation Recast*, Oxford Private International Law Series, 2015, para. 4.110 and 4.112, which note, as an example, that such scenarios may arise, particularly in environmental tort cases affecting multiple countries. The mosaic approach has also been extended to the determination of applicable law under Article 4 of the Rome II Regulation in cases of multi-State damage, with Recital 25 of the Rome II Regulation emphasising the need for consistency between the two Regulations; see A. DICKINSON, *Tort/Delict – General Rules*, in *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford, 2010, para. 4.69; J. VON HEIN, *Art. 4*, in R. MORITZ-G.P. CALLIESS (eds.), *Rome Regulations: Commentary*, Alphen aan den Rijn, 2020, 541, 565; L. DE LIMA PINHEIRO, *Choice of Law on Non-Contractual Obligations between Communitarization and Globalization, A First Assessment of EC Regulation Rome II*, in *RDIPP*, 2008, 16; J. VON HEIN, *Of Older Siblings and Distant Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law*, in *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht*, 2009, 475-476; M. WILDERSPIN, *The European Private International Law of Obligations*, London, 2023, 18-029.

⁶⁹ R. MONICO, *International Jurisdiction in Diesel Emissions Claims under the Brussels I bis Regulation*, in *Cuadernos de Derecho Transnacional*, 2025, 1331; R. MONICO, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, Torino, 2022, 215, who affirms that the mosaic approach is “sectoral” rather than general, being applicable only, for example, to actions for damages in matters relating to defamation, infringement of personality rights, copyright, or publication on the internet of allegedly disparaging comments, where the initial event causes harm in several EU Member States. In a similar vein, regarding the inapplicability of the mosaic approach in climate change litigation, see O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 140.

⁷⁰ Positively on the application of the mosaic approach with respect to environmental damage, both regarding jurisdiction and applicable law: on jurisdiction see E. ARISTOVA-U. GRUŠIĆ, *Private International Law*, in D. KYSAR-E. LIM (eds.), *The Oxford Handbook*

A growing strand of scholarship contends that climate-related damage does not constitute “dispersed loss” within the meaning of *Shevill*, but rather a traditional distance tort⁷¹. This is argued for a number of reasons. First, it has been argued that the defamation claim addressed in *Shevill* cannot be directly compared to an action seeking to establish climate liability, given the fundamentally different nature of the rights at stake: the mosaic theory was developed in the context of personality rights, balancing freedom of expression against *privacy*, whereas climate litigation typically pursues the protection of collective interests linked to the preservation of the global climate system⁷². Second, in

of *Climate Change and Private Law*, Oxford, forthcoming 2025, available at <https://ssrn.com/abstract=5439974>; M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, in *RabelsZ*, 2019, 90; S. MARINO, *La climate change litigation nella prospettiva del diritto internazionale privato e processuale*, in *RDIPP*, 2021, 910; J. SPIEGEL, *Forum Shopping in the EU – A Useful Strategy in Corporate Climate Change Litigation?*, in *Católica Law Review*, 2024, 181; L. GARCIA ALVAREZ, *Environmental Damages Caused by Transnational Groups: Access to Justice*, in *YPIL*, 2016/2017, 286. On applicability of mosaic approach in the context of law applicable to climate change see M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 12; G. TE WINKEL-X.P.A. VAN HEESCH, *The Shell judgment – A bombShell in private international law?*, cit., 540; A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 541; E. GUINCHARD-S. LAMONT-BLACK, *Environmental Law – The Black Sheep in Rome II’s Drive for Legal Certainty – Art. 7 of Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations in Context*, in *Environmental Law Review*, 2009, 169; A. FUCHS, *Article 7*, in P. HUBER (ed.), *Rome II Regulation: Pocket Commentary*, Munich, 2011, 212. See also J. VON HEIN, *Art. 7*, in R. MORITZ-G.P. CALLIESS (eds.), *Rome Regulations: Commentary*, cit., 661; J. VON HEIN, *Of Older Siblings and Distant Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law*, cit., 475–476, who affirms that the mosaic approach should also be applied in other cases where several injuries are spread across multiple countries, e.g., cases of pure economic loss and environmental damages, where in the latter case the injured parties may opt for the place where the event giving rise to the damage occurred under Article 7 Rome II to achieve the application of a single law to multiple injuries. See also M. WILDERSPIN, *The European Private International Law of Obligations*, cit., 18–029, expressly referring to *Shevill* in the context of Article 7, providing an example of a “modified” *Bier* judgment: “Thus, if a factory situated in France pollutes the Meuse river thereby causing damage to the property of a person who owns land adjoining the Meuse on both sides of the Belgian-Dutch border, liability for the damage to the land in Belgium will, by virtue of Article 4(1), be governed by Belgian law and the damage to the land in the Netherlands by Dutch law”.

⁷¹ M.P. WELLER-J.M. NASSE-L. NASSE, *Climate change litigation in Germany*, in W. KAHL-M.P. WELLER (eds.), *Climate Change Litigation*, cit., 390; M.P. WELLER-M.L. TRAN, *Climate Litigation against companies*, cit., 6.

⁷² O. FERACI, *Contenzioso climatico e diritto internazionale privato dell’Unione Europea*, cit., 140.

line with this consideration, while press-related offenses involve an injurious act producing dispersed harm to a *single* victim across multiple jurisdictions, resulting in dispersed damage, greenhouse gas emissions generate harm to an *indeterminate* number of victims located in different (Member) States. In the first scenario, the dispersion of damage is viewed from the perspective of the injuring party, as a single act gives rise to dispersed effects across multiple jurisdictions. In the second scenario, by contrast, numerous injured parties suffer harm in different States – constituting so-called mass damage – and collectively seek redress before a single forum⁷³.

Similar doubts regarding the applicability of the mosaic approach to climate change litigation can also be inferred from other point of view of a close reading of the *Shevill* judgment. In *Shevill*, the CJEU, in establishing mosaic principle, considered a scenario where a *single* tortious conduct resulted in damage across multiple jurisdictions (a “multi-located damage”), but did not address cases involving a *multiplicity of tortious conducts* committed in different States (“multi-located conducts”)⁷⁴. On the other hand, it may be argued that even though the Court ultimately assessed *Shevill* case as a situation involving *one single* wrongful act with multiple places of damage, the underlying facts of the case actually concerned a combination of different types of conduct by the defendant that preceded and contributed to the eventual harm dispersed in several States⁷⁵. Part of the doctrine has therefore argued that particular weight should be attributed to the “initial” event or⁷⁶, to the place where “the substance of

⁷³ M.P. WELLER-J.M. NASSE-L. NASSE, *Climate change litigation in Germany*, cit., 390; O. FERACI, *Contenzioso climatico e diritto internazionale privato dell’Unione Europea*, cit., 140.

⁷⁴ See J. VON HEIN, *Of Older Siblings and Distant Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law*, cit., 475, that affirms that when the *single* event leads to injuries in several states, mosaic principle is applicable.

⁷⁵ In the case addressed by the *Shevill* ruling, the event giving rise to the damage was the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation. The damage is considered complete only upon its dissemination – that is, at the moment when the printed material leaves the publisher’s sphere of control and the information becomes public for the first time – thereby assigning initial significance to conduct that already had external relevance, in this regard R. MONICO, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, cit., 197.

⁷⁶ On the “initial” event see Opinion of AG Bobek delivered on 28 February 2018 in CJEU, C-27/17, *flyLAL-Lithuanian Airlines*, ECLI:EU:C:2018:136, par. 104, referring to “the first relevant link in the causal chain”. See in this regard also R. MONICO, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, cit., 196-200; L. SALERNO, *Brevi note in tema*

the tortious conduct arises” – that is, the jurisdiction that is most closely connected to the conduct⁷⁷. This criterion becomes especially relevant where the harm is the result of a chain of related conducts undertaken in different jurisdictions by the same defendant. In such a case, in line with the CJEU approach, it seems that an effort to identify one single *locus* of conduct is required: in fact “for a specific kind of tort involving a chain of events, a specific event along that chain will be considered as having particular importance”⁷⁸. By contrast, it seems uncertain whether the mosaic approach may apply when the harmful conduct is truly plural and no single “initial” or “most closely connected” action is possible to meaningfully isolate⁷⁹.

For all these reasons above, it has been suggested that climate change litigation should fall under a “non-restricted” conception of the *ubiquity principle*, thereby enabling the claimant to bring an action for the *entirety* of the damage before either of the two fora – *i.e.*, at the place of the conduct or that of the damage⁸⁰. Furthermore, it was argued that where the climate action pursued is of a preventive or injunctive nature – aimed at compelling reductions in CO₂ emissions rather than seeking compensatory relief – the mosaic theory seems particularly ill-suited: were the mosaic theory to apply, a court seised in one Member State could adjudicate only upon that segment of the emissions’ impact attributable to its own territory, resulting in a fragmented exercise of jurisdiction⁸¹. However, the

di “luogo dell’evento dannoso” ed itinerario interpretativo dell’art. 5, n. 3 del Regolamento CE 44/2001, in *Resp. civ. e prev.*, 2013, 900; L. MARI, *Il diritto processuale civile della Convenzione di Bruxelles, I, Il sistema della competenza*, Padova, 1999, 394 ss.; N. NISI, *La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I*, in *RDIPP*, 2013, 399-401.

⁷⁷ S. CARBONE-E.CH. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, 2016, 101; P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 266; O. FERACI, *Contenzioso climatico e diritto internazionale privato dell’Unione Europea*, cit., 133. See also P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 266, which affirms that it is not possible to rely only on the *origin* of a chain of events, whereby “direct” causality must be always ascertained.

⁷⁸ Opinion of AG Bobek delivered on 28 February 2018 in CJEU, C-27/17, *flyLAL-Lithuanian Airlines*, ECLI:EU:C:2018:136, par. 94.

⁷⁹ Whether such a unitary place of conduct might be identified in the context of “climate change conducts” will be further examined in Section 4.2.1.2.

⁸⁰ M.P. WELLER-J.M. NASSE-L. NASSE, *Climate change litigation in Germany*, cit., 390.

⁸¹ O. FERACI, *Contenzioso climatico e diritto internazionale privato dell’Unione Europea*, cit., 135 and 140-141. Despite the persistence of doubts regarding the extension of CJEU case law

practical reach of this “non-restricted” proposal seems remain limited. As will be addressed in Sections 4.2.1.2. and 4.2.2.1., jurisdiction under Article 7(2) of the Brussels Ia Regulation must be assessed individually for each claimant and in relation to the specific damage that directly affects that person⁸². In cases involving multiple victims with differing legally protected interests (e.g., in strategic litigation), the existence of a single, common place of damage for all the victims across several Member States is unlikely. Thus, while the theoretical grounds for a broader application of the *ubiquity* principle are compelling, their implementation in complex climate litigation remains highly uncertain, as it will be discussed later in detail.

The *ubiquity* principle discussed above was initially conceived to address relatively straightforward scenarios, such as transboundary pollution cases where contamination originating in State A causes damage downstream in State B. Climate change, by contrast, represents a far more complex and diffuse phenomenon in which the harmful conducts and the resulting damage may be multiple⁸³. The process begins with the emission of carbon dioxide and other greenhouse gases – mainly produced by industrial activity and energy generation – which accumulate in the atmosphere and form a layer that traps heat on a planetary scale. Part of these emissions is absorbed by natural carbon sinks such as soils, oceans, and vegetation, while the surplus remains in the atmosphere, intensifying the greenhouse effect. The continuous combustion of fossil fuels and the consequent rise in atmospheric CO₂ concentrations drive global warming, resulting in wide-ranging environmental consequences such as rising sea levels, heatwaves, droughts, floods, and other extreme events detrimental to human life, ecosystems, and property⁸⁴. Thus, greenhouse gas emissions

on defamation to other types of torts, it should be noted that the CJEU, 21 December 2021, C-251/20, *Gtflx Tv*, ECLI:EU:C:2021:1036; 17 October 2017, C-194/16, *Bolagsupplysningen and Ilsjan*, ECLI:EU:C:2017:766, upheld that the fragmentation of jurisdiction with respect to the *locus damni* applies exclusively to claims for compensation for damage, whereas this solution cannot be transposed to injunction proceedings, which are indivisible in nature, see, R. MONICO, *Il foro in materia di diffamazione online alla luce della sentenza Ilsjan*, in *RDIPP*, 2018, 359.

⁸² CJEU, 18 July 2013, C-147/12, *ÖFAB*, ECLI:EU:C:2013:490, para. 58; 21 May 2015, C-352/13, *CDC Hydrogen Peroxide SA*, ECLI:EU:C:2015:335, paras. 35-36; 25 January 2018, C-498/16, *Schrems*, ECLI:EU:C:2018:37, para. 48.

⁸³ C. BENINI, *Sui giudizi di responsabilità civile intentati contro i c.d. global carbon majors: riflessioni internazionalprivatistiche a margine della climate change litigation*, in *JUS-ONLINE*, 2024, 190.

⁸⁴ Direct evidence for the assumption of a steadily increasing CO₂ concentration and the associated warming was already found in 1958, see White House Report, *Restoring the Quality of Our Environment*, Report of the Environmental Pollution Panel, President’s Science

transcend national borders, producing adverse effects on the global climate and causing harm to human health, property, and the environment irrespective of territorial boundaries⁸⁵. The global and cumulative nature of both the conduct and its consequences renders the application of Article 7(2) of the Brussels Ia Regulation particularly challenging, as the traditional distinction between *locus actus* and *locus damni* may often seem blurred and may be hardly identifiable.

4.2.1. *Identifying the place of the event giving rise to the damage.*

When identifying the place of the event giving rise to the damage – the first limb of the *Mines de Potasse d'Alsace* formula – in the context of climate change litigation, both doctrine and national case-law have proposed different solutions, which have mainly emerged in relation to the applicable law under Article 7 of the Rome II Regulation, which refers to the *lex loci actus*.

The two most common approaches identify the relevant place of the harmful conduct as either (i) the location of the corporate management decisions on gas emissions or (ii) the site of the greenhouse gas-emitting installations⁸⁶. Both interpretations were put forward in the *Shell* case with regard to applicable law: the claimant argued that the relevant place of conduct was in the Netherlands, where the parent company (RDS) adopted its corporate policy on greenhouse gas emissions – an argument that was ultimately upheld by the court – whereas the defendant contended that the actual CO₂ emissions constituted the harmful event and thus that the place of emission should prevail.

With respect to both approaches, it is noteworthy to mention also the recent Italian case *Greenpeace v. Eni*, in which the Italian court affirmed its jurisdiction over a climate change dispute on the basis of Articles 4(1) and 7(2) of the Brussels Ia Regulation⁸⁷. The court appeared to rely primarily on the second

Advisory Committee, November 1965 and E. REVELLE-W. BROECKER-C.D. KEELING-H. CRAIG-J. SMAGORINSKY, *Atmospheric Carbon Dioxide, Appendix Y4 to the Report of the Environmental Pollution Panel*, President's Science Advisory Committee, Restoring the Quality of Our Environment, The White House, November 1965, 111 ff.

⁸⁵ E.M. KIENINGER, *Conflicts of jurisdiction and the applicable law in domestic courts' proceedings*, cit., 129.

⁸⁶ A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 369; M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 13; S. DE VIDO, *The Privatisation of Climate Change Litigation: Current Developments in Conflict of Laws*, in *Jus Cogens*, 2024, 76-77; M.P. WELLER-M.L. TRAN, *Climate Litigation against companies*, cit., 6-7; M.P. WELLER-J.M. NASSE-L. NASSE, *Climate change litigation in Germany*, cit., 388-389.

⁸⁷ On more details see also fn 58.

approach – identifying the place of conduct as the location of greenhouse gas emissions, by stating that:

“the place where the event giving rise to the damage occurred must be identified as the place (or all the places, having regard to the plurality of places and States in which ENI’s activity is directly or indirectly carried out) where the climate-changing emissions are produced...”⁸⁸.

On the other hand, it must be stressed that the court did not entirely exclude also the view that the place where the corporate strategy was formulated could also constitute the *locus* of the harmful conduct. As stated in the judgment:

“... it should also be noted that, in reconstructing the causal sequence giving rise to the alleged damage, the plaintiffs identified its origin in ENI’s industrial and commercial strategy, the development of which is ultimately the responsibility of the company’s governing bodies, which operate in the place where it has its registered office and operations, allowing the harmful conduct to be located within the national territory, with the consequence that, also from this point of view, jurisdiction must be assigned to the Italian judicial authorities”⁸⁹.

However, this “dual” line of reasoning – without identifying one clear and definitive place of conduct – may attract criticism, as it risks introducing uncertainty into future jurisdictional assessments, particularly in complex cross-border scenarios such as climate change litigation. Both approaches are examined in more details below.

4.2.1.1. *Corporate decision-making as the locus actus?*

The first suggested proposal – locating the event giving rise to the damage at the place of corporate decision-making – deserves closer consideration. In fact, it was suggested by the part of scholars that such decisions in climate change actions do not represent merely preparatory act – they represent the decisive, originating, and initiating conduct – whereas any subsequent activities are of a derivative or indirect nature⁹⁰. Also, following the reasoning advanced

⁸⁸ Italian Court of Cassation, 21 July 2025, n. 20381, para. 8.1.: On English translation see <https://rdipp.unimi.it/2025/07/25/climate-change-litigation-before-the-italian-supreme-court/>.

⁸⁹ *Ibidem*.

⁹⁰ In this vein see M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 14; P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 269. On support of this approach see also A.C.

by the claimants in *Shell*, one could argue that the type of the action concerning prevention of greenhouse gas emissions necessarily requires intervention at the level of corporate management and policy-making⁹¹.

The recognition of the place of corporate management decisions as the relevant *locus* of conduct seems not to be completely excluded in previous CJEU case-law, albeit in relation to different types of torts – a point also noted by the claimants in the *Shell* proceedings. For instance, in *Kolassa*, concerning prospectus liability, the Court attributed significance to the decisions regarding the arrangements for the investments proposed by the potential perpetrator and to the preparation of the relevant prospectuses⁹². A similar reasoning can be traced in CJEU case *Pez Hejduk*, a case involving copyright infringement, where the CJEU held that the *locus actus* could be located solely at the place where the operator of the website was established, since “that is where the company took and carried out the decision to place photographs online on a particular website” without the author’s consent⁹³. On the other hand, Advocate General Bobek in case *flyLAL-Lithuanian Airlines* (concerning abuse of dominance under Article 102 TFEU), clarified that the “development of the relevant commercial strategy” – such as the adoption of pricing structures – cannot constitute the event giving rise to the harm, even if such strategy would amount to an abuse once implemented, since “by its very nature it requires implementation”⁹⁴. It is therefore regrettable that, in the absence of a directly applicable precedent in the field of climate change litigation, the Dutch court in *Shell* did

HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 370; L. CARBALLO PIÑEIRO, *Litigación Internacional Y daños Al Ambiente*, in *Revista Ítalo-española De Derecho Procesal*, 2018, 85. See also C. OTERO GARCÍA-CASTRILLÓN, *El Derecho Internacional Privado de la Unión Europea en la determinación de la responsabilidad civil por daños al medio ambiente*, in *Anuario Hispano Luso Americano de Derecho internacional*, 2013, 391-392, who supports this conclusion through the application of Articles 2(6), 6, and 8 of Directive 2004/35/EC on environmental liability, concerning the prevention and remediation of environmental damage, and establishes that the person responsible is the “operator”, defined, *inter alia*, as any natural or legal person who operates or controls the activity carried out in the course of an economic activity, business, or undertaking.

⁹¹ G. TE WINKEL-X.P.A. VAN HEESCH, *The Shell judgment – A bombShell in private international law?*, cit., 536.

⁹² CJEU, 28 January 2015, C-375/13, *Kolassa*, para. 53. See also P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 269.

⁹³ CJEU, 22 January 2015, Case C-441/13, *Hejduk*, ECLI:EU:C:2015:28, para. 24.

⁹⁴ Opinion of AG Bobek delivered on 28 February 2018 in CJEU, C-27/17, *flyLAL-Lithuanian Airlines*, para. 110-111.

not provide a detailed justification why it refused to apply analogous line of reasoning, even adopted in other tort actions, without seeking a preliminary ruling from the CJEU ⁹⁵.

In any event, even assuming that the location of corporate decision-making on emissions could qualify as a relevant connecting factor, one must still address whether such localisation satisfies the fundamental requirement of predictability and legal certainty – core values expressly emphasised in Recital 16 of the Brussels Ia Regulation ⁹⁶. In this regard, locating the place of conduct at the seat of the company's decision-making on emission-related strategies appears foreseeable for both parties, as they may reasonably anticipate litigation in the State where the relevant corporate policy was adopted ⁹⁷. Moreover, the CJEU has underlined that “legal certainty requires that rules of jurisdiction be predictable in such a way as to enable a *normally well-informed* defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued” ⁹⁸. Importantly, this “normally well-informed” foreseeability requirement does not impose a temporal limitation: it applies both at the pre-litigation stage and during the parties' pre-dispute conduct ⁹⁹. Given that the risks associated with global warming have been publicly acknowledged since at least the mid-twentieth century, corporate actors can hardly claim ignorance of

⁹⁵ G. TE WINKEL-X.P.A. VAN HEESCH, *The Shell judgment – a bombShell in private international law?*, cit., 541. The Court found no sufficient basis to interpret the relevant provision by reference to the CJEU case law cited by the parties. While it is true that those cases concerned specific subject matters – such as intellectual property rights and prospectus liability – the Court failed to provide a reasoned justification for its refusal to apply them by analogy. Similarly, the Court dismissed the analogy drawn by RDS to national case law, Supreme Court of the Netherlands, 21 September 2001, ECLI:NL:HR:2001:ZC3483, *BUS/Chemconserve*, which held that a purely internal corporate decision cannot constitute a harmful event, asserting that RDS's group policy could not be equated with such internal decision-making, again without further explanation.

⁹⁶ CJEU, 3 July 1997, C-269/95, *Benincasa v Dentalkit*, ECLI:EU:C:1997:337, para. 26; 4 March 1982, 38/81, *Effer v Kantner*, ECLI:EU:C:1982:79, para. 6; 23 April 2009, C-533/07, *Falco Privatstiftung and Rabitsch*, ECLI:EU:C:2009:257, para. 22; 17 November 2011, C-327/10, *Hypoteční banka*, ECLI:EU:C:2011:745, para. 44.

⁹⁷ A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 370.

⁹⁸ CJEU, 19 February 2002, C-256/00, *Besix*, ECLI:EU:C:2002:99, para. 24; 1 March 2005, C-281/02, *Owusu*, ECLI:EU:C:2005:120, paras. 38-40; 17 June 1992, C-26/91, *Jakob Handte*, ECLI:EU:C:1992:268, para. 18.

⁹⁹ T.W. DORNIS, *Negotiorum gestio and Brussels I bis Regulation*, in P. MANKOWSKI (ed.), *Research Handbook on the Brussels I bis Regulation*, Cheltenham, 2020, 85.

the potential jurisdictional implications of their emission-related decisions. Accordingly, identifying the place of corporate management decisions as the *locus actus* could appear consistent with the Regulation's objective of predictability.

The conclusion concerning the possibility of locating the place of the conduct at the place of corporate decision may be supported in the context of the objective of already examined *strategic* actions, where there is often no action on compensation of *individual* loss suffered as the result of climate change, but it rather aims to influence corporate conduct and decision-making of companies in order to change measures for the reduction of CO₂ emissions mainly through the mitigation measures. In such cases, the harm is frequently "invisible": no tangible damage to health or property has occurred, yet preventive intervention is required. These actions seek to compel corporate actors to achieve specific environmental outcomes and aim at broader societal objectives, such as promoting social justice, influencing corporate behaviour, and shaping normative frameworks for future conduct in line with climate policy goals. Identifying the place of corporate decision-making as the *locus actus* in strategic litigation thus could allow the otherwise "invisible" harm to become visible within the jurisdictional framework¹⁰⁰.

However, such a consideration directed to the satisfaction of the objectives appears difficult to endorse: it would implicitly suggest that the objective of a strategic actions (or of any actions more generally) could operate to "re-shape" the jurisdictional heads under the Brussels regime, while taking into account the underlying reasons behind – possibility of expanding the claimant's choice of forum in pursuit of a more favourable judicial setting (for instance, one in which legal standing is granted). Similarly, attempts to "reposition" the place of the event giving rise to the damage at the level of preliminary corporate decision-making – simply because the concrete *locus* of the causative conduct is hard to isolate (as in gas of place of gas emissions as it will be dealt further) – might be sustained with difficulty. The place of conduct pursuant to Article 7(2) of the Brussels Ia Regulation is objective connecting factor, corresponding to the place "where the event which gave rise to the damage produces its harmful effects"¹⁰¹. Consequently, substantive policy considerations – such as those relating to the objectives of a given action – have no role in determining this jurisdictional criterion within the Brussels regime.

In line with this reasoning, a significant strand of the scholarship considers

¹⁰⁰ On "invisibility" of the claims see G. GANGULY-J. SETZER-V. HEYVAERT, *If at First You Don't Succeed: Suing Corporations for Climate Change*, cit., 484.

¹⁰¹ CJEU, 16 July 2009, C-189/08, *Zuid-Chemie BV*, ECLI:EU:C:2009:475, para. 27.

such corporate decisions to constitute mere preparatory acts, which lack the requisite proximity to the legally relevant harm: the “event giving rise to the damage” must coincide with the place where the polluting activities are physically carried out, as the violation of individual protected interests materialises through greenhouse gas emissions, not from the corporate decision¹⁰². Indeed, this approach aligns with the established practice of identifying the wrongful act with a concrete, *physical* manifested activity that directly gives rise to the damage, rather than with an internal process, such as the mere adoption of a corporate or business policy¹⁰³. The jurisdictional rule under Article 7(2) rests on the existence of a particularly close connection between the dispute and the court seised, primarily justified by considerations of proximity, given the central importance in tort actions of establishing a causal link between the alleged damage and its origin¹⁰⁴. Accordingly, this proximity requirement appears significantly weakened where jurisdiction is asserted at the place where

¹⁰² On the irrelevance of preparatory acts for the purpose of identifying the place of conduct under the Brussels Ia Regulation see R. MONICO, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, 196; in the context of climate change litigation see M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, cit., 90; S. MARINO, *La climate change litigation nella prospettiva del diritto internazionale privato e processuale*, cit., 911; E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea. Quale spazio per la tutela collettiva?*, cit., 870-871; O. FERACI, *Conterzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 136; under Article 7 of the Rome II Regulation: J. VON HEIN, *Art. 7*, in R. MORITZ-G.P. CALLIESS (eds.), *Rome Regulations: Commentary*, cit., 662; P. FRANZINA, *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali (“Roma II”)*, in *Le nuove leggi commentate*, 2008, 1010 fn 161. On the other hand, see P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 268-269, which indicates that the decision to start an industrial production which consequently leads to pollution and environmental damage is irrelevant and the acts of actually producing are its consequences. The author affirms that “...the spark and the driving force behind them is the entrepreneurial decision. Hence, the decision-making should matter as should the later act of producing”. Also, as stressed by C. HONORATI, *La nuova disciplina tedesca della legge applicabile al fatto illecito*, in *RDIPP*, 2000, 335, it is not always easy to distinguish when an act remains merely preparatory and when it already constitutes an integral part of the conduct.

¹⁰³ M.P. WELLER-M.P. WEINER, *The “Event Giving Rise to the Damage” under Art. 7 Rome II Regulation in CO2 Reduction Claims – A break through an empty Shell?*, available at <https://conflictoflaws.net/2023/the-event-giving-rise-to-the-damage-under-art-7-rome-ii-regulation-in-co2-reduction-claims-a-break-through-an-empty-shell/>.

¹⁰⁴ See e.g., CJEU, 8 July 2013, C-147/12, *ÖFAB*, EU:C:2013:490, para. 50; 30 November 1976, 21/76, *Handelskekerij Bier v Mines de Potasse d’Alsace*, para. 17, in combination with paras 15 and 16.

corporate decisions on emissions are taken, rather than at the place where the polluting activities physically occur.

Finally – and this is the most crucial point – one must question whether anchoring the place of conduct to the location where corporate emission-related decisions are taken would meaningfully provide claimants with an alternative forum. In practical terms, its impact in broadening jurisdictional options appears rather limited: in the vast majority of cases, the place of corporate decision-making will overlap with the defendant's statutory seat, central administration or principal place of business, as defined in Articles 4 and 63 of the Brussels Ia Regulation¹⁰⁵.

4.2.1.2. *Alternative approach: place of emissions.*

The second approach identifies the wrongful conduct with the physical location of the greenhouse gas emissions, namely the site of the industrial facility or power plant responsible for their release. This interpretation appears particularly appropriate in all kind of climate change cases, where the claimant seeks compensation or remedial measures for direct, tangible harm to health or property, but it may equally apply in instances of intangible harm, such as the infringement of the right to a healthy environment¹⁰⁶. The connection between the injurious activity and the ensuing damage is, in this view, more immediate and concrete: the protected individual interest is directly affected by the emissions themselves, thereby rendering the place of the polluting activity closely linked to the harm suffered by the victim and consistent with the proximity principle underlying Article 7 of the Brussels Ia Regulation. This logic was reflected in *Lliuya v. RWE*, where the court treated the site of the emissions as the relevant *locus actus* – specifically, under Article 7 of the Rome II Regulation¹⁰⁷.

¹⁰⁵ In general see inter alia T. GARBER, *Injunctive Relief under the Brussels I bis Regulation*, in P. MANKOWSKI (ed.), *Research Handbook on the Brussels I bis Regulation*, cit., 129; in respect to the climate change see J. SPIEGEL, *Forum Shopping in the EU – A Useful Strategy in Corporate Climate Change Litigation?*, cit., 181; M.P. WELLER-M.L. TRAN, *Climate Litigation against companies*, cit., 5; O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 136; F. RIELAENDER, *Aligning the Brussels regime with the representative actions directive*, in *International & Comparative Law Quarterly*, 2022, 113.

¹⁰⁶ In support of this conclusion, with regard to compensation and adaptation claims concerning applicable law, M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 14.

¹⁰⁷ See Hamm Higher Regional, 28 May 2025, para. 2, a), dd): "... according to this provision, the law of the country in which the event occurs is generally applicable, unless the

A similar reasoning appears to have been followed in *Greenpeace v. Eni*, as mentioned in the Section 4.2.1, in which the Italian Court of Cassation primarily identified the place of conduct as the location “where the climate-changing emissions are produced”¹⁰⁸.

However, significant difficulties may arise in determining the precise place where the event giving rise to the damage occurred, given that emission facilities are often dispersed across multiple locations and that isolating the specific contribution of each installation to the individual harm suffered by the claimant is inherently complex¹⁰⁹. Although a comprehensive evidentiary assessment of the facts relevant to jurisdiction is not required – and the court must assess jurisdiction “in the light of all the information available to it, including, where appropriate, the defendant’s allegations”¹¹⁰ – it remains doubtful whether such information available to court would enable the unequivocal localisation of the relevant conduct, *i.e.*, specific emission source that directly affected the legal interests of the individual claimant, which should ensure the satisfaction of the proximity requirement underpinning the Brussels regime. This difficulty emerges both in routine and strategic litigation: it was therefore argued that actions relying on the first limb of the *Mines de Potasse* formula should, in this context, be disregarded. This conclusion may be gained further support with regard to injunctive or mitigation claims seeking the reduction or cessation of CO₂ emissions, as the CJEU has observed (albeit on a different occasion), that an obligation “not to do something” which lacks a fixed geographical *locus*, is

injured party decides to base his claim on the law of the country in which the event giving rise to the damage – in this case the emission – took place. In the present case, the plaintiff has made this decision (in agreement with the defendant) in favor of German law”. However, an additional issue arises since the defendant’s conduct (emission activity) has been ongoing since 1965, whereas the Rome II Regulation has only applied to non-contractual obligations since 11 January 2009 (see Article 31 Rome II Regulation).

¹⁰⁸ Italian Court of Cassation, 21 July 2025, n. 20381, para. 8.1: On English translation see <https://rdipp.unimi.it/2025/07/25/climate-change-litigation-before-the-italian-supreme-court/>.

¹⁰⁹ P. WEINER-M.P. WELLER, *The “event giving rise to the damage” under Art. 7 Rome II Regulation in CO2 reduction claims*, in YPIL, 2021-2022, 271.

¹¹⁰ CJEU, 28 January 2015, C-375/13, *Kolassa*, ECLI:EU:C:2015:37, paras. 63 and 64. See also F.C. VILLATA, *Rapporto sull’applicazione in Italia del Regolamento (CE) n. 44/2001, del 22 dicembre 2000 (“Bruxelles I”), e del Regolamento (UE) n. 1215/2012, del 12 dicembre 2012 (“Bruxelles I-bis”), concernenti la competenza giurisdizionale, il riconoscimento e l’esecuzione delle decisioni in materia civile e commerciale*, in S. BARIATTI-I. VIARENGO-F.C. VILLATA (eds.), *La giurisprudenza italiana sui regolamenti europei in materia civile e commerciale e di famiglia*, Padova, 2016, 15-16. For more details see Section 4.2.2.2.

characterised by a multiplicity of places of performance. Accordingly, jurisdiction in such cases might only be established by reference to the general rule ¹¹¹.

Although there is no clear basis that an alternative jurisdiction under Article 7(2) must always exist ¹¹², before adopting such a far-reaching conclusion, it should be borne in mind that the CJEU has, in this regard, affirmed in *Mines de Potasse* that:

“... close connection between the component parts of every sort of liability, it does not appear appropriate to opt for one of the two connecting factors to the exclusion of the other, since each of them can, depending on the circumstances, be particularly helpful from the point of view of the evidence and of the conduct of the proceedings” ¹¹³.

Accordingly, the harmful conduct in the form of greenhouse gas emissions as a whole, which results in air pollution, could fall within the category of *multi-located conducts* occurring simultaneously across numerous Member States. As discussed in Section 4.2., the question of multi-located conducts undertaken in different jurisdictions has not yet been unequivocally clarified by the CJEU. Nonetheless, the Court appears to have developed a tendency to identify a single *locus actus* by attributing weight to the *initial* event or to the place where “the substance of the tortious conduct arises” ¹¹⁴. This raises the question of what should be regarded as the *initial* event or the *substance of the tortious conduct* in the context of polluting activities carried out by emission plants located in multiple sites, which must be directly linked to the alleged harm suffered by the victim and necessarily assessed on an individual basis for each victim ¹¹⁵.

¹¹¹ CJEU, 19 February 2002, C-256/00, *Besix*, ECLI:EU:C:2002:99.

¹¹² Opinion of AG Bobek delivered on 21 June 2018, C-337/17, *Feniks*, ECLI:EU:C:2018:805, para. 98, “... there is no obvious foundation for the idea that there should always or even often be an alternative to the courts of the defendant’s domicile”. In the same vein see P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 131.

¹¹³ CJEU, 30 November 1976, 21/76, *Handelskwekerij Bier v Mines de Potasse d’Alsace*, ECLI:EU:C:1976:166, para. 17.

¹¹⁴ On more detail see Section 4.2.

¹¹⁵ Where several claims are brought together in a single action, jurisdiction must be assessed independently and separately in relation to each claimant and each individual claim: CJEU, 18 July 2013, C-147/12, *ÖFAB*, ECLI:EU:C:2013:490, para. 58; 21 May 2015, C-352/13, *CDC Hydrogen Peroxide SA*, ECLI:EU:C:2015:335, paras. 35-36; 25 January 2018, C-498/16, *Schrems*, ECLI:EU:C:2018:37, para. 48.

Several proposals have been advanced in the doctrine (particularly in the context of applicable law), such as focal point or central place of activity approach, which designates as relevant the place that contributed most significantly to the damage¹¹⁶. This reasoning would align with the broader logic underpinning *multi-located conducts*, which emphasises the place where, the substance of action in tort arises – namely, the location to which the wrongful conduct is most closely connected¹¹⁷. Alternatively, following the rationale of the *initial event* in multi-state torts, even this seems less convincing, attention would be directed to the first causal element in the chain leading to the damage, such as the establishment of the initial emission facility. Against this background, it may be doubted whether the focal point or central site of activity – or even the first installed plant – would suffice to satisfy the proximity requirement, which presupposes a close connection between the court and the harm suffered by each individual victim. Consequently, one might question whether, for reasons of legal certainty, a more fact-based, *ad hoc* rule for the climate change matters – similar to that adopted under Article 7(1)(b) of the Brussels Ia Regulation in contractual matters – should not be adopted¹¹⁸.

A further approach, inspired by the mosaic principle established by the CJEU in *Shevill*, has also been proposed. Under this new view of “reversed mosaic principle”, applicable law¹¹⁹ and jurisdiction would fragment along the

¹¹⁶ For similar proposals see P. WEINER-M.P. WELLER, *The “event giving rise to the damage” under Art. 7 Rome II Regulation in CO2 reduction claims*, cit., 271-272.

¹¹⁷ Such place could be determined either on the basis of the proportional contribution of each facility to the overall emissions, or by identifying the central place of activity of the company’s environmentally harmful operations – such as the site responsible for the longest or most intensive period of emissions. On similar approach as to modified mosaic approach with regard to applicable law see P. WEINER-M.P. WELLER, *The “event giving rise to the damage” under Art. 7 Rome II Regulation in CO2 reduction claims*, cit., 271-272. In this regard, it must be borne in mind that the determination of such a place is not subject to a full evidentiary inquiry into the facts; however, the court must nevertheless assess jurisdiction in the light of all the information available to it, which is primarily defined by the *causa petendi*. See CJEU, 28 January 2015, C-375/13, *Kolassa*, ECLI:EU:C:2015:37, paras. 63 and 64; Italian Court of Cassation, 14 July 2014 n. 16065. For more details see Section 4.2.2.2.

¹¹⁸ For more details underlying the reasons for taking this approach in contractual matters see P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 199.

¹¹⁹ M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 12, 19; M.P. WELLER-M.P. WEINER, *The “Event Giving Rise to the Damage” under Art. 7 Rome II Regulation in CO2 Reduction Claims – A break through an empty Shell?*, cit., 271-272; S. DE VIDO, *The Privatisation of Climate Change Litigation: Current Developments in Conflict*

lines of the various places of the events giving rise to the harm, rather than the places where the damage materialises under the “traditional *Shevill* mosaic approach”¹²⁰. In particular, the places of gas emissions – interpreted as different places of conduct – would be applied on a distributive basis, leading to additional fragmentation of jurisdiction. A similar scenario of a “reversed mosaic” approach was illustrated by the defendant in the *Shell* case, albeit limited to the question of applicable law. It was argued that identifying the *locus actus* as the place of emission would result in the application of a large number of legal systems, since RDS’s emissions were produced in multiple countries worldwide, leading to a fragmented mosaic regime concerning the event giving rise to the damage¹²¹. The court, however, rejected this argument, locating the relevant conduct instead in the company’s decision-making policy process, which it considered to be the true place of the event giving rise to the damage. Nevertheless, as previously discussed, given that the CJEU has shown a preference for identifying a single *locus actus* for a multi-state conduct, it is doubtful whether an additional mosaic approach to the place of the event giving rise to the damage – absent prior clarification from the Court – is desirable. Indeed, a significant part of the doctrine has sought to avoid the traditional *Shevill* mosaic model precisely because of its tendency to fragment jurisdiction. Lastly, it may be argued that such a mosaic approach could arguably fail to satisfy the requirement of proximity between the court and the dispute.

of Laws, cit., 75-77, also discusses and endorses the approaches suggested by M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit. See also A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 369, who maintains that treating greenhouse gas emissions as the law of the causal act leads to a fragmentation of the applicable legal regime.

¹²⁰ See E. ÁLVAREZ-ARMAS, *Le contentieux international privé en matière de changement climatique à l’épreuve de l’article 17 du règlement Rome ii: enjeux et perspectives*, in *RDIA*, 2021, 114-115, who notes that, in *Lliuya v. RWE*, the claimant argued that two-thirds of RWE’s greenhouse gas emissions occurred in Germany. According to the author, this should have precluded the application of German law to the entire dispute and required, on a distributive basis, the application of the law(s) of the locations from which the remaining one-third of emissions originated. However, author observes that this argument was likely not raised in order to avoid further complicating an already technically complex legal situation. On the application of the “reverse mosaic” approach in the context of Article 7(2) Brussels Ia Regulation regarding the place of the event giving rise to damage, see E. ÁLVAREZ-ARMAS, *Climate change litigation through the prism of private international law*, in *SYbIL*, 2024, 351, where, according to the author, such an approach could also be transposed to jurisdictional issues.

¹²¹ The Hague District Court, *Milieudefensie et al. v. Royal Dutch Shell plc.*, 26 May 2021, No C/09/571932, paras. 4.3.2. and 4.3.5.

It is also noteworthy that the same *Shell* judgment explicitly referred to Von Hein's commentary on Article 7 of the Rome II Regulation, which observes:

"Where events giving rise to environmental damage occur in several states, it is not possible to invoke the escape clause (Article 4(3)) in order to concentrate the applicable law with regard to a single act. Thus, the plaintiff may opt for different laws as far as acts by multiple tortfeasors acting in various states are concerned....one has to concede that extending the victim's right to choose the law, of each place of act would considerably undermine legal predictability. On the other hand, such generous approach would fit the favor naturae underlying Article 7"¹²².

From this reading, it can be inferred that in cases involving multi-located conducts, the mosaic approach should not apply to the place of the event giving rise to the damage. Rather, the plaintiff should have the option to select one of the relevant places of *conduct* and claim compensation for the entire harm there. In the context of climate change litigation, such an approach – allowing the claimant to choose the law of one of the emitting plants – has also been supported in legal scholarship¹²³. In this regard, it must be noted that Article 7 of the Rome II Regulation introduces an autonomous connecting factor, reflecting a form of unilateral party autonomy that allows the claimant to opt for a law other than that of the place of damage under Article 4¹²⁴. As clarified in Recital 25, this flexibility pursues the objective of promoting a high level of environmental protection¹²⁵. Accordingly, the possibility of choosing the law of one of the places of conduct could be seen as complementing this protective purpose. However, although the Rome II Regulation expressly calls for consistency with the Brussels Ia Regulation, the latter does not provide a corresponding explicit mechanism of protection in the form of a special jurisdictional rule based on the polluter-pays principle¹²⁶. On the contrary, extending

¹²² J. VON HEIN, *Art. 7*, in R. MORITZ-G.P. CALLIESS (eds.), *Rome Regulations: Commentary*, cit., 662.

¹²³ P. WEINER-M.P. WELLER, *The "event giving rise to the damage" under Art. 7 Rome II Regulation in CO2 reduction claims*, cit., 271-272.

¹²⁴ *Ibidem*.

¹²⁵ Recital 25 of the Rome II Regulation refers to Article 174 TFUE and provides "there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage".

¹²⁶ On the other hand, this choice has also been suggested as one of the solutions for

even more the claimant's choice of forum could undermine predictability – a fundamental objective of the Brussels system¹²⁷. As previously discussed in this regard, the CJEU has consistently limited opportunities for *forum shopping*¹²⁸, seeking to maintain a fair balance between the parties and to ensure that alternative jurisdictional grounds – such as Article 7(2) – always operate within the framework of legal certainty and foreseeability¹²⁹. This approach equally seems to apply to the category of “multi-located conducts”, where the Court appears to have striven to determine a single *locus actus*¹³⁰. Finally, the CJEU has made clear that the terms “the place where the damage occurred” and “the place of the event giving rise to it” cannot be interpreted extensively, and that “the choice thus available to the plaintiff cannot be extended beyond the particular circumstances which justify it”¹³¹.

identifying the place of the event giving rise to damage under the Brussels Ia Regulation in cases of a “event of continuous offence”, where it is argued that “pragmatically sympathy might favour” this approach, see P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 267.

¹²⁷ In the context of applicable law, see P. WEINER-M.P. WELLER, *The “event giving rise to the damage” under Art. 7 Rome II Regulation in CO2 reduction claims*, cit., 271-272. Contrary, the requirement of predictability appears weakened with regard to Article 7 of the Rome II Regulation as to applicable law: as affirmed by J. VON HEIN, *Art. 7*, in R. MORITZ-G.P. CALLISS (eds.), *Rome Regulations: Commentary*, cit., 662, Article 7 of the Rome II Regulation is not subject to an escape clause; thus, the application of *lex loci damni* cannot be excluded on the grounds that it could not be reasonably foreseen by the person responsible for the environmental damage.

¹²⁸ CJEU, 7 March 1995, C-68/93, *Shevill and Others v Presse Alliance*, paras. 28-33. See also P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 259.

¹²⁹ On the other hand, as affirmed by the CJEU, the objectives of that provision – ensuring that the court with jurisdiction is foreseeable and preserving legal certainty – are not related to the allocation of roles between claimant and defendant, nor to the protection of either party, which differs from rules designed to provide stronger protection to the weaker party, see CJEU, 15 March 2012, C-292/10, G, ECLI:EU:C:2012:142, para. 39; 19 April 2012, C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220, para. 23; 25 October 2012, C-133/11, *Folien Fischer and Fofitec*, ECLI:EU:C:2012:664, para. 45, 46.

¹³⁰ On more detail see Section 4.2.

¹³¹ CJEU, 19 September 1995, C-364/93, *Marinari v Lloyd's Bank*, paras. 13, 14. However, it is questionable whether the Italian Court of Cassation, 21 July 2025, n. 20381, para. 8.1. (on English translation of this point 8.1. see <https://rdipp.unimi.it/2025/07/25/climate-change-litigation-before-the-italian-supreme-court/>) indirectly acknowledged the possibility of an “option” approach. As noted above, with regard to the place of conduct, the Court referred *inter alia* to business strategy, but also to the location of the gas emissions.

4.2.2. *Identifying locus damni.*

Having examined the identification of the place of the event giving rise to the damage, attention now turns to the related question of the place of damage (*locus damni*). In identifying the place of damage, two main approaches may be considered: either focusing on the location where the victim's legal interest was affected, or disregarding the concept of place of damage under the second limb of Article 7(2) entirely in the context of climate change. In defining the relevant notion of damage, it must be stressed that the CJEU has consistently adopted a restrictive interpretation, limiting it to direct damage – the place where the event directly produced its harmful effects upon the person who is the immediate victim of that event¹³². As specified by the CJEU in *Marinari*, only this initial damage is considered relevant: any subsequent harm arising in another Member State as a consequence of the initial event is treated as an adverse consequence and therefore irrelevant for determining the place of the harmful event. Accordingly, the place where the claimant's financial loss ultimately materializes constitutes indirect damage and is irrelevant for establishing special jurisdiction under the Brussels Ia Regulation¹³³.

4.2.2.1. *“Direct” damage and the locus damni: from individual to collective harm.*

The approach that advocates disregarding the concept of the *locus damni* altogether has been advanced in legal scholarship on the premise that the causal connection between the alleged wrongful conduct and the specific harm is “too indirect” to establish jurisdiction, in light of the CJEU interpretation in *Dumez* and *Marinari*. In particular, it has been argued that, since natural phenomena must first be induced by global warming before any concrete injury to life, health, or property materialises, the resulting damage is too indirect to create a sufficient *nexus* with a particular conduct – especially when cannot be directly traced to the conduct of a specific defendant¹³⁴. On this view, the only direct damage would consist of climate change itself and its general climate-related effects, which, by their very nature, are potentially

¹³² CJEU, 11 January 1990, C-220/88, *Dumez France and Others v Hessische Landesbank and Others*, para. 20; in the context of applicable law see 10 December 2015, C-350/14, *Lazar*, ECLI:EU:C:2015:802.

¹³³ CJEU, 19 September 1995, C-364/93, *Marinari v Lloyd's Bank*, para. 21.

¹³⁴ M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, cit., 92.

attributable to the activities of companies globally resulting in inherent risk to be sued worldwide¹³⁵. If it were accepted that no direct damage exists for the purposes of Article 7(2), the place of damage could not be identified as a valid jurisdictional head, with the consequence that corporations contributing to global warming could be sued only before the courts of their domicile or of the place where the conduct giving rise to the alleged harm occurred. As examined, the latter – *locus actus* – may often coincide with the company's central administration or principal place of business under Article 4 of the Brussels Ia Regulation, particularly where the harmful conduct is being localised at the place of the corporate management decisions on gas emissions¹³⁶. Alternatively, where the place of conduct is identified with the location of the emissions themselves, there might be a risk that this could – *in extremis*, under the premises outlined in Section 4.2.1.2. – ultimately lead to the disregard of the *Mines de Potasse* first limb in the context of climate change disputes. As a consequence, in practical terms, climate change litigation could be deprived of the alternative head of special jurisdiction in matters relating to tort, delict, or quasi-delict under Article 7(2)¹³⁷.

It may nevertheless be questioned whether the atmosphere itself can be regarded as the *locus* of direct damage within the meaning of Article 7(2)¹³⁸. This tort forum generally refers to a legally protected interest associated with the victim – such as property, life, or health – rather than to harm inflicted upon a collective interest, such as the environment as a common good of humanity¹³⁹. This interpretation may find support in the rule of Article 7 of the Rome II Regulation as to applicable law, which distinguishes between two categories of

¹³⁵ M.P. WELLER-M.L. TRAN, *Climate Litigation against companies*, cit., 6, argue that such concerns are unfounded, as the territorial scope of the Brussels Ia Regulation is confined to the Member States.

¹³⁶ M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, cit., 92; E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea. Quale spazio per la tutela collettiva?*, cit., 871.

¹³⁷ M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, cit., 92.

¹³⁸ M.P. WELLER-J.M. NASSE-L. NASSE, *Climate change litigation in Germany*, cit., 390, S. MARINO, *La climate change litigation nella prospettiva del diritto internazionali privato e processuale*, cit., 910.

¹³⁹ M.P. WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 10.

environmental harm¹⁴⁰: first, “pure” damage to the environment as established in Recital 24 of the Rome II Regulation, read together with Directive 2004/35/EC on environmental liability, and second, consequential or “collateral” damage¹⁴¹ to persons or property resulting from environmental degradation, namely personal injury or property damage derived from environmental damage, as distinct from the indirect consequences of the initial harmful event¹⁴².

If such an understanding of direct damage is accepted, the initial harm may be conceived as the violation of an individual legal interest affected by climate change – namely, personal injury or damage to property¹⁴³. Since, as established, the place of damage corresponds to the location where the event directly produced its harmful *effects* upon the victim, it should be understood as the location where these individual legal interests are infringed. Consequently, in line with the *Marinari* judgment, any financial loss subsequently suffered by the claimant – such as a reduction in financial assets due to climate-related damage to health or property located in another Member State – should be classified as indirect damage, and thus irrelevant for determining jurisdiction¹⁴⁴.

¹⁴⁰ See Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, 22 July 2003, COM(2003) 427 final, 19; A. FUCHS, *Article 7*, in P. HUBER (ed.), *Rome II Regulation: Pocket Commentary*, cit., 212; J. VON HEIN, *Art. 7*, in R. MORITZ-G.P. CALLIESS (eds.), *Rome Regulations: Commentary*, cit., 656. Recital 17 of the Rome II Regulation then explicitly provides that in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

¹⁴¹ A.L. CALVO CARAVACA-J. CARRASCOSA GONZÁLEZ, *Las obligaciones extracontractuales en Derecho internacional privado. El Reglamento “Roma II”*, Granada, 2008, 162.

¹⁴² See Recital 17 and Article 4(1) of the Rome II Regulation.

¹⁴³ See also P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 286 which refers to “the primarily protected assets or values of the victim”, that should be understood widely and that requires to identify the legal interest potentially affected, while the identification of the primarily protected asset or value is “an incidental or preliminary question, and which substantive law has to be determined via the Rome II Regulation”.

¹⁴⁴ AG Campos Sánchez-Bordona delivered on 2 April 2020 in CJEU, C-343/19, *Verein für Konsumenteninformation*, ECLI:EU:C:2020:253, paras. 38 and 39, argued that the existence of the vehicle as a tangible object does not preclude classification of the harm as financial; rather, it symbolizes the reduction in assets and makes it possible to identify the origin of that reduction. Consequently, such financial damage is initial and not consequential, and is derived directly from the event giving rise to the damage. However, the CJEU, 9 July 2020, C-343/19, *Verein für Konsumenteninformation*, ECLI:EU:C:2020:534, paras. 33 and 34, characterized the damage as material, since it affects tangible vehicles, and consequently, the

However, localising the infringement of general or collective legal interests – particularly where the harm is “invisible”, as in mitigation actions seeking the reduction or cessation of CO₂ emissions and where no tangible damage has occurred – raises substantially greater challenges. In such cases, compounded by the difficulties of admissibility and standing discussed in Section 3, the harm concerns intangible rights, such as the right to enjoy a healthy environment and an atmosphere unaffected by global warming. The violation of such rights could be understood as occurring where these interests are enjoyed and impaired, namely, where individuals experience the adverse effects on their health or living conditions¹⁴⁵.

When the dispute involves claim for monetary compensation or reimbursement of expenses arising from damage to the individual’s property or personal injury caused by climate change or related events, identifying the place of damage seems relatively clear: it corresponds to the location where the victim’s tangible *individual* legal interests in health, life, or property have been impaired. For instance, the *Lliuya* case concerned an adaptation claim in which Mr. Lliuya sought reimbursement for the costs of implementing safety measures to mitigate flood risks to his property in Peru, allegedly resulting from the accelerated melting of glaciers caused by global warming attributable to the defendant’s CO₂ emissions. In this judgment, it was emphasised that the claim related to an imminent impairment of the claimant’s absolute legal right to the enjoyment of his property in Peru, arising from the past, present, and ongoing emissions produced by the defendant’s corporate group. Even though it did not explicitly determine the place of damage for jurisdictional and applicable law purposes (which were, respectively, based on Articles 4 and 63 of the Brussels Ia Regulation and Article 7 of the Rome II Regulation, referring to the place of the emissions in Germany), it seems that the court treated the property in Peru as the *locus* of the threatened impairment of claimants’ absolute right.

Thus, some scholars have suggested that the place of damage, for the purpose of applicable law, understood as the location of the property impairment, would be in Peru¹⁴⁶. While the conclusion is hardly transportable into the

initial and direct loss in value of the vehicles occurred at the place where the vehicles were purchased.

¹⁴⁵ A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 371; L. GARCÍA ÁLVAREZ-D. IGLESIAS MÁRQUEZ, *La regla de la ubicuidad y la responsabilidad ambiental corporativa*, in M.C. MARULLO-F.J. ZAMORA CABOT (eds.), *Empresas y Derechos Humanos. Temas actuales*, Napoli, 2018, 149.

¹⁴⁶ With respect to the applicable law under Article 4 of the Rome II Regulation, see M.P.

jurisdictional sphere – given the territorial limits of the Brussels Ia Regulation – it provides a useful indication of how the connection between the place of damage and protected legal interests might be reasoned.

By contrast, as mentioned above, climate change actions brought collectively by multiple claimants to influence corporate emission practices or policies further complicate the identification of the place of damage: there is often no “visible” or tangible damage in the form of a violation of individual legal interests, such as property rights, as was the case in *Lliyua*. Rather, these actions concern the infringement of collective rights, such as the right to a healthy environment. Consequently, as noted above, damage to such intangible goods may be considered to occur at the location where the violation of the collective right to a healthy environment and an atmosphere unaffected by global warming takes place¹⁴⁷.

In this regard, for a better understanding of such concept of the place of damage, reference might be made to the recent Italian case *Greenpeace v. Eni*¹⁴⁸, concerning an action for compensation for material and non-material damages (distinct from environmental harm) resulting from violations of human rights protected under the Italian Constitution and international treaties, including the rights to health and life¹⁴⁹. The Italian court asserted jurisdiction over the climate change litigation based on Articles 4(1) and 7(2) of the Brussels Ia Regulation¹⁵⁰, while in assessing “the place where the damage occurred”, the court stated that

“... it must also be considered that climate-changing emissions, despite originating in the place where fossil fuels are produced, transported and marketed, have

WELLER-M.P. WEINER, *Corporate Climate Liability in Private International Law*, cit., 10; A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 371. See also the Statement of Claim of the claimant, referring to Peruvian law under Article 4 of the Rome II Regulation: <https://www.germanwatch.org/sites/default/files/announcement/20822.pdf>.

¹⁴⁷ A.C. HERNÁNDEZ, *International Climate Litigation against Companies: Issues of Applicable Law*, cit., 371; L. GARCÍA ÁLVAREZ-D. IGLESIAS MÁRQUEZ, *La regla de la ubicación y la responsabilidad ambiental corporativa*, cit., 149.

¹⁴⁸ Italian Court of Cassation, 21 July 2025, n. 20381.

¹⁴⁹ Italian Constitution: Articles 2, 9, 32, 41 (rights to life, cultural and environmental heritage, health, and private economic initiative); ECHR: Articles 2, 8 (right to life; respect for private and family life); CFREU: Articles 2, 7 (right to life; respect for private and family life).

¹⁵⁰ The Italian court did not rule on the merits of the claim, as the proceedings concerned a “regolamento di giurisdizione” under the Italian Code of Civil Procedure, aimed solely at determining whether the Italian court had jurisdiction. On critique of mixed application of Articles 4 and 7 see fn 58.

a naturally diffusive scope, extending their effects to the entire Earth's atmosphere, within which the increase in global temperature that causes climate change is determined; the violation of the right to life and to private and family life alleged in support of the claim occurs, on the other hand, in the place where the applicants reside, where the impairment of life expectancy, health conditions and overall quality of life, which is the ultimate effect of the causal sequence triggered by climate change, is destined to occur, and where the applicants have identified the individual, concrete and actual damage they have suffered".

On this basis, the court concluded that the application of this criterion allows to conclude that jurisdiction over the claim for compensation brought by the plaintiffs lies with the Italian courts.

In other words, in this judgment, direct damage was identified by the Italian court as the violation of the rights to life and private and family life, which is accordingly situated at the place of the impairment of life expectancy, health conditions, and overall quality of life, effectively linking the *locus damni* to the claimants' residence. This reasoning aligns with the considerations discussed above and supports a victim-oriented approach to jurisdiction based on the claimant's residence, which may serve as an important precedent for future climate litigation within the EU framework. It appears that the court relied on the national concept of residence¹⁵¹, rather than referring to the notion of domicile¹⁵² or habitual residence established under the p.i.l. EU Regulations¹⁵³.

¹⁵¹ See Article 43 of Italian Civil Code. See in this regard Italian Court of Cassation, 15 February 2021, No 3841, where the court provided that the notion of a person's residence, under Article 43 of the Italian Civil Code, is determined by habitual and voluntary abode in a given place, characterised by remaining there for a sufficiently appreciable period of time – though not necessarily the majority of one's time – and by the intention to live there on a stable basis, as revealed through one's habits of life and the conduct of ordinary social, family, and emotional relationships.

¹⁵² On the notion of the domicile of legal persons, see Section 4.1. of this Chapter. On the domicile of individuals, see Article 62, which refers to the internal law of the Member State seised. Under Article 43 of Italian Civil Code, a person's domicile is the place where they have established the principal seat of their business and personal interests.

¹⁵³ Article 23 of the Rome II Regulation does not provide a definition of the habitual residence of a natural person acting outside the course of business activity; thus, a common understanding of this notion must be developed across the EU p.i.l. framework. Until 2020, there was no CJEU jurisprudence concerning the habitual residence of adults as a connecting factor in private international law. However, this has since changed with a trilogy of judgments: CJEU, 16 July 2020, C-80/19, *E. E.*, ECLI:EU:C:2020:569; 25 November 2021, C-289/20, *IB v FA*, ECLI:EU:C:2021:955; 1 August 2022, C-501/20, *MPA*, ECLI:EU:C:2022:619,

In this context, the question arises as to how the place of damage should be identified in cases involving multiple plaintiffs asserting general, rather than individual, interests. The Brussels regime was traditionally designed around two-party proceedings, focusing on the resolution of individual disputes, and is not tailored to collective cross-border litigation with numerous claimants¹⁵⁴. As the CJEU has clarified, where multiple claims are accumulated in a single action, jurisdiction must be determined independently and separately for each claimant and each claim¹⁵⁵.

If one assumes that the *Shevill* case, concerning multi-state damage, is applicable to climate change litigation under the mosaic principle – limiting each court’s jurisdiction to losses occurring within its own territory, thereby fragmenting proceedings – the situation in cases, which typically involve the individual interests of single persons, does not appear to create significant problems. It seems unlikely that an individual would suffer damage across multiple Member States, thus resulting in jurisdictional fragmentation¹⁵⁶. The same reasoning applies to collective actions brought to date, where the group of claimants is confined to a specific area and asserts a geographically identifiable legal interest, the effects of which are likely limited to the territory of a single Member State¹⁵⁷. Conversely, in cases where multiple victims, harmed by the same

albeit relating to UE Regulations in family matters. On the habitual residence of adults, see among many, M. NÍ SHÚILLEABHÁIN, *Adult habitual residence in EU private international law: an interpretative odyssey begins*, in *JPIL*, 2025, 30-67; M. PFEIFFER, *Habitual Residence and Nationality as Personal Law Connecting Factors in European Private International Law*, in J. CARRUTHERS-B. LINDSAY (eds.), *Research Handbook on International Family Law*, Cheltenham, 2024, 83-71; T. KRUGER, *Finding a Habitual Residence*, in I. VIARENGO-F. VILLATA (eds.), *Planning the Future of Cross-Border Families: A Path Through Coordination*, Oxford, 2020, 121; C. RICCI, *Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes Connected with the EU: Challenges and Potential*, in *Civil Procedure Review*, 2020, 151-178; J. RE, *Where Did They Live? Habitual Residence in the Succession Regulation*, in *RDIPP*, 2018, 978-1009; A. LIMANTE, *Establishing habitual residence of adults under the Brussels IIa regulation: best practices from national case-law*, in *JPIL*, 2018, 160-181.

¹⁵⁴ E. LEIN, *Cross-Border Collective Redress and Jurisdiction Under Brussels I: a Mismatch*, in D. FAIRGRIEVE-E. LEIN (eds.), *Extraterritoriality and Collective Redress*, Oxford, 2012, para. 8.05.

¹⁵⁵ CJEU, 18 July 2013, C-147/12, *ÖFAB*, ECLI:EU:C:2013:490, para. 58; 21 May 2015, C-352/13, *CDC Hydrogen Peroxide SA*, ECLI:EU:C:2015:335, paras. 35-36; 25 January 2018, C-498/16, *Schrems*, ECLI:EU:C:2018:37, para. 48.

¹⁵⁶ S. MARINO, *La climate change litigation nella prospettiva del diritto internazionali privato e processuale*, cit., 910.

¹⁵⁷ *Ibidem*. See in this regard cited Italian Court of Cassation, 21 July 2025, n. 20381, *Greenpeace v. Eni*, which concerned interest of Italian association and of the Italian citizens

conduct, suffer damage across different Member States, the mosaic theory, *prima facie*, appears to preclude the concentration of jurisdiction in a single court under the second prong of the *Mines de Potasse* rule¹⁵⁸. On the other hand, if one assumes that the mosaic approach established in *Shevill* should not apply to climate change disputes (for reasons discussed in Section 4.2.), then multiple victims suffering damage in different Member States would, in theory, be entitled to seek redress for the entire damage wherever any part of it occurs¹⁵⁹. However, this possibility appears rather theoretical, since the assessment of jurisdiction under Article 7(2) of the Brussels Ia Regulation – identified as the place where the impairment of life expectancy, health conditions, and overall quality of life occurs (thereby often linking the *locus damni* to the claimants' domicile or residence as in Italian case *Greenpeace v. Eni*) – must be carried out individually for each member of the class. It is therefore questionable whether the place of damage – conceived as the general and collective violation of interests in enjoying a healthy environment – could be considered as situated worldwide for each victim (even if limited to the territory of the Member States under the Brussels regime), thereby allowing any Member State court to be seized for the entire damage. In such a scenario, the discussed requirements of predictability and proximity would be further strained and may arguably be disregarded.

Thus, the traditional model of jurisdictional allocation – which determines jurisdiction separately for each individual claim and, considering even the potential risk connected with the mosaic principle, which limits courts to the damage sustained within their own territory – poses significant challenges to the centralisation of proceedings and increases the risk of parallel litigation and inconsistent judgments¹⁶⁰. In response, some scholars have proposed identifying a “centre of the collective interests of the injured victims” as a common place of damage of multitude of victims for the purpose of allocating

resident in Italy. See also The Hague District Court, *Milieudefensie et al. v. Royal Dutch Shell plc.*, 26 May 2021, No C/09/571932, where for the purposes of applicable law, interpreted it as the location where the plaintiffs' legal interests – those of Dutch residents – were violated.

¹⁵⁸ E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea. Quale spazio per la tutela collettiva?*, cit., 872; F. RIELAENDER, *Aligning the Brussels regime with the representative actions directive*, cit., 113.

¹⁵⁹ P. MANKOWSKI, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Brussels I bis Regulation – Commentary*, cit., 259.

¹⁶⁰ F. RIELAENDER, *Aligning the Brussels regime with the representative actions directive*, cit., 113.

jurisdiction¹⁶¹. This concept, inspired by and modelled on the notion of the “centre of interests” developed by the CJEU in its case law on the infringement of personality rights, would allow actions to be brought in respect of all the damage sustained before the courts of the Member State in which such a centre is located¹⁶². For the purpose of defining this centre of collective interests, various geographical connecting criteria could be considered, such as the place where most victims are habitually resident, the area where the bulk of the damage has materialised, or the location of the entity representing the victims in the proceedings¹⁶³. Centralising jurisdiction in cases involving mass harm could promote the principle of the sound administration of justice, as enshrined in Recital 16 of the Brussels Ia Regulation, by allowing comprehensive adjudication of all related claims within a single, and potentially more accessible, forum¹⁶⁴. Nevertheless, apart from doubts as to whether the interpretation developed in defamation cases might be extended to other torts involving damage – even with specific adjustments to fit collective redress actions – it is difficult to envisage the application of such a “centre of collective interests of the injured

¹⁶¹ A. NUYTS, *The Consolidation of Collective Claims Under Brussels I*, in N.E. HATZIMIHAIL A. NUYTS (eds.), *Cross-Border Class Actions: The European Way*, Munich, 2013, 77-79.

¹⁶² The centre of victims’ interests may either correspond in general to their habitual residence or to other factors, such as the pursuit of a professional activity, which may establish the existence of a particularly close link with that State, see CJEU, C-509/09, 25 October 2011, *eDate Advertising and Others*, ECLI:EU:C:2011:685, para. 49. However, as recalled in CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen and Ilsjan*, para. 42, as regards a legal person pursuing an economic activity, the centre of interests must be determined by reference to the place of commercial reputation and place of the main part of its economic activities, which may coincide with the place of its registered office; see *inter alia*: O. FERACI, *Diffamazione internazionale a mezzo Internet: quale foro competente? Alcune considerazioni sulla sentenza eDate*, in *Riv. dir. int.*, 2012, 461; M. BOGDAN, *Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate case*, in *YPIL*, 2011, 483; R. MONICO, *Il foro in materia di diffamazione online alla luce della sentenza Ilsjan*, cit., 359.

¹⁶³ On these proposals see A. NUYTS, *The Consolidation of Collective Claims Under Brussels I*, in N.E. HATZIMIHAIL-A. NUYTS (eds.), *Cross-Border Class Actions: The European Way*, cit., 78; E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell’Unione europea. Quale spazio per la tutela collettiva?*, cit., 873. On the *de lege ferenda* proposal see B. HESS-BURKHARD-D. ALTHOFF-T. BENS-N. ELSNER-I. JÄRVEKÜLG, *The Reform of the Brussels I bis Regulation*, in *MPILux Research Paper*, 2022, 13; E. LEIN, *Cross-Border Collective Redress and Jurisdiction Under Brussels I: a Mismatch*, in *Extraterritoriality and Collective Redress*, cit., para. 8.37; *contra* F. RIELAENDER, *Aligning the Brussels regime with the representative actions directive*, cit.

¹⁶⁴ A. NUYTS, *The Consolidation of Collective Claims Under Brussels I*, in *Cross-Border Class Actions: The European Way*, cit., 79.

victims” without prior intervention by the CJEU ¹⁶⁵. In addition, as Advocate General Sánchez-Bordona noted in his Opinion in *Vereniging van Effectenbezitters*,

“... it is not for the courts, including the Court of Justice, to introduce new procedural mechanisms, pre-empting the legislature on such a sensitive matter; nor is it for them to create an ad hoc ground of jurisdiction” ¹⁶⁶.

Thus, while the idea of identifying a centre of the collective interests of the injured victims offers appealing solution to the jurisdictional fragmentation inherent in the Brussels regime, its implementation remains uncertain in the absence of an explicit judicial interpretation or legislative basis. The existing framework, grounded in the assessment of individual damage and jurisdiction, does not easily accommodate transboundary collective forms of harm such as those arising from climate change.

4.2.2.2. *Proof of causation.*

A further difficulty concerns the proof of causation between the harmful conduct and the damage. As recalled by the CJEU, the conduct must directly produce its effects upon the victim, implying that a direct causal link between the wrongful act and the resulting damage – under Article 7(2) of the Brussels Ia Regulation – should, in principle, be proved in relation to the affected legal interests (life, physical integrity, health, or property) ¹⁶⁷. Scientific advances, as discussed in Section 2, now make it increasingly plausible to link specific emissions to global warming and, in turn, to concrete climate-related events. Yet, the question may arise whether such a causal *nexus* – already difficult to establish at the stage of examining the merits – must be assessed as early as the

¹⁶⁵ It is maintained that cases of the CJEU, 25 October 2011, C-509/09, *eDate Advertising and Others*, and 17 October 2017, C-194/16, *Bolagsupplysningen and Ilsjan*, represent exceptions that cannot be extended to other torts, such as online IP infringements or broader cross-border actions under EU law, on more details see fn 81. See also CJEU, 19 April 2012, Case C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220, para. 24; CJEU, 3 October 2013, C-170/12, *Peter Pinckney*, para. 45; CJEU, 22 January 2015, Case C-441/13, *Hejduk*, paras. 36-37; F. RIELAENDER, *Aligning the Brussels regime with the representative actions directive*, cit., 115.

¹⁶⁶ Opinion of Advocate General Sánchez Bordona delivered on 17 December 2020, Case C-709/19, *Vereniging van Effectenbezitters*, ECLI:EU:C:2020:1056, para 95. Similarly see Opinion of Advocate General Bobek delivered on 14 November 2017, C-498/16, *Schrems*, ECLI:EU:C:2017:863, paras. 119 to 123.

¹⁶⁷ J. CARRASCOSA GONZÁLEZ, *Distance Torts: the Mines de Potasse Decision Forty Years on*, in *YPIL*, 2016/2017, 25.

jurisdictional stage, when determining the place of direct damage for the purposes of Article 7(2) ¹⁶⁸. According the CJEU in *Kolassa*, “an obligation to conduct, at that early stage, a comprehensive taking of evidence as regards the facts relevant both to jurisdiction and substance risks prejudicing the assessment of the substance”, nevertheless, national courts are required “to be able to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant’s allegations” ¹⁶⁹. Adhering to the approach of the CJEU in *Kolassa* case, the Italian Court of Cassation clarified that jurisdiction must be determined on the basis of the claim, identified with reference to the so-called *substantive petitum*, which is defined primarily by the *causa petendi*, that is, by the objective nature of the legally protected subjective position asserted in the proceedings and identified in light of the alleged facts and the legal relationship of which those facts are a representation ¹⁷⁰. Thus, proving causation at this stage is unnecessary, as it would improperly shift to the jurisdictional inquiry a matter that properly belongs to the substantive assessment of liability under the applicable law. The causation should be treated as a “double-relevant fact”, meaning that the claimant’s *prima facie* allegations suffice for the purpose of establishing jurisdiction ¹⁷¹.

4.2.2.3. Locus damni challenge: predictability.

As stated, the localisation of the place of damage under Article 7(2) of the Brussels Ia Regulation – conceived as the place where the impairment of life expectancy, health conditions, and overall quality of life occurs, and thus often associated with the claimants’ domicile or residence – must necessarily be assessed on an individual basis for each member of the claimant class. Such an approach,

¹⁶⁸ As to causation, in particular the “but-for” test and other approaches for determining causation, see fn 26.

¹⁶⁹ CJEU, 28 January 2015, C-375/13, *Kolassa*, ECLI:EU:C:2015:37, paras. 63 and 64.

¹⁷⁰ Italian Court of Cassation, 14 July 2014, n. 16065. See also F.C. VILLATA, *Rapporto sull’applicazione in Italia del Regolamento (CE) n. 44/2001, del 22 dicembre 2000 (“Bruxelles I”), e del Regolamento (UE) n. 1215/2012, del 12 dicembre 2012 (“Bruxelles I-bis”), concernenti la competenza giurisdizionale, il riconoscimento e l’esecuzione delle decisioni in materia civile e commerciale*, in *La giurisprudenza italiana sui regolamenti europei in materia civile e commerciale e di famiglia*, cit., 15-16.

¹⁷¹ M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, cit., 91; E. ARISTOVA-U. GRUŠIĆ, *Forthcoming*, in D. KYSAR-E. LIM (eds.), *The Oxford Handbook of Climate Change and Private Law*, Oxford, 2026, *Private International Law*, cit., 12.

however, raises considerable concerns in relation to the fulfilment of the requirement of foreseeability underscored in Recital 16 of the Regulation and consistently reaffirmed in the jurisprudence of the CJEU, which mandates that the defendants be reasonably able to anticipate the forum in which they may be sued ¹⁷².

Although it may be argued that defendants could have foreseen the risks associated with global warming – publicly known since at least the mid-twentieth century – and therefore had time and opportunity to adjust their climate policies or anticipated potential legal actions, the requirement of predictability underpinning Article 7(2) of the Brussels Ia Regulation casts still some doubt on this conclusion ¹⁷³. Admittedly, the Brussels Ia Regulation is territorially limited to the Member States, and companies are not exposed to litigation worldwide ¹⁷⁴. Nevertheless, the diffuse and cumulative character of emissions-related harm renders the ensuing jurisdictional landscape – potentially encompassing the courts of twenty-seven Member States – markedly unforeseeable from the defendant’s perspective ¹⁷⁵. In response to this concern, several scholars have proposed introducing a “corrective” to Article 7(2) in order to explicitly incorporate a foreseeability principle – for instance, by drawing inspiration from Article 5 of the Rome II Regulation on product liability ¹⁷⁶.

Conversely, it may be argued that in the *Mines de Potasse* judgment, the CJEU already accounted for the globally diffuse nature of pollution and incorporated foreseeability into its reasoning, making it a relevant precedent for climate change litigation ¹⁷⁷. Yet, in that case, the *locus* of initial damage was clearly

¹⁷² CJEU, 3 July 1997, C-269/95, *Benincasa v Dentalkit*, ECLI:EU:C:1997:337, para. 26; 4 March 1982, 38/81, *Effer v Kantner*, ECLI:EU:C:1982:79, para. 6; 23 April 2009, C-533/07, *Falco Privatstiftung and Rabitsch*, ECLI:EU:C:2009:257, para. 22; 17 November 2011, C-327/10, *Hypoteční banka*, ECLI:EU:C:2011:745, para. 44.

¹⁷³ On the satisfaction of the requirement of predictability given defendants’ long-standing awareness of climate risks and their capacity to adapt their conduct, see E. ÁLVAREZ-ARMAS, *Climate change litigation through the prism of private international law*, cit., 360.

¹⁷⁴ M.P. WELLER-M.L. TRAN, *Climate Litigation against companies*, cit., 6.

¹⁷⁵ M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht: Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden*, cit., 91.

¹⁷⁶ *Ibidem*.

¹⁷⁷ E. ÁLVAREZ-ARMAS, *Climate change litigation through the prism of private international law*, cit., 360. The author also reasons on “the potential geographically unrestricted reach of the underlying defamatory acts, and the ensuing lack of jurisdictional foreseeability”, which “did not put into question the solutions enshrined therein”. However, see case of CJEU, 17 June 2021, C-800/19, *Mittelbayerischer Verlag KG v SM*, ECLI:EU:C:2021:489.

identifiable in the Netherlands, owing to the flow of the river. On the other hand, with gas emissions, which are inherently diffuse and not easily traceable, identifying the place of damage may be considerably less predictable. The CJEU has, however, in other contexts involving intangible harm, been still able to determine the place of damage while giving effect to the predictability principle enshrined in the Brussels regime. For instance, in cases of pure financial loss, *i.e.*, loss without accompanying harm to a plaintiff's person or property, as in *Kolassa* case, the Court adopted a plaintiff-oriented approach, emphasizing the relevance of the claimant's domicile where the financial loss is realized in the victim's bank account in their Member State¹⁷⁸. Although this case-law cannot be directly applied to climate change disputes, the underlying considerations supporting the principle of foreseeability when it comes to intangible harm may nonetheless be instructive¹⁷⁹. The Court justified its approach based on predictability, reasoning that "given that the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer loss"¹⁸⁰.

Thus, it may be assumed that, even though the dispersed and potentially numerous plaintiffs (investors) across multiple Member States render it difficult to predict precisely which court may be seised, the defendant who fails to comply with his legal obligations shall reasonably expect to be exposed to claims in general¹⁸¹. In line with this interpretation, applied to climate change litigation, the analogy suggests that while corporations contributing to global emissions

¹⁷⁸ CJEU, 28 January 2015, C-375/13, *Kolassa*, ECLI:EU:C:2015:37, para. 57. See also "reinterpretation" of this case in light of CJEU, 16 June 2016, C-12/15, *Universal Music International Holding*, EU:C:2016:449, para. 38, where the Court held that purely financial damage occurring directly in the claimant's bank account cannot, by itself, be qualified as the only "relevant connecting factor" under the Brussels I Regulation. For confirmation of this conclusion see CJEU, 12 September 2018, C-304/17, *Löber*, ECLI:EU:C:2018:701. On more details see J. UNGERER, *Pure financial loss and international jurisdiction for tort under the Brussels I (Recast) Regulation*, in *Maastricht Journal of European and Comparative Law*, 2017, 448-455.

¹⁷⁹ See fn 144.

¹⁸⁰ CJEU, 28 January 2015, C-375/13, *Kolassa*, ECLI:EU:C:2015:37, para. 56.

¹⁸¹ On critique of *Kolassa* case also in terms of predictability for issuers, M. GARGANTINI, *Capital markets and the market for judicial decisions: in search of consistency*, in *MPILux Working Paper 1*, 2016; M. LEHMANN, *Prospectus liability and private international law – assessing the landscape after the CJEU Kolassa ruling (Case C-375/13)*, in *JPIL*, 2016.

may foresee the risk of claims in broad terms, they cannot only reliably predict where such claims might be brought.

Accordingly, it was argued that unforeseeability operates reciprocally in climate change disputes. While victims generally cannot predict the occurrence of harm, defendants – by engaging in industrial activities – must be deemed to have assumed the inherent risk of litigation arising from potential damage, albeit without knowing precisely where such damage will materialise and, consequently, in which forum they may be sued¹⁸². Nonetheless, it remains an open question whether this notion of “reciprocal unforeseeability” might effectively neutralise the predictability requirement, which underpins the principle of legal protection afforded to persons within the Union as enshrined in the Brussels Ia Regulation, maintaining a fair balance between the parties and enabling plaintiffs to identify the competent court with relative ease while allowing defendants to reasonably anticipate the forum in which they may be brought. In light of these unresolved legal uncertainties, it would be highly desirable for the CJEU to provide clarification on the application of the foreseeability principle in the context of climate change litigation.

5. *Concluding remarks.*

The foregoing analysis highlights the multifaceted nature of transnational climate change litigation, which operates at the intersection of individual and collective rights, national and transnational legal frameworks, and traditional tort law and evolving climate governance objectives. Climate litigation, particularly in its horizontal, corporate-focused dimension, is no longer a purely compensatory mechanism. Rather, it functions as an instrument of regulatory influence, capable of driving corporate accountability and systemic transformation. In particular, strategic cases tend to pursue broader societal objectives, including mitigation, adaptation, and climate justice. While early efforts often failed, advances in climate attribution science have significantly expanded the plaintiffs’ toolkit, allowing them to frame claims that were previously regarded as legally or scientifically unattainable.

This chapter has also underscored the importance of venue as a critical component of climate litigation strategy, especially for claimants seeking to advance collective interests. Access to justice in such disputes is largely contingent on

¹⁸² E. ÁLVAREZ-ARMAS, *Climate change litigation through the prism of private international law*, cit., 360.

identifying forums where legal standing requirements are compatible with the nature of the claims, given the current absence of harmonisation in the EU framework. Therefore, rather than seeking to “stretch” jurisdictional grounds to expand claimants’ forum choices, attention should primarily be directed to the need for harmonised standards on legal standing in climate change disputes across the EU.

Within the Union, the Brussels Ia Regulation provides multiple potential avenues for establishing jurisdiction, the most significant of which remains the defendant’s domicile. While the domicile-based forum under Article 4 generally ensures predictability and procedural concentration, the diffuse and global nature of greenhouse gas emissions introduces unique complexities, particularly when claimants invoke the special jurisdiction in tort under Article 7(2).

Two key dimensions emerge under Article 7(2). First, identifying the *locus actus* – the place of the event giving rise to the damage – requires careful assessment of whether the relevant conduct should be located at the site of emissions or, alternatively, at the place of corporate decision-making. Although the latter interpretation may appear appealing in strategic litigation aimed at influencing corporate behaviour and overcoming the challenges of emission localisation, it risks conflating the substantive objectives of climate claims with jurisdictional criteria provided in the Brussels regime. Moreover, in practice, this interpretation has so far not resulted in an expansion of the claimant’s forum options, as it often coincides with the general domicile forum. By contrast, anchoring the *locus actus* to the site of emissions remains more consistent with the principle of proximity and the CJEU’s established case-law, even if it presents significant practical difficulties in multi-sited, globally dispersed emission scenarios. This tension underscores the desirability of CJEU clarification or, preferably, targeted legislative reform introducing specific jurisdictional rules for climate-related torts.

Second, the identification of the *locus damni* – the place where the damage occurs – raises equally complex questions. While it may appear relatively straightforward in individual claims, it becomes significantly more challenging in cases involving collective and diffuse rights, such as the right to a healthy environment. The current Brussels Ia framework offers limited capacity to accommodate such cross-border, collective claims, particularly where harm manifests across multiple jurisdictions. Proposals such as identifying a “centre of collective interests” offer promising avenues for centralising jurisdiction yet remain uncertain absent CJEU interpretation or legislative intervention. Furthermore, it is unclear whether linking the place of damage to the location of individual impairment – such as health or quality of life – complies with the

foreseeability requirement, given the potentially wide territorial scope of climate-related impacts.

Overall, the chapter demonstrates that while the Brussels Ia Regulation provides a foundational framework for adjudicating climate torts within the EU, its mechanisms – designed for conventional, localised disputes – encounter significant limitations when applied to the global, preventive, and multi-actor realities of climate change litigation. Future developments, whether through judicial interpretation or legislative reform, will be essential to reconcile the principles of procedural efficiency, predictability, and access to justice with the unique demands posed by transnational climate claims.

THE LAW APPLICABLE TO ENVIRONMENTAL DAMAGE CLAIMS

Olivera Boskovic *

SUMMARY: 1. Introduction. – 2. The tort path. – 2.1. The functioning of Article 7. – 2.2. The interaction with other provisions. – 2.2.1. Article 17. – 2.2.2. Article 14. – 2.2.3. Article 16. – 2.2.4. Article 26 (public policy). – 3. The CSDD Directive path.

1. *Introduction.*

When one thinks about the law governing environmental damage claims, the first thing that comes to mind is Article 7 of the Rome II Regulation ¹. Before examining this provision in detail, it is interesting to note that special choice of law rules for environmental torts are very rare in comparative law. Before the Rome II Regulation, one of the rare legislations that did contain a specific rule was the Belgian law of 2004 ². However, this rule merely designated the law of the place of the damage. The European legislator was highly innovative with the adoption of Article 7. As is well known, this provision enables claimants to choose between the law of the place of the damage and the law of the place where the event giving rise to the damage occurred. The objective pursued by the legislator is clearly stated in Recital 25: it is to protect the environment. However, the functioning of this provision as well as its interaction with other provisions of the Regulation poses a certain number of questions.

* The oral style of the speech has been largely preserved.

¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

² Article 99(2)(3).

To these “traditional” questions one can now add others, posed by the idea of corporate sustainability due diligence. Indeed, concerning environmental damage claims, two legal paths come to mind. There is the ordinary tort law path and there is the corporate sustainability due diligence path. This coexistence is illustrated by a recent French case. Interestingly, in the Total climate case, on the 18th of June 2024³, the Paris court of appeal deciding on the admissibility of the claims, had to determine whether a claim based on Article 1252 of the French civil code which allows the court to prescribe reasonable measures in order to prevent or stop ecological damage should be declared inadmissible. Indeed, Total’s argument was that this claim is identical to the one presented on the basis of the 2017 law on the duty of vigilance and that its purpose was to circumvent certain conditions required by this special regime and namely the requirement of a formal notice before bringing an action to court. However, this argument was rejected by the Paris court of appeal which considered that the two actions have a distinct and autonomous legal basis and that they can be brought in a complementary way.

Under the topic “the law applicable to environmental damage claims”, one could also discuss the interaction between international contracts and the protection of the environment. However, most environmental damage claims are tortious in nature. By way of consequence and for lack of time, this topic will not be addressed. There are also some very interesting procedural aspects which do not strictly speaking fall within the scope of private international law. I am referring to available proof-related measures. They will be determined by the *lex fori*. It is really crucial to stress their importance. A still ongoing case in France shows for example how difficult it is to access even some very basic information about the organization and functioning of companies⁴. We can also mention the determination of measures, namely preventive ones, that a court can decide⁵.

Although extremely interesting, these questions are not at the heart of our topic. For that reason, I will now focus on the two paths mentioned earlier concerning environmental damages claims.

³ CA Paris, 18 juin 2024, RG no. 23/14/348.

⁴ The Perenco case. See for example, CA Paris 17 sept. 2020, note O. BOSKOVIC, in *EEI*, 2021, 47.

⁵ The question of extraterritorial preventive measures can for example be raised.

2. *The tort path.*

Determining the applicable law to an environmental damage claim presented according to the classical tort path will primarily depend on Article 7 of the Rome II Regulation. I will first say a few words about Article 7 itself (2.1.). After, I will address its interactions with other provisions (2.2.).

2.1. *The functioning of Article 7.*

Several small difficulties have been identified. For example, one can mention the question of the moment when the claimant can choose between the law of the place of the damage and the law of the place of the causal event⁶. The Regulation does not clearly answer this question⁷. However, it is a minor problem and as such does not deserve a lot of time.

The first question, which does deserve to be examined is the definition of environmental damage⁸. The adopted definition is very wide⁹. It includes damage suffered by natural or legal persons but also pure environmental damage. This is an important point, since as we will see there is some ambiguity on this point in the CSDD directive¹⁰. A question which has however arisen is whether climate change is an environmental damage within the meaning of Article 7. Although the opposite answer could be argued, the answer generally given by academic writers but also by the Dutch court in the very well-known Shell climate case¹¹ is yes.

The second question concerns the types of claims covered by Article 7. In other words, is Article 7 applicable only to claims for damages or does it cover also preventive actions? The wording of Article 7 refers to the person seeking compensation. Hence, a literal interpretation would tend to exclude preventive

⁶ See also can the EEZ be considered as a country within the meaning of Article 7, *Jalla v. Shell*, <https://www.bailii.org/ew/cases/EWHC/TCC/2023/424.html>.

⁷ The only guideline is to be found in Recital 25.

⁸ See also frontier problem with product liability. It is generally considered that Article 7 should be seen as *lex specialis* and should prevail over Article 5. See for example J. VON HEIN, *Article 7 – Environmental Damage*, in G.P. CALLIESS, M. RENNER (eds), *The Rome Regulations*, Alphen aan den Rijn, 2020, 649, 657.

⁹ See Recital 24.

¹⁰ See *infra*, para. 3.

¹¹ See *infra*, fn 16.

actions. However, it is generally agreed that a teleological interpretation must, on the contrary, lead to the inclusion in the scope of this provision of preventive actions and actions for injunctions. Two other provisions can be invoked in favour of the same interpretation: Article 2 Rome II which provides that “This Regulation shall also apply to non-contractual obligations which may arise” and Article 15 Rome II which states that the law applicable to liability applies, *inter alia*, to measures to prevent and cease damage.

Having said that, the important point is to say that Article 7 is generally considered as a satisfactory rule, fit for its purpose, meaning contributing to the protection of the environment. However, in the light of some discussions that took place concerning human rights violations and the idea that human rights violations and environmental damage should be subjected to a common rule, one could ask oneself whether the rule should be modified and perhaps the claimant awarded an even larger choice¹². The answer generally given to this question is negative. However, what the question does highlight is the necessity to define the causal event. This is actually the biggest difficulty in the functioning of Article 7.

This question was raised by some commentators as soon as the Regulation was adopted, but it has gained a lot of interest in recent years in the light of several cases and of the discussions about the CSDD. Basically, the question is: is the causal event necessarily a material act which directly caused the environmental damage or can decisions or even the adoption of a corporate policy of a company be considered as the causal event of the damage? National courts have rendered several interesting decisions on this point. I would like to quote three decisions.

The first one is a Swedish decision in the *Arica v. Boliden* case decided in 2019¹³. This case was about the spill of toxic waste by a Swedish company in Chile. *Ratione temporis* the applicable choice of law rules were Swedish rules which pointed to the law of the place of the causal event. The Swedish court decided that this place should be determined by seeking for the center of

¹² See for example, O. BOSKOVIC, *La loi applicable aux “actions pour violations des droits de l’homme en matière commerciale”*, D. 2021, 252 See also E. ALVAREZ-ARMAS, *Rome II in the face of human rights challenges: the law applicable to SLAPPS and to human-rights-related torts*, available at https://www.uclouvain.be/fr/system/files/uclouvain_assetmanager/groups/cms-editors-cedie/Cahiers%20CeDIE/2021_01_AlvarezArmas.pdf.

¹³ See for example <http://toxicjustice.org/> See also V.R. KLOCKER LARSEN, *Foreign direct liability claims in Sweden: Learning from “Arica Victims KB” v “Boliden Mineral AB”?*, in *Nordic Journal of International Law*, 2014, 404-438.

gravity. And it was held that “This center may be established with regard to where the qualitatively important elements have their focus rather than according to quantitative criteria”. Hence the place of the causal event was held to be Sweden where the decisions were taken. The Supreme Court rejected the appeal which was lodged against this decision.

The second case is the French Perenco case, which was about environmental damage in the Democratic Republic of Congo. The Paris Court of Appeal in a decision rendered in 2020¹⁴ held (just like the first instance judge) that the causal event was necessarily a material act. Consequently, it occurred in Congo. The Cour de cassation quashed the decision¹⁵, but on a different question and did not examine this point.

The last but not least decision that I would like to quote is the decision of the Hague district court in the Shell climate case¹⁶. We all remember this decision, characterized as historical rendered on the 26 may 2021 which ordered Shell to reduce its emissions by 45 % as compared to 2019. The important point for my today’s topic is the interpretation of Article 7 given by the court. Indeed, the Dutch judges considered that the “adoption of the corporate policy of the Shell group – constitutes an independent cause of the damage”. Actually, the decision was somewhat ambiguous, since it was not very clear whether the court considered that this was the only cause of the damage or, merely one cause among others, implying that the claimant could have a choice. In any event, the adoption of corporate policy was considered a causal event. The decision was overturned, on November the 12th 2024¹⁷, but this point was not debated again, since Shell renounced to appeal on this point.

These cases show that there is a real need for clarification of the concept of causal event within the meaning of Article 7. The idea that the adoption of a corporate policy should be considered as a causal event, among others, has gained a lot of support. However, an important question remains: should the

¹⁴ CA Paris 17 sept. 2020, note O. BOSKOVIC, in *EEI*, 2021, 47.

¹⁵ Civ. 1^{ère}, 9 mars 2022, n. 20-22.444, note O. BOSKOVIC, in *JCP*, 2022, 552; note M. MENJUCQ, in *Rev. soc.*, 2022, 510; étude C. GUILLARD, in *Rev. crit. DIP*, 2022, 251; note H. MUIR WATT, *ibid.*, 305.

¹⁶ https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339#_77720e22-0a75-4080-97c4-aac8a70b656f, Milieudefensie v. Royal Dutch Shell PLC, n° C/09/571932/HAZA19-379, Énergie – Environnement – Infrastructures n° 11, Novembre 2021, comm. 86, F.-G. Trebulle; D. 2021 p. 1968, obs. A.-M. Ilcheva.

¹⁷ Gerechtshof Den Haag (Cour d’appel de La Haye), 12 novembre 2024, n° 200.302.332/01, Shell Plc c/ Milieudefensie *et alli.*

claimant be allowed to choose among the different causal events or would the appropriate solution be to leave courts to assess the “characteristic causal” event in the light of the circumstances of each case? In addition to this difficulty, others stem from the interaction with other provisions.

2.2. *The interaction with other provisions.*

Several provisions must be examined. Articles 14,16,17 and 26 come to mind. We will examine them starting with the one that raised the most questions and moving towards the one that raised the least.

2.2.1. *Article 17.*

Article 17 provides that “In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability”.

This means that Article 17 reintroduces the law of the place of the causal event, which should be irrelevant if the claimant opts for the law of the place of the damage. The question in environmental damage claims is: can the defendant argue that his or her actions are lawful under the law of the place of the causal event in order to escape liability under the law of the place of the damage? A further question is: what if, not only the action is lawful, but the defendant received an administrative authorization in the country of the causal event? Should that authorization allow the defendant to escape liability?

It is clear that if Article 17 is interpreted too widely it can undermine the objective of Article 7. For this reason, many specialists consider that Article 17 should be excluded in environmental matters¹⁸. The GEDIP also suggested a similar rule in the field of corporate sustainability due diligence¹⁹.

¹⁸ O. BOSKOVIC, *L'efficacité du droit international privé en matière environnementale*, in O. BOSKOVIC (dir.), *L'efficacité du droit de l'environnement Mise en œuvre et sanctions*, Paris, 2010, 53. Along the same lines see E. ALVAREZ-ARMAS, *Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II: enjeux et perspectives*, in *RDIA*, n. 3, 2020, 136-138; E. ALVAREZ-ARMAS, O. BOSKOVIC, *Private International Law and Climate Change*, in A. FRACKOWIAK-ADAMSKA, G. RÜHL (eds), *Private International Law and Global Crises*, 2026, forthcoming.

¹⁹ <https://gedip-egpil.eu/wp-content/uploads/2021/02/Recommandation-GEDIP-Recommandation-EGPIL-final-1.pdf>; <https://gedip-egpil.eu/wp-content/uploads/2022/07/RecommandationGEDIP2022F.pdf>.

2.2.2. Article 14.

Another difficulty arises from the interaction with Article 14. Unlike Articles 6 and 8, which relate to violations of competition law and intellectual property rights, Article 7 does not exclude Article 14. This means that parties can choose the governing law.

The rationale behind this rule is difficult to understand²⁰. It is difficult to imagine party autonomy in the field of pure environmental damage. Furthermore, concerning damage sustained by persons or property, the claimant already has an *ex post* unilateral choice. There is no need for party autonomy. This leaves the question of *ex ante* choice, but it could be argued that such a rule is dangerous and should be excluded. Two other provisions should be mentioned.

2.2.3. Article 16.

Article 16 is an interesting provision because, prior to the adoption of the Regulation, one of the arguments against establishing a specific choice-of-law rule for environmental damage was that the technique of overriding mandatory provisions was sufficient.

And of course, it is true that some rules in this field of the law will probably be considered as overriding mandatory provisions. However, the relationship between Article 7 and Article 16 is difficult. On the one hand, in so far as the whole purpose of Article 7 is to let the claimant choose, the automatic application of overriding mandatory provisions regardless of the content of the law designated by Article 7 is not desirable. Indeed, the law designated by Article 7 could be more favourable to the protection of the environment than the overriding mandatory provisions of the forum. This argument supports the idea that the role of Article 16 in the field of environmental damage should be minimized. On the other hand, Article 16 is often criticized for not allowing the

²⁰ In favour of the exclusion of Article 14 in environmental matters see DE BOER, *Party Autonomy and its Limitations in the Rome II Regulation*, in *Yearbook of Private International Law*, 9, 2007, 19, 25; M. FALLON, *The Law Applicable to Specific Torts in Europe*, in J. BASEDOW, H. BAUM, Y. NISHITANI (eds.), *Japanese and European Private International Law in Comparative Perspective*, 2008, 261, 270; Y. NISHITANI, *La loi applicable à la responsabilité délictuelle. Le règlement "Rome II" du point de vue japonais*, in *Rev. dr. int. comp.*, 2008, 639, 655; cf. also P. MANKOWSKI, *Internationalprozess- und internationalprivatrechtliche Aspekte von grenzüberschreitender Climate Change Litigation in Deutschland*, in *GS Schmehl*, 557, 567. Against this solution J. VON HEIN, *Article 7 – Environmental Damage*, cit.

application of foreign overriding mandatory provisions, even though these could sometimes be useful²¹. Some authors consider it should be reformed.

2.2.4. *Article 26 (public policy).*

Finally, there is of course the traditional public policy exception. One could consider that a law insufficiently protective of the environment should be considered as contrary to the public policy of the forum. However, it is well known that this exception is used very restrictively. As the law stands today, it is quite unlikely that a court would reason this way.

3. *The CSDD Directive path.*

Although several member States of the EU have national statutes on corporate sustainability due diligence, potentially the main source of law on this point was supposed to be the European directive adopted on 13 June 2024. However, in February 2025, the European Commission backtracked by proposing an omnibus directive²² aimed at simplifying several European texts, including the corporate sustainability due diligence directive. This proposal casts doubt on the future of the directive²³.

Regardless of this uncertainty, the corporate sustainability due diligence path was not an easy one. First of all, as we all know, the directive, even in its original version, was only intended for certain claims. For example, only large companies fall within its scope. Climate change is excluded from civil liability. There is also a question about pure environmental damage. Indeed, Article 29 provides that “Member States shall ensure that a company can be held liable for damage caused to a natural or legal person”. Does this wording exclude pure environmental damage? Should one, on the contrary, consider that pure environmental damage causes a damage to NGOs whose purpose is to protect the environment? It can be argued that it would be absurd to exclude it but the wording is by no means clear.

²¹ See for example M. LEHMAN, *Regulation, global governance and private international law*, in *Journal of Private International Law*, 2020, 1.

²² Com (2025) 81 final.

²³ There are many amendments to the due diligence obligations. More importantly for our topic, the omnibus package would have considerable consequences on the civil liability regime. In short, the proposal removes most of Article 29.

Secondly, it is also well known that the CSDD directive does not contain a choice of law rule. Although many academics as well as the GEDIP²⁴ observed that such a rule was necessary, the European legislator opted exclusively for the method of overriding mandatory provisions. Indeed, Article 29(7) provides that “Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State”²⁵. This means that the ordinary choice of law rules contained in the Rome II Regulation continue to apply. Concerning environmental damage claims, Article 7 will apply. All the questions raised by this provision, namely the question of the definition of the causal event will reappear²⁶. In the context of CSDDD, it seems reasonable to consider that the violation of the duty of due diligence occurs at the place of the seat of the company.

However, even though in environmental matters (as opposed to human rights violations), at least regarding European companies, the choice of law rule often operates in a fairly satisfactory manner, allowing for the application of the law of a member State, Article 29(7) imposes the overriding mandatory rules method.

This poses several important questions. What are the exact provisions targeted by Article 29(7)? Which national transposition should be applied? What happens if the law designated by the choice of law rule is more favorable to the claimant than the provisions considered as overriding mandatory provisions? These questions need, if Article 29(7) is not repealed, to be examined in detail. One can offer here a few initial thoughts.

On the first point, Article 29(7) says “the provisions of national law transposing this Article” which seems to be quite restrictive, but Recital no 90 does say that Member States should also be able to take into account all related national rules to the extent they are necessary to ensure the protection of victims and crucial for safeguarding the Member States’ public interests, such as its political, social or economic organization. Many observers have noted that, although this seems contrary to the traditional way of reasoning, in the interest of efficiency, the entire liability regime under the directive should be considered as mandatory. However, it is needless to say that a real debate would be necessary on the transposition of this provision into national law.

²⁴ See *supra*, fn 19.

²⁵ The proposed omnibus directive aims to repeal this text.

²⁶ See *supra*, no 8.

On the second point, according to traditional reasoning, an overriding mandatory provision applies without any comparison and regardless of the content of foreign law. Many NGOs have expressed the view that in this context if the foreign law is more favorable to the victim, the claimant should be allowed to ask for its application. This is problematic within the traditional line of reasoning. However, it is true that, in a judgment dated 5 September 2024²⁷, the CJEU considered that a national provision cannot be regarded as an overriding mandatory rule unless it can be shown that the objective it pursues cannot be achieved by applying the law designated pursuant to the conflict-of-law rules of that Regulation. This requirement, which is in principle completely foreign to the concept of mandatory rules, is new. It could open up new perspectives.

On the other hand, if Article 29(7) is repealed, member States would still have the possibility of applying certain provisions of the directive as overriding mandatory provisions through Article 16 of the Rome II Regulation. Article 17 could also be used. However, none of these avenues provide any certainty and this is undoubtedly a cause for regret.

²⁷ CJEU, 5 September 2024, C-86/23, pt 43.

ECOLOGICAL DAMAGE AND CONFLICT OF LAWS: A PLEA AGAINST POST-COLONIAL AND ANTHROPOCENTRIC APPROACHES IN PRIVATE INTERNATIONAL LAW

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SUMMARY: 1. Introduction and scope of investigation. – 2. Equal sovereignty in conflict of laws and post-colonial extra-territoriality of domestic laws. – 3. Private law's regulatory rules *vs* public laws: the interference of national authorizations on the operability of Article 7 Rome II Regulation. – 4. Article 7 Rome II Regulation: environmental damages *vs* damages to properties following adverse effects on the environment. – 5. Conclusions.

1. Introduction and scope of investigation.

In the context of environmental damages *lato sensu*, and in particular in the sub-field of climate change actions ¹, it has long been investigated which role

¹ *Ex multis*, on environmental damages in private international law, C. VON BAR, *Environmental Damage in Private International Law*, in 268 *Rec. des cours*, 1997, 291; G. BETLEM-C. BERNASCONI, *European Private International Law, the Environment and Obstacles for Public Authorities*, in *Law Quart. Rev.*, 2006, 124; M. BOGDAN, *Some Reflections Regarding Environmental Damage and the Rome II Regulation*, in G. VENTURINI-S. BARIATTI (eds.), *Liber Fausto Pocar*, vol. II, *Nuovi strumenti del diritto internazionale privato*, Milano, 2009, 95; M. BOGDAN-M. HELLNER, *Article 7: Environmental Damage*, in U. MAGNUS-P. MANKOWSKI (eds.), *ECPII*, vol. III, *Rome II Regulation*, Köln, 2019, 287; O. BOSKOVIC (ed.), *Localisation of Damage in Private International Law*, Leiden, 2025; K. FACH GÓMEZ, *The Law Applicable to Cross-Border Environmental Damage: From the European National Systems to Rome II*, in *YPIL*, 6, 2004, 291; G. HAGER, *Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen grenzüberschreitender Immissionen*, in *RabelsZ*, 1989, 293; J. VON HEIN, *Article 7 Environmental Damage*, in G.P. CALLIESS (ed.), *Rome Regulations*, Alphen aan den Rijn, 2015, 603; P. IVALDI, *Unione europea, tutela ambientale e diritto internazionale privato. L'art. 7 del Regolamento Roma II*, in *RDIPP*, 2013, 861; T. KADNER GRAZIANO, *The Law Applicable to Cross-Border Damage to the Environment*, in *YPIL*, 9, 2008, 71; P. MANKOWSKI, *Ausgewählte Einzelfragen zur Rom II-VO*:

private international law (traditionally understood as dealing with private relationships in cross-border cases) may acquire in the global governance of public commons and generalised interests (most often regulated by *public* – international – law). Whereas answers to the above question may not necessarily be satisfactory as current rules on jurisdiction and applicable law, often fragmented throughout the legal systems of the globe, may have a number of limits in ensuring that private international law and civil cross-border litigation become empowering tools of private (environmental law) enforcement² against private actors, the reverse question seems to have been less debated

Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie, in *IPRax*, 2010, 389; D. MARTINY, *Grenzüberschreitende Umwelthaftung im Schnittpunkt zwischen Internationalem Privatrecht und Internationalem Verwaltungsrecht*, in *FS Franz-Joseph Peine*, Berlin, 2016, 181; S. PABST, *Artikel 7 Rom II-VO*, in T. RAUSCHER (ed.), *EuZPR / EuIPR Kommentar, Band III*, Köln, 2023, 753; K. THORN, *Die Haftung für Umweltschäden im Gefüge der Rom II-VO*, in E.M. KIENINGER-O. REMIEN (eds.), *Europäische Kollisionsrechtsvereinheitlichung*, Baden-Baden, 2012, 139; A. PLANAS, *Cross-Border Environmental Damage in Conflict of Laws*, in *YPIL*, 18, 2016/2017, 289. On climate change and conflict of laws, see I. ALOGNA-C. BILLIET-M. FERMEGLIA-A. HOLZHAUSEN (eds.), *Climate Change Litigation in Europe: Regional, Comparative and Sectoral Perspectives*, Cambridge, 2023; C. BENINI, *Sui giudizi di responsabilità civile intentati contro i c.d. global carbon majors: riflessioni internazionalprivatistiche a margine della climate change litigation*, in *Jus*, 2024, 183; S. DOMINELLI, *‘Einmal ist keinmal’. L’insostenibile leggerezza degli obblighi di diritto internazionale in tema di climate change mitigation nella prospettiva di una proliferazione delle azioni giudiziarie pubbliche e private*, in *RGA*, 2023, 899; P. FRANZINA, *Il problema del cambiamento climatico nell’ottica del diritto internazionale*, in *Cambiamento climatico, sostenibilità e rapporti civili. Atti del Convegno della Società Italiana degli Studiosi del Diritto Civile*, Napoli, 2024, 81; U. GRUSIC, *International Environmental Litigation in EU Courts: A Regulatory Perspective*, in *YEuL.*, 2016, 180; W. KAHL-M.P. WELLER (eds.), *Climate Change Litigation*, München, 2021; E.M. KIENINGER, *Das internationale Privat- und Verfahrensrecht der Klimahaftung*, in *IPRax*, 2022, 1; L. HÜBNER, *Climate Change Litigation an der Schnittstelle von öffentlichem Recht und Privatrecht – Die ausländische Anlagengenehmigung*, in *IPRax*, 2022, 219; M. LEHMANN-F. EICHEL, *Globaler Klimawandel und Internationales Privatrecht*, in *RablesZ*, 2019, 77; F. MARONGIU BUONAIUTI, *L’incidenza della disciplina della giurisdizione nelle azioni nei confronti delle società multinazionali per danni all’ambiente sul diritto di accesso alla giustizia*, in *Ordine internazionale e diritti umani*, 2023, 635; S. MARINO, *La ‘Climate Change Litigation’ nella prospettiva del diritto internazionale privato e processuale*, in *RDIPP*, 2021, 898; C. MASIERI, *La ‘Law of Torts’ alla prova dei cambiamenti climatici*, in *RGA*, 2022, 457; E. VANNATA, *Environmental Solidarity in the Area of Freedom, Security and Justice. Towards the Judicial Protection of (Intergenerational) Environmental Rights in the EU*, in *Freedom, Security & Justice*, 2022, 266.

² *Amplius*, S.M. CARBONE-L. SCHIANO DI PEPE, *Uniform Law and Conflicts in Private Enforcement of Environmental Law: The Maritime Sector and Beyond*, in *Dir.mar.*, 2009, 50, and F. MUNARI, *Public e Private enforcement del diritto ambientale dell’Unione*, in *Atti convegni AIS-DUE*, gennaio 2023, 1.

from an epistemological perspective: how can environmental damages contribute to new approaches in conflict of laws? ³ If it is true that a panoptic vision of private international law forces us to focus on (and possibly rethink) fundamental legal categories ⁴, it should also hold true that new challenges, when not satisfactorily coped with by private international law, should themselves be a ground to rethink fundamental approaches in private international law in what can be described as being a fluid osmotic process of evolution ⁵.

Aim of the present work is to contextualise and reflect on what environmental damages can do for new solutions in conflict of laws. Three aspects will be explored. First, tendencies to apply domestic laws to de-localised events will be addressed under the focal lens of post-colonialism to understand what consequences they may have on general conflict of laws theory, namely the need for the connecting factor to express a sufficient connection. Second, the scope of application of Article 7 Rome II Regulation ⁶, namely the limited territorial effects of national authorisations in cross-border cases, will be sketched to advocate in favour of 'regulatory' private international law approaches. Third, the definition of environmental damage in Article 7 Rome II Regulation will be addressed to stress that the conceptual possibility of 'the environment' to suffer damages is one of the few limited cases where the anthropocentric veil in conflict of laws is breached, possibly suggesting that private international law might also be non-human centric.

³ *Mutatis mutandis*, for a reversed axiom in tort law, see D.A. KYSAR, *What Climate Change Can Do for Tort Law*, in *Env.Law*, 2011, 1.

⁴ M.S. GREEN, *A Plea for Private International Law (Conflict of Laws)*, in *Notre Dame L. Rev. Reflection*, 2025, 73.

⁵ In the different context of SDG goals and their potential role in a new thinking of PIL on legal identity, see S. CORNELOUP-J. VERHELLEN, *SDG 16: Peace, Justice and Strong Institutions*, in R. MICHAELS-V. RUIZ ABOU-NIGM-H. VAN LOON (eds.), *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law*, Cambridge, 2021, 535. Also suggesting that new conflict of laws rules that could properly take into better consideration the principle of sustainability could be developed over time, see R. MICHAELS-S. ZEH, *Sustainability and Private International Law*, Max Planck Institute for Comparative and International Private Law, Research Paper Series No. 24/16, 22. Critical on the role conflict of laws has (not) acquired in the global management of common goods, see H. MUIR WATT, *Private International Law Beyond the Schism*, in *Trans. L. Theory*, 2011, 347.

⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in *OJ L* 199, 31 luglio 2007, 40.

2. *Equal sovereignty in conflict of laws and post-colonial extra-territoriality of domestic laws.*

Private international law, as is well known, is (also) grounded on the principle of equal sovereignty of States⁷. Applying laws of a sovereign State highlights their equal standing. Regardless of whether such application follows a legal duty or comity between nations⁸, it has been questioned how conflict of laws could have possibly been developed in an historical moment where international relations were dominated by the very negation of the principle of equal sovereignty: colonialism⁹. Colonialism as such, understood as the subjection of peoples to alien authority, is nowadays considered as being against the principles of the United Nations' Charter itself and States have to take action to ensure the right to self-determination of people¹⁰. Despite this shift in international law and inter-State relations, it may be argued that some of the underlying attitudes, at times unconscious, maybe, yet deeply rooted in legal culture, may still perpetrate systematic inequalities and discrimination against foreign legal systems. As noted by some scholars, "*A cornerstone of colonial governance survives*

⁷ *Ex multis*, E. VITTA, *Diritto internazionale privato*, vol. I, *Parte generale*, Torino, 1972, 10 ff. Also stressing the 'justice' element in the application of the 'proper' law to private relationships, see G. KEGEL, *Internationales Privatrecht*, München, 1960, 26 ff.

⁸ In the USSC case law, see *Hilton v. Guyot*, 159 U.S. 113 (1895), 163 f.; for a critique on comity, see already S. LIVERMORE, *Dissertations on The Questions which arise from the Contrariety of the Positive Laws of Different States and Nations*, New Orleans, 1828, 171 f., writing "In the course of this dissertation I have had occasion to differ in opinion from several judges, for whom I have much respect. The principal cause of this difference will be found to be in this, that our conclusions are founded on different premises. They consider the recognition of foreign laws to rest only in juridical courtesy; whereas I believe it to be required by strict principles of law. This doctrine of courtesy [...] appears to me to be inconsistent with the very nature of a court of justice [...]".

⁹ B. ELBALTI, *Rethinking Private International Law Through the Lens of Colonialism*, in *Conflictolaws.net*, blogpost June 13, 2025. On colonialism in private international law, see S. GÖSSL, *Colonialism and German PIL (1) – Colonial Structures in Traditional PIL*, in *Conflictolaws.net*, blogpost January 4, 2024; Y. BADR, *Religion, Colonialism, and Legal Pluralism: The Story and Legacy of the Egyptian Choice of Law Rules for Personal Status and International and Interpersonal Conflicts of Law*, in *Indiana J. Gl. Leg. Stu.*, 2024, 1, and S. RAMANI GARIMELLA, *India's Private International Law Rules: Persistence of Colonial Law in a Post-Colonial State: A TWAIL-ean Exploration*, in X. KRAMER-L. CARBALLO PIÑEIRO (eds.), *Research Methods in Private International Law: A Handbook on Regulation, Research and Teaching*, Cheltenham, 2024, 286. For all, on postcolonialism in general, see C.L. LIM, *The Aims and Methods of Postcolonial International Law*, in *Rec. des cours*, 437, 2024, 9, in part. 144 ff.

¹⁰ Cf. General Assembly Resolution 1514 (XV), 14 December 1960.

*into the present: great powers still seek to rule the world by applying their laws unilaterally to foreign nationals outside their borders”*¹¹.

Of course, extra-territoriality should carefully be defined – and distinguished from an extended territorial scope of application of laws and statutes¹². Evidently, the boundaries between the two elements may become blurry. Albeit authors may adopt different views on such qualifications¹³, it is argued here that extra-territoriality (in a ‘negative’ sense that presupposes some interferences between States) coincides with the domestic regulation of acts and conducts that take place beyond the borders of a State’s territory and which have *weak* connections with such a territory. On its own side, *public* international law is traditionally considered as not (clearly¹⁴) prohibiting extra-territorial prescriptive and adjudicative jurisdiction, whilst it does prohibit extra-territorial enforcement jurisdiction, still conceived in territorial terms¹⁵. Yet, *private* international law seems to be dogmatically hesitant, at best, when it comes to extra-territoriality as understood in the terms above: ever since von Savigny’s

¹¹ E.J. CRIDDLE, *Extraterritoriality’s Empire: How Self-Determination Limits Extraterritorial Law Making*, in *Am. J. Int. L.*, 2024, 608.

¹² On such a distinction, see N. BOSCHIERO, *L’extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *DUDI*, 2023, 665 ff., and J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, in *Am. J. Comp. L.*, 2014, 87.

¹³ Cf. D.P. WOOD, *Extraterritorial Enforcement of Regulatory Laws*, in *Rec. des cours*, 401, 2019, 17 f, writing that extra-territoriality is when “... one country (the regulating country) seeks to control activity that is, in whole or in part, located in another country (the source country) but that nonetheless has important [emphasis added] effects within the regulating country”.

¹⁴ Arguing that international law nevertheless requires a “sufficient connection” for prescriptive and adjudicatory jurisdiction, see M.T. KAMMINGA, *Extraterritoriality*, in *Max Planck Encyclopedia of Public International Law*, vol. III, Oxford, 2012, 1072.

¹⁵ Such position is traditionally associated with a judgment (in criminal matters) rendered by the Permanent Court of International Justice, in *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), writing, at para. 46, that “*It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad*”. See in the scholarship H.L. BUXBAUM, *The Practice(s) of Extraterritoriality*, in H.L. BUXBAUM-T. FLEURY FRAFF (eds.), *Extraterritoriality / L’extraterritorialité*, Leiden, 2022, 13 ff. Cf. also A. HEMLER, *Deconstructing Blocking Statutes: Why Extraterritorial Legislation Cannot Violate the Sovereignty of Other States*, in *JPIL*, 2025, 115, arguing that extra-territoriality pursued via blocking statutes, even when based and justified on weak connections, does not infringe the sovereignty of the foreign State where the activity is located as this does not prejudice the foreign State’s authority in its own territory.

*Sitz Theorie*¹⁶, as a matter of principle, most continental law systems seek to ‘discover’ the centre of gravity of a given legal relationship and apply the relevant law accordingly. In these terms, there appears to be a tension between the practice of extra-territoriality and conflict of laws. A conceptual inconsistency that can be reconciled where the scope of application of domestic laws is extended, so as to ‘justify’ somewhat the applicability of the local law and reject *in nuce* any extra-territoriality claim or critique.

Territorial expansion – the expansion of the territorial’s scope of application of laws – seems to be a common practice¹⁷. Whereas States (or legal systems in general, such as the EU¹⁸) may adopt presumptions against extra-territoriality¹⁹, the parallel adoption of weak(er) *objective* (or territorially less relevant) connecting factors to justify the applicability of domestic rules to events that take place abroad, seems to find the desired compromise solution: excluding the applicability of the laws of another sovereign State that may have a qualified objective connection and greater proximity with the case, to privilege domestic rules. A way to expand the territorial reach of domestic statutes is to adopt an ‘effects-based’ approach rather than a pure ‘conduct-based’ approach: regardless of where a conduct may take place, if it affects the relevant domestic system (a market, or other), the foreign conduct is subsumed within the scope of

¹⁶ *Amplius*, also in comparative perspective, see E. RABEL, *The Conflict of Laws. A Comparative Study*, vol. I, Ann Arbor, 1958, 95.

¹⁷ See A.L. PARRISH, *The Interplay between Extraterritoriality, Sovereignty, and the Foundations of International Law*, in D.S. MARGOLIES-U. ÖZSU-M. PAL-N. TZOUVALA (eds.), *The Extraterritoriality of Law. History, Theory, Politics*, London, 2019, 169, and H.L. BUXBAUM, *Extraterritoriality in Comparative Context: Defining the Scope of State Law in a Global Era*, in H.L. BUXBAUM (ed.), *Extraterritoriality in Comparative Perspective*, Leiden, 2025, 3.

¹⁸ On EU law and extraterritoriality, see M. CREMONA-J. SCOTT (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* Get access Arrow, Oxford, 2019.

¹⁹ In the United States, cf *The Apollon*, 22 U.S. 9 Wheat. 362 (1824), 370 ff., and, more recently, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), on which, specifically on extra-territoriality, see S.H. CLEVELAND, *The Kiobel Presumption and Extraterritoriality*, in *Col. J. Trans. Law*, 2013, 8. As a “reaction” to US extra-territorial approaches in competition law, see in the European Union: Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, in OJ L 309, 29 November 1996, 1, and Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, Brussels 18 June 1997 COM(97) 233 fin, 2.

application of domestic laws. Similar approaches can be found both in the case law²⁰, as well as in statutory texts²¹.

²⁰ Recently, in the case law of the Court of Justice of the European Union, see Judgment of the Court (Fourth Chamber) of 7 April 2022, *Q and Others v United Airlines, Inc.*, Case C-561/20, ECLI:EU:C:2022:266, on which see K. TONNER, *Ausgleichszahlung durch Nicht-EU-Airline für verspätete Flugankunft in einem Drittstaat*, in *VuR*, 2022, 231; F. MAOLI, *Flights Partially Performed Outside the Territory of Member States, Compensation Rights and Customary International Law: The Court of Justice of the European Union in C-561/20 United Airlines*, in B. HEIDERHOFF-I. QUEIROLO (eds.), *EU and Private International Law: Trending Topics in Contracts, Successions, and Civil Liability*, Napoli, 2023, 117, and S. DOMINELLI, *Extra-territorialità e diritto dell'Unione europea: letture e conferme di approcci a margine della sentenza della Corte di giustizia nell'affare United Airlines C-561/20*, in *Dir. maritt.*, 2024, 846. Here the Court found that international law, namely principles and rules on State sovereignty, do not stand against the applicability of the Air Passenger's Rights Regulation to the segment of a flight fully operated in a third country if that flight has been purchased with a contract providing for transport from an EU airport to the final destination with connection in a third country. The imperative necessity to protect European passengers has led to Court to justify the application of the regulation also to events fully localised in a third country (see paras. 45 ff.).

²¹ On Global Chain Values and obligations for local business to ensure respect of given standards on the contractual chain, see *Lieferkettensorgfaltspflichtengesetz* vom 16. Juli 2021 (BGBl. I S. 2959), and Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, in OJ L, 2024/1760. In the scholarship, see *ex multis* J. BASEDOW, *Von Lieferketten, Kinderarbeit und Standesämtern – Gedanken zu europäischer Moral und globaler Realität*, in *GS Peter Mankowski*, Tübingen, 2024, 761; A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, in *JUS*, 2022, 295; A. BONFANTI-M. FASCIGLIONE, *La futura direttiva europea sulla corporate sustainability due diligence: un'introduzione*, in *DUDI*, 2023, 655; N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, cit., 661; V. BRINO, *Corporate sustainability due diligence: quali implicazioni per i diritti dei lavoratori?*, in *DUDI*, 2023, 70; O. BOSKOVIC, *Extraterritoriality and the Proposed Directive on Corporate Sustainability Due Diligence. A Recap*, in *JPIL*, 2024, 117; G. CARELLA, *Art. 19 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: attuazione della responsabilità sociale d'impresa e diritto internazionale privato*, in *DUDI*, 2023, 169; A. DUTTA, *Internationale Zuständigkeit für privatrechtliche Klagen gegen transnational tätige Unternehmen wegen Verletzung von Menschenrechten und von Normen zum Schutz der natürlichen Lebensgrundlagen im Ausland*, in A. REINISCH-S. HOBE-E.M. KIENINGER-A. PETERS (eds.), *Unternehmensverantwortung und Internationales Recht*, Heidelberg, 2020, 39; T. DOMEJ, *Zivilrechtliche Rechtsdurchsetzungsinstrumente*, in A. REINISCH-S. HOBE-E.M. KIENINGER-A. PETERS (eds.), *Unternehmensverantwortung und Internationales Recht*, Heidelberg, 2020, 229; R. GRECO, *Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection?*, in *DUDI*, 2023, 5; M. HABERSACK-P. ZICKGRAF, *Sorgfaltspflichten*

What has to be stressed is that, despite the different fields in which such extra-territorial approaches may be developed, only domestic rules that may express a relevant national interest are generally expanded in their scope of application. And their extended application often translates in a (unspoken) critique to human rights or environmental standards of States whose law would otherwise be applicable²². In turn, this may be at odds with the principle of equal sovereignty of a decolonialised international community²³, where some States endorse unilateral values moving beyond the limitations of a State-based system²⁴. Not only: if such approaches are to be interpreted as being an unspoken critique to another State's laws, they also shake another foundation of *private* international law. Bilateral conflict of laws rules²⁵, when adopted, presuppose a certain degree of irrelevance of whether domestic or foreign law is applied in a given case²⁶. Expanding the territorial scope of application of domestic

und Haftung in der Lieferkette als Regelungsmodell, in *RabelsZ*, 2023, 532; E.M. KIENINGER, *Englisches Deliktsrecht, internationale Unternehmensverantwortung und deutsches Sorgfaltspflichtengesetz*, in *RIW*, 2021, 331; N. KRISCH, *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung*, in A. REINISCH-S. HOBE-E.M. KIENINGER-A. PETERS (eds.), *Unternehmensverantwortung und Internationales Recht*, Heidelberg, 2020, 11; P. MANKOWSKI, *Einführung (C. Internationales Prozess- und Privatrecht, internationale Zuständigkeit und anwendbares Recht)*, in H. FLEISCHER-P. MANKOWSKI (eds.), *LkSG Kommentar*, München, 2023, 72; F. MARONGIU BUONAIUTI, *L'incidenza della disciplina della giurisdizione nelle azioni nei confronti delle società multinazionali per danni all'ambiente sul diritto di accesso alla giustizia*, in *Ordine internazionale e diritti umani*, 2023, 634; R. MICHAELS-A. SOMMERFELD, *EU-Lieferketten-Richtlinie und internationale Zuständigkeit*, in *GS Peter Mankowski*, Tübingen, 2024, 775; N. PERRONE, *Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence*, in *It. Rev. Int. and Comp. Law*, 2023, 389; G. RÜHL, *Unternehmensverantwortung und (Internationales) Privatrecht*, in A. REINISCH-S. HOBE-E.M. KIENINGER-A. PETERS (eds.), *Unternehmensverantwortung und Internationales Recht*, Heidelberg, 2020, 89; G. RÜHL, *Cross-Border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act*, in *GS Jonathan Fitch*, London, 2024, 163; C.E. TUO, *Rimedi per abusi di diritti umani da parte delle imprese: profili di diritto internazionale privato*, in F. MARRELLA-C. MASTELLONE (eds.), *International Business Contracts and Sustainability*, Pisa, 2024, 101.

²² J. BASEDOW, *Von Lieferketten, Kinderarbeit und Standesämtern – Gedanken zu europäischer Moral und globaler Realität*, cit., 761.

²³ *Idem*.

²⁴ A.L. PARRISH, *The Interplay between Extraterritoriality, Sovereignty, and the Foundations of International Law*, cit., 169.

²⁵ On which see already T. NIEMEYER, *Das internationale Privatrecht des Bürgerlichen Gesetzbuchs*, Berlin, 1901, 14.

²⁶ Speaking of “interchangeability” of laws, see F. VISCHER, *General Course on Private*

laws to events weakly connected with the given legal order appears to be at odds with such a principle of neutrality towards private law.

Of course, this does not mean that conflict of laws does open the gateways to foreign law without control. Overriding mandatory provisions and public policy are well-known limits to the ‘openness’ of a system. Yet their operation generally takes place assuming that they are an exception to the rule whose recourse is necessary to ensure the protection of fundamental values of the forum. Even more so, such tools may also be used as a post-colonial tool²⁷ that promote structural inequalities. It has been widely explored that, in conflict of laws, some States are ‘more equal than others’²⁸.

To conclude on the point, the expansion of the territorial scope of application of domestic laws, in as much as it becomes a critique to the law of other States, weakens the equal Sovereignty principle both in public and in private international law and promotes a limited shift from proximity in connecting factors to value-oriented solutions. This ultimately highlights that private law no longer has a simple function of governing inter-partes relationship, but becomes – yet again – a tool for enforcing public policies. In other words, the ‘regulatory’ function of private law re-expands, and, as will be now addressed, this should not remain without consequences for private international law.

3. *Private law’s regulatory rules vs public laws: the interference of national authorizations on the operability of Article 7 Rome II Regulation.*

The evolution of the nature of private law, namely its shift towards regulatory aims in given fields such as environmental matters²⁹, coupled with their expanded territorial reach that usually translates in the development of

International Law, in *Rec. des cours*, 232, 1992, 127 (writing that “... if the equality and interchangeability of private laws is a guiding principle of private international law, there is no theoretical objection against a choice by the parties”). On the neutral stance of private international law on governance matters in the era of globalisation, see L. CARBALLO PIÑEIRO-X. KRAMER, *The Role of Private International Law in Contemporary Society: Global Governance as a Challenge*, in *Erasmus L. Rev.*, 2014, 109.

²⁷ B. ELBALTI, *Rethinking Private International Law Through the Lens of Colonialism*, cit.

²⁸ See D. AMOROSO-L. MAROTTI-P. ROSSI-A. SPAGNOLO-G. ZARRA (eds.), *More Equal than Others? Perspectives on the Principle of Equality from International and EU Law*, The Hague, 2023.

²⁹ See A. REYES, *The Use of Domestic Law to Regulate the Conduct of Individuals, Corporations and Government Extraterritorially*, in *Rec. des cours*, 441, 2024, 53.

overriding mandatory provisions that pursue a unilateral model³⁰, relegating conflict of laws to the sidelines³¹, ‘shows’ a further crisis in conflict of laws that becomes particularly relevant in the context of environmental actions in cross-border cases. Historically speaking, conflict of laws has rested on a public / private divide³², where only foreign private law rules were “interchangeable” with domestic ones. Foreign public laws were consequently excluded from the scope of application of conflict of laws³³. The emergence of public rules that regulate private relationships but pursue common interests, and which may take advantage of private enforcement rather than recurring to administrative authorities’ enforcement, evidently constitutes a challenge for the field³⁴.

Still, it must be noted, the exclusion of foreign public laws from the scope of private international law at large has been the subject of debates in the scholarship which, in the first place, has admitted that foreign public laws regulating private matters (such as foreign law concerning personal status), are to be applied by domestic courts. In this sense, the exclusion of foreign public law only encompasses rules that govern the relationship between the individual and the foreign State itself³⁵, or, in other words, rules that protect a public interest rather than a private one³⁶. Yet, considering the current evolution and the acquisition of regulatory content by private law, one can only

³⁰ Extensively, on unilateralism in conflict of laws, see G. ROMANO, *L'unilateralismo nel diritto internazionale privato moderno*, Zürich, 2014.

³¹ On private regulatory rules in conflict of laws, see M. LEHMANN, *Regulation, Global Governance and Private International Law: Squaring the Triangle*, in *JPIL*, 2020, 1; R. MICHAELS, *Towards a Private International Law for Regulatory Conflicts*, in *Jap. YIL*, 2016, 175, and R. MICHAELS-R. BANU-H. VAN LOON, *Panel Discussion. PIL for a better world: Vision – Reality – Aberration?*, in K. DUDEN (ed.), *IPR für eine bessere Welt. Vision – Realität – Irrweg?*, Tübingen, 2022, 179.

³² For a recent and exhaustive reading on the topic, B. HESS, *The Private-Public Divide in International Dispute Resolution*, in *Rec. des cours*, 388, 2018, 49.

³³ Cf. *ex multis* E. VITTA, *Diritto internazionale privato*, vol. I, *Parte generale*, cit., 13; D. MCCLEAN, *Morris on The Conflict of Laws*, London, 2025, 78 ff., and *amplius* L. COLLINS, *Revolution and Restitution: Foreign States in National Courts*, in *Rec. des cours*, 326, 2007, 58 ff.

³⁴ Referring to regulatory rules in employment, competition, and data protection, see M. LEHMANN, *Regulation, Global Governance and Private International Law: Squaring the Triangle*, cit., 3 ff.

³⁵ E. VITTA, *Diritto internazionale privato*, vol. I, *Parte generale*, cit., 13.

³⁶ In these terms, R. QUADRI, *Leggi politiche e diritto internazionale privato*, in R. QUADRI, *Studi critici di diritto internazionale privato*, vol. I, Milano, 1958, 369. Cf. also 370, writing that “... le varie tesi esaminate e in forza delle quali le norme straniere ad ispirazione politica fuoriuscirebbero in ogni caso dal riferimento delle norme di diritto internazionale privato, [sono] senz'altro da scartare”.

agree with those who did prophetically argue that the interpenetration between private and administrative law can only lead to uncertainties as per the public / private dichotomy in conflict of laws³⁷, and with those who stress that foreign public law acts may in substance regulate private law aspects³⁸.

Article 7 of the Rome II Regulation only reinforces the structural inadequacy of the traditional understanding of private international law as not encompassing public laws or regulatory provisions within its scope of application. The effect of foreign State authorizations and possible limitations to civil liability therein contained³⁹ has seen different approaches both in case law as in the scholarship. Whereas in some German cases the effects of foreign State authorizations were denied based on a (now declined⁴⁰) territoriality principle of administrative law⁴¹, Austrian courts did partially (and theoretically) open to such recognition as long as a number of conditions were met, amongst which an 'equivalence principle' with domestic administrative authorizations⁴² (meaning that if an activity cannot be allowed internally, foreign authorizations cannot be given effects to).

Scholars have proposed different solutions when acknowledging that *per se* the Rome II Regulation does not directly tackle the issue. Whereas some argue that the last mentioned case law should to some extent guide the interpretation of Article 7 Rome II Regulation and allow taking into consideration foreign

³⁷ H. BATIFFOL-P. LAGARDE, *Droit international privé*, Tome I, Paris, 1970, 303, rn. 248.

³⁸ C. VON BAR, *Environmental Damage in Private International Law*, cit., 389 ("[preclusions] are classified as public law regulations by some authors because of their close relationship to the state of facts pertaining to the permission. Therefore, they say, the standards of preclusion are only applicable according to the principle of territoriality according to public law. But this public law qualification fails to see that the legal effects of the standards of preclusion unambiguously refer to private law. They do indeed ally a public law act (the permission) with the facts of the case, but simply because of that they do not become public law of themselves").

³⁹ See A. JUNKER, Art. 7 Rom II-VO, in *Münchener Kommentar zum BGB*, Band 13, IX. Auflage, München, 2025, 1019, rn. 49.

⁴⁰ P. MANKOWSKI, *Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthafungsrecht, internationales Kartellrecht, revoi, Parteiautonomie*, cit., 390.

⁴¹ BGH Beschl. v. 10. März 1978, Az.: V ZR 73/76, in *IPRspr.* 1978/40, para. 13 ("Die Genehmigung ist ein Verwaltungsakt, dessen Wirkung in der Regel auf das Hoheitsgebiet des Staates beschränkt ist, dessen Behörde sie erlassen hat"). Cf. also OLG Saarbrücken, Urteil vom 22. 10. 1957 – 2 U 45/57, in *NJW*, 1958, 754.

⁴² See OGH 20. Dezember 1998, 2 Ob 656/87, in *JBl*, 1989, 239, with note by G. Wilhelm. On substitution for public law acts with specific reference to climate change litigation, see M.P. WELLER-M. PETERSEN WEINER, *Corporate Climate Liability in Private International Law*, in *YPIL*, 26, 2024, 15.

authorizations at least under Article 17 concerning rules on safety of conduct when the applicable law is not the law of the State granting authorization⁴³, such a solution has been contested by others. On the one side, it has been noted that the *ratio* of Article 17 is very specific – allowing taking into consideration so far “as is appropriate”⁴⁴ those rules in force in the place of conduct that may introduce prohibitions, such as driving on a given side of the road⁴⁵. State authorizations, on the contrary, *allow* something. On the other side, it has been suggested that articles 7, and 17 may have clashing and opposing interests: giving effects to limitation of liability⁴⁶ via Article 17 may be at odds with the high level of protection pursued by Article 7 on environmental damage⁴⁷.

Furthermore, and specifically for the sub-field of greenhouse gases emission, Article 17 Rome II Regulation has been applied in the latest case law⁴⁸ so as to essentially give effect to State authorizations of the place where company

⁴³ T. KADNER GRAZIANO, *Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, in *RabelsZ*, 2009, 48 ff., and P. RÜPPELL, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen*, Tübingen, 2012, 258 f.

⁴⁴ Stressing the uncertainties following the discretionality enshrined in the provision, see M. BOGDAN-M. HELLNER, *Article 7: Environmental Damage*, cit., 296 f. Furthermore, “taking into consideration” raises the question of the cross-border legal value of foreign emission permits; scholars approaching the matter from the perspective of Article 17 Rome II Regulation suggest that foreign authorizations should be considered as a fact (P. RÜPPELL, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen*, cit., 90), whose legal relevance should thus be governed by the law applicable to the non-contractual obligation under Article 15 of the Rome II Regulation (P. RÜPPELL, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen*, cit., 245 f).

⁴⁵ P. MANKOWSKI, *Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, revoi, Parteiautonomie*, cit., 390.

⁴⁶ Cf. C. VON BAR, *Environmental Damage in Private International Law*, cit., 384 (clearly noting that “... the only problematic point is that of the law of conflict of laws in getting round the private law reflexive effects of such permission that acts to the disadvantage of a third party – that is, to the disadvantage of private persons who want restitution or compensation for damage from the environment polluter”).

⁴⁷ S. PABST, *Artikel 7 Rom II-VO*, cit., 768.

⁴⁸ See Rechtbank Den Haag, 26 May 2021, C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English version), para. 4.4.44. The district court, whilst theoretically open to “taking into consideration” all allowances of the Shell group (“the court considers the rights of the Shell group under the ETS system and other ‘cap and trade’ emission systems that apply elsewhere in the world”), further proceeds in its analysis by focusing on the European ‘cap and trade’ system only. Also in the sense that the decision only applies rules of safety and conduct (i.e., State emission allowances) of the place of the seat of the company where environmental decisions are taken, see M.P. WELLER-M. PETERSEN WEINER, *Corporate Climate Liability in Private International Law*, cit., 16.

decisions have been taken, rather than of places where single emitting plants are located, thus showing the structural inadequacy of the provision for the purposes at hand. Always concerning the specific sub-field of greenhouse gases emission under EU law⁴⁹, some authors have convincingly reconstructed the existence of a conflict of laws rule according to which national authorizations of other Member States should be given effect to⁵⁰.

In addressing the general problem of environmental damage and foreign State permits, several scenarios are usually distinguished⁵¹. When applying a foreign law, a court would not be allowed to disregard State authorizations of the *lex fori*; if the court applies the law of the foreign State granting the authorization, even when damages are located in the forum, the application of the relevant foreign law should also lead to the applicability of the foreign State's authorization that may introduce limits in civil liability.

Possible cases where a State authorization may be ignored are when the court applies the *lex fori* as *lex loci damni*, but the defendant would be entitled to limitations under the foreign (non-applied) law. Ignoring such an authorization may lead to the national decision not being recognised and enforced in the State where the tortfeasor has their domicile⁵² (and under whose law could potentially invoke limitations).

On its own side, the Court of Justice of the European Union has argued, in the limited scenario of State authorizations in the field of atomic energy, that not recognising authorizations of another Member States may amount to a violation of the principle of non-discrimination⁵³; yet, it is still uncertain whether such approach grounded on EURATOM primary law may be extended to any field⁵⁴.

⁴⁹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, in OJ L 275, 25 October 2003, 32.

⁵⁰ M. PASQUA, *Authorisations to Emit Greenhouse Gases – A Conflict-of-Laws Perspective*, in *It. Rev. Int. and Comp. Law*, 2023, 422 ff.

⁵¹ C. VON BAR, *Environmental Damage in Private International Law*, cit., 384; A. JUNKER, *Art. 7 Rom II-VO*, cit., rn. 51 ff.; M.L. TRAN, *Grenzüberschreitende Klimaklagen*, Tübingen, 2024, 197 ff.; M. THÖNE, *Globaler Klimaschutz und Internationales Privatrecht*, in *ZEuP*, 2025, 46.

⁵² T. KADNER GRAZIANO, *Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, cit., 49.

⁵³ Judgment of the Court (Grand Chamber) of 27 October 2009, *Land Oberösterreich v ČEZ as*, Case C-115/08, ECLI:EU:C:2009:660, on which see M.L. TRAN, *Grenzüberschreitende Klimaklagen*, cit., 215 ff.; W.G. SCHÄRF, *Unterlassungsklage gegen Betrieb eines Kernkraftwerks eines anderen Mitgliedstaats*, in *EuZW*, 2010, 33.

⁵⁴ In these terms, L. HÜBNER, *Climate Change Litigation an der Schnittstelle von öffentlichem*

Despite the issue being addressed for years, it seems unlikely that a possible recast of the Rome II Regulation will expressly take into account such matters⁵⁵ as they have been subsumed in the realm of “doctrinal problems”⁵⁶. Of course this evaluation may change: uncertainties may encourage forum shopping and an *over-private* enforcement⁵⁷ in perspective both of strategic litigation⁵⁸ and collective actions⁵⁹ may render the question more common and practical in nature up to such a point where a revision of Article 7 Rome II Regulation would have to explicitly address the question knowing that, *mutatis mutandis*, any new solution may be invoked to advocate for a unitary approach in conflict of laws when it comes to regulatory laws at large.

4. Article 7 Rome II Regulation: environmental damages vs damages to properties following adverse effects on the environment.

Not only Article 7 Rome II Regulation has the potential to trigger a new approach of conflict of laws in respect to the relationship of the entire field *viz* regulatory law; Article 7 seems also structurally able to redefine a typically colonialist approach at large which has led ‘law’ in general as being highly

Recht und Privatrecht – Die ausländische Anlagengenehmigung, cit., 225. Cf. also A. JUNKER, *Art. 7 Rom II-VO*, cit., rn. 58.

⁵⁵ See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), Brussels, 31 July 2025, COM(2025) 20 final.

⁵⁶ See Study on the Rome II Regulation (EC) 864/2007 on the law applicable to noncontractual obligations, JUST/2019/JCOO_FW_CIVL_0167, 2021, 36.

⁵⁷ Speaking of private “overenforcement”, L. HÜBNER, *Climate Change Litigation an der Schnittstelle von öffentlichem Recht und Privatrecht – Die ausländische Anlagengenehmigung*, cit., 224. Also on the rise of litigation in cases of cross-border pollution, K. SIEHR, *The Rome II Regulation and Specific Maritime torts: Product Liability, Environmental Damage, Industrial Action*, in *RabelsZ*, 2010, 145, also correctly noting at 146 f. that in many cases of pollution by oil tankers, special international conventions of substantive law will possibly apply and take precedence.

⁵⁸ On which see for all P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *RDIPP*, 2022, 828.

⁵⁹ On collective actions in conflict of laws, see *ex multis* S. BARIATTI, *Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale*, in *RDIPP*, 2011, 19; B. RENTSCH, *Grenzüberschreitender kollektiver Rechtsschutz in der Europäischen Union – No New Deal for Consumers*, in *RabelsZ*, 2021, 544.

anthropocentric in nature. Only ‘humans’ and human-based aggregations have legal personality, thus enjoy rights and obligations⁶⁰, whilst non-humans generally fall within the domain of *res*. By far, this does not mean that properties are without protection; yet their effective protection in a court of law is delegated to the owner, who will act according to their own autonomous and independent personal interests. The emergence of a legal or quasi-legal personality for the environment and for non-humans has now been widely addressed by scholars⁶¹, even though the conflict of laws perspective seems to be still at its beginnings⁶².

⁶⁰ *Ex multis*, D. ANZILOTTI, *Corsi di diritto internazionale privato e processuale* (reprint ed. by F. SALERNO), Padova, 1996, 201 (“Personalità, in generale parlando, è capacità di essere subietti di diritti e di doveri giuridici; ossia, il concetto di personalità corrisponde a quello di capacità generale di diritto, in contrapposto alla capacità speciale di diritto, o capacità di diritti speciali che presuppongono la personalità e consiste nella capacità di essere subietti di determinati rapporti giuridici”).

⁶¹ Cf. J. JUSTE RUIZ, *The Spanish Law for the Recognition of Legal Personality to the Mar Menor Lagoon and its Basin in the International Context: Another Step Towards the Implementation of the Rights of Nature*, in *RGA*, 2024, 165; L. KRÄMER, *Rights of Nature in Europe: The Spanish Lagoon Mar Menor Becomes a Legal Person*, in *J. Eu. Env. & Planning L.*, 2023, 5; A. FISCHER-LESCANO, *Nature as a Legal Person: Proxy Constellations in Law*, in *Law & Literature*, 2020, 237; E. MUSSAWIR, *On the Juridical Existence of Animals: The Case of a Bear in Colombia's Constitutional Court*, in A. ALVAREZ-NAKAGAWA-C. COSTAS DOUZINAS (eds.), *Non-Human Rights Critical Perspectives*, Cheltenham, 2024, 20; C.D. STONE, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, in *Southern Cal. L. R.*, 1972, 450; M. WARNOCK, *Should Trees Have Standing?*, in *J. Hum. Rights and the Env.*, 2012, 56; N. NAFFINE, *Legal Personality and the Natural World: On the Persistence of the Human Measure of Value*, in *ibidem*, 68; L. CODE, *Ecological Responsibilities: Which Trees? Where? Why?*, in *ibidem*, 84; R. LOUVIN, *L'attribuzione di personalità giuridica ai corpi idrici naturali*, in *DPCE*, 2017, 623; L. SCHIMMÖLLER, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, in *Trans. Env. L.*, 2020, 569; C. VON BAR, *Rechtsfähigkeiten*, in *GS Peter Mankowski*, Tübingen, 2024, 877; S. DOMINELLI, *Per un 'diritto degli animali' e 'della natura' tra scetticismo ed adesione a modelli normativi antropocentrici: riflessioni di diritto internazionale (pubblico e privato)*, in *RGA*, 2023, 5; A. PETERS, *The Importance of Having Rights*, in *ZaöRV*, 2021, 7; J.F. SÁNCHEZ JARAMILLO, *Los animales como sujetos de derechos: una categoría jurídica en disputa*, Bogotá, 2023, 35; F. RESCIGNO, *I diritti degli animali. Da res a soggetti*, Torino, 2005; J. BONIFÁCIO RAMOS, *The Animal Issue Revisited: Tertium Genus or Subject*, in *Int. J. Law and Soc.*, 2021, 177; C. FOSSA, *Frammenti di oggettività e soggettività animale tempi maturi per una metamorfosi del “pet” da bene (di consumo) a “tertium genus” tra “res” e “personae”?*, in *Contr. e impr.*, 2020, 527-559; M. BUFFA, *I diritti degli animali non umani. Una questione di coscienza*, in I. FANLO CORTÉS-P. DONADONI (eds.), *Ambiente, animali e umani: il pensiero bioetico di Silvana Castignone*, Milano, 2018, 117.

⁶² See L. GARCÍA ÁLVAREZ, *Environmental Damages Caused by Transnational Groups: Access to Justice*, in *YPIL*, 18, 2016/2017, 281 ff. On the extra-territorial effects of a foreign legal personality to environment and animals, see S. DOMINELLI, *A New Legal Status for the*

Given this starting point, it comes with little surprise that private international law also takes as implied core value that humans are the focus⁶³, and thus connecting factors are drafted accordingly – speaking of ‘residence’, ‘nationality’, and so on.

It is against this background that the Rome II Regulation hides, admittedly under many layers, the seed of change. Both EU law and the Rome II Regulation implement a teleological *favor naturae*⁶⁴ which methodologically translates in the adoption of the *Ubiquitätsprinzip*⁶⁵, allowing for the unilateral choice of law of the place of the State of the conduct in derogation to the *lex loci damni*. Unilateral discretion in the choice of applicable law is already a peculiarity in EU conflict of laws. However, the Rome II Regulation, in its efforts to pursue a *favor naturae*, goes right to the heart of the post-colonial anthropocentric model, as it makes clear that the relevant provision not only is applicable when humans suffer damages following humans-induced environmental disasters. Article 7 is also applicable to damages to the environment *per se*. In the Commission’s words, Article 7 Rome II Regulation covers a ‘*damage to the ecology itself*’⁶⁶. Even more so, Recital 24 of the Rome II Regulation adheres to a rather extensive definition of environmental damage, which does not necessarily require any *direct* ‘private damage’⁶⁷. Of course, this does not mean that the traditional anthropocentric point of view is completely abandoned: despite the possible lack of a direct individual damage, a prejudice to the environment and

Environment and Animals, and Private International Law: Tertium Genus Non Datur? Some Thoughts on (the Need for) Eco-Centric Approaches in Conflict of Laws, in RDIPP, 2024, 1165.

⁶³ For a critique to traditional conflict of laws approaches and for a plea to re-think the field, see H. MUIR WATT, *Alterity in the Conflict of Laws. An Ontology of the In-Between*, in *RabelsZ*, 2023, 433.

⁶⁴ Cf. P. MANKOWSKI, *Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthafungsrecht, internationales Kartellrecht, revoi, Parteiautonomie*, cit., 389. Explicitly on the need for a high level of environmental protection, see Rome II Regulation, Recital 25.

⁶⁵ *Ex multis*, C. VON BAR, *Environmental Damage in Private International Law*, cit., 371 ff., and A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford, 2009, rn. 7.22 ff.

⁶⁶ Commission’s Proposal for a Regulation of the European Parliament and Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), Brussels, 22 July 2003, COM(2003) 427 final, 19.

⁶⁷ Rome II Regulation, Recital 24: “‘Environmental damage’ should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms”.

its functions by necessity translates into an indirect damage to society itself⁶⁸.

One element may still acquire a strong anthropocentric feature, albeit leaving room for interpretation. Article 7 Rome II Regulation, after admitting that the ‘victim’ may be the environment, when introducing the optional connecting factor, writes that such an *optio legis* can be made by “*the person seeking compensation*”. At a first reading, the word ‘person’ could be seen as a limitation for non-humans to claim compensation. However, it is submitted here, that this is not the case. Being ‘a person’ is a matter of status, which is not governed by the Rome II Regulation. Also taking into consideration the time when the instrument was drafted, which pre-dates the question of non-human legal personality gaining momentum, the term ‘person’ in Article 7 Rome II Regulation should be interpreted as being applicable also to cases where components of the environment are granted a limited legal personality under domestic laws, as is the case of Mar Menor in Spain⁶⁹. In similar circumstances, it should be allowed for the legal representative of the relevant ‘environmental person’ to claim compensation for the autonomous direct environmental damage the victim has suffered.

The proposed solution not only seems coherent with the *telos* of the Regulation and its *favor naturae*, but it partially improves some structural weaknesses. The dissociation between the direct victim (the environment) lacking legal personality and ‘the person seeking compensation’ in Article 7 Rome II Regulation means that it is usually for public authorities to claim compensations. However, if such authorities act based on their public powers, their action is *iure imperii* and the Rome II Regulation is not applicable *ratione materiae*⁷⁰. In practical terms, this may translate in Article 7 Rome II Regulation (and its underlying policies and goals) rarely applying in one of the two types of claims addressed by the provision.

So, and to conclude on the point, Article 7 Rome II Regulation, by postulating that the *ecology* may suffer a direct damage for which compensation may be sought by the relevant representative in courts, private international law can actively contribute to current legal narratives seeking to abandon purely

⁶⁸ Cf. *ex multis* M. BOGDAN-M. HELLNER, *Article 7: Environmental Damage*, cit., 291.

⁶⁹ See Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca, BOE núm. 237, de 3 de octubre de 2022, 135131 ff.

⁷⁰ For all, see M. BOGDAN-M. HELLNER, *Article 7: Environmental Damage*, cit., 291. Also rejecting possible “green positions” that would see Article 7 Rome II Regulation applicable when public authorities act for the recovery of environmental damage, see A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, cit., rn. 7.05-6.

anthropocentric approaches in law. Albeit the structure of the specific provision may wrongfully lead to think that only 'persons' in a human-oriented sense would fall within the scope of application of Article 7 Rome II Regulation, and acknowledging that the contribution of the provision to general debates and narrative on non-human personality may be timid, a message seems clear and here to stay: damages against ecology and regardless of whether there are effective direct consequences for individuals, do potentially fall within the scope of application of an *ad hoc* conflict of laws rule.

5. Conclusions.

Environmental matters not only pose pressing practical questions that need to be addressed; they also raise dogmatic questions of conflict of laws that touch upon its very epistemology.

The raise of expanded territorial application of laws may reinforce post-colonial shades that promote structural inequality at odds with three fundamental premises of private international law, *i.e.* equal sovereignty; neutrality of material applicable law, and connecting factors implementing a proximity criterion.

The interpenetration between administrative and private law, whereby public law becomes a tool to regulate private relationships in the pursuit of common interests, calls for a new assessment of when private international law should be applied, and whether it should *clearly* evolve towards a 'regulatory' private international law.

The legal value of foreign State authorizations establishing private law preclusions may soon get to the heart of cross-border strategic litigation, and could call for uniform answers, which seem unlikely to be taken in a recast of the Rome II Regulation. Should however such a new rule effectively be drafted, it has to be noted, the task of forging conditions to grant extra-territorial effects to foreign emissions permits and alike will be complex, in particular if approached under the post-colonial focal lens. Whereas some authors have proposed solutions particularly favourable to inter-EU recognition abiding to the fundamental principles of mutual trust and the prohibition of discrimination between Member States⁷¹, a possible discrimination against non-EU Member States would remain.

⁷¹ P. MANKOWSKI, *Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, revoi, Parteiautonomie*, cit., 395. Cf. P. RÜPPELL, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen*, cit., 160 ff., and 259.

Not only environmental matters may become a leverage to change approaches in private international law; Article 7 Rome II Regulation, by creating a conflict of laws rule on *ecology damages per se* may contribute to the evolution of law in general and promote less stringent anthropocentric approaches⁷².

It seems thus that Article 7 Rome II Regulation entails a significant latent potential for legal and societal change which only awaits to be unlocked – the question standing is whether private (even maybe collective) enforcement and strategic litigation will prove to be a fit key to open it, and whether domestic courts will be inspired by the most recent advisory opinions of international tribunals⁷³ which have given substantial proof of their capacity to rise to the occasion in the re-shaping of international law and climate change.

⁷² Cf. in material law, Article 1249(1) of the French civil code on reparations to ecological damages (“*La réparation du préjudice écologique s’effectue par priorité en nature*”).

⁷³ ITLOS, Advisory Opinion on Climate Change and International Law, Advisory Opinion 21 May 2024; Inter-American Court of Human Rights, Advisory Opinion OC-32/25 of 28 May 2025 on Climate Emergency and Human Rights; ICJ, Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025. In the scholarship, see B. MAYER, *The Judicial Assessment of States’ Action on Climate Change Mitigation*, in *Leiden J. Int. L.*, 2022, 801; ID., *International Advisory Proceedings on Climate Change*, in *Michigan J. Int. L.*, 2023, 41; ID., *Prompting Climate Change Mitigation Through Litigation*, in *Int. Comp. L. Quart.*, 2023, 233.

THE LAW APPLICABLE TO HUMAN RIGHTS CLAIMS

Roberta Greco

SUMMARY: 1. Introduction. – 2. Applicable law under the Corporate Sustainability Due Diligence Directive. – 3. The *Omnibus* proposal to amend the CSDDD. – 4. Applicable law under the Legally Binding Instrument on Business and Human Rights. – 5. Conclusion.

1. *Introduction.*

This paper focuses on the law applicable to transnational civil liability disputes concerning adverse human rights impacts caused by multinational enterprises and their subsidiaries or business partners¹. First, in section 2 it considers the provisions of the Corporate Sustainability Due Diligence Directive² addressing the law applicable to human rights-related disputes brought before the court of an EU Member State over damage incurred outside the European Union (“EU”) caused by a subsidiary or a business partner of a company with a seat within the EU. Then, section 3 discusses the recent proposal to amend the CSDDD with specific regard to the rules determining the law applicable to such disputes. It argues that the CSDDD leaves a substantial gap in the protection of victims of human rights abuses, which will worsen if the proposed amendment will be adopted. On this basis, section 4 addresses the relevant

¹For an overview of the legal context of these disputes see, among others, L.F.H. ENNEKING, *Judicial Remedies: The Issue of Applicable Law*, in *Human Rights in Business*, in L.J.J.A. RUBIO-K. YIANNIBAS (eds.), *Removal of Barriers to Access to Justice in the European Union*, London, 2017, 38-43.

²Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, *OJ L* 2024/1760, 5 July 2024, entered into force on 25 July 2024 (hereinafter “Directive” or “CSDDD”).

provisions of the Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereinafter “Legally Binding Instrument” or “LBI”), which is currently under negotiation at the United Nations³, to see whether and to what extent this new instrument, if adopted, would have the potential to fill this gap. Finally, section 5 draws some conclusions.

2. Applicable law under the Corporate Sustainability Due Diligence Directive.

By way of introduction, the CSDDD has three principal objectives⁴. First, it requires Member States to establish corporate sustainability due diligence obligations – both in terms of human rights and environmental protection – that companies must carry out in their own operations and in relation to those of their subsidiaries and their business partners in their chain of activities. Second, it lays down rules on liability for violations of corporate due diligence obligations. Third, it provides that companies must adopt and implement transition plans aimed at mitigating climate change by ensuring, through best efforts, the compatibility of their business model and strategy with the transition towards a sustainable economy and the global warming target of 1.5 °C provided by the 2015 Paris Agreement.

This section deals with the civil liability regime established by the Directive, focusing on its extraterritorial reach, that is, its capacity to also bind non-EU companies⁵. This author maintains that the positive impact of the Directive’s broad reach, both in terms of human rights protection and of competitiveness for EU companies, risks being compromised if the civil liability regime supporting the Directive is ineffective.

³ For all information about the ongoing negotiations, see: www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

⁴ CSDDD, Article 1.

⁵ The extraterritorial reach of the CSDDD has been discussed by several authors, among others, N. BOSCHIERO, *L’extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *Diritti umani e diritto internazionale*, 2023, 661; O. BOSKOVIC, *Extraterritoriality and the Proposed Directive on Corporate Sustainability Due Diligence, A Recap*, in *Journal of Private International Law*, 2024, 661; R. GRECO, *La Direttiva sul Dovere di Diligenza delle imprese ai fini della sostenibilità: quale portata extra UE?*, in *SIDIBlog*, 20 September 2024.

In this connection, as far as the law applicable to the dispute is concerned, at least three different scenarios are possible under the Directive⁶.

First, it is possible that the damage occurs outside the EU and is caused jointly by a company covered by the CSDDD (with a seat within the European Union) and by its subsidiary or by its business partner. According to Articles 29(1) and 12(1) of the Directive, the company covered by the Directive is jointly and severally liable for such damage and, accordingly, it is required to provide remediation⁷.

However, this author doubts that the company covered by the Directive could be considered liable under the substantive provisions adopted by Member States to transpose the CSDDD, as these provisions are unlikely to apply. Indeed, if the damage occurs in a third State and the Rome II Regulation⁸ applies, according to the general rule enshrined in Article 4, the law applicable to the dispute will be the law of that third State, irrespective of the location of the event giving rise to the damage⁹ or the indirect consequences of that event¹⁰.

Therefore, if the substantive civil liability provisions of the third State are deficient, the company covered by the Directive may escape liability in contravention of the Directive even when it is jointly responsible for the damage.

Second, the damage may occur outside the EU and be caused only by a subsidiary of a company covered by the Directive. The CSDDD does not exclude that the company covered by the Directive could be held liable. This may

⁶ On the international private law issues arising from the Directive see, among others: N. BUENO-C. BRIGHT, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, in *The International and Comparative Law Quarterly*, 2020, 789 ff.; O. BOSKOVIC, *Extraterritoriality and the proposed directive on corporate sustainability due diligence*, cit., 117 ff.; P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *Rivista di diritto internazionale privato e processuale*, 2022, 828 ff.

⁷ Under Article 29(5) of the CSDDD, this is without prejudice to the provisions of national law concerning the conditions for joint and several liability and the right to recourse.

⁸ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31 July 2007, 40-49.

⁹ This event may be deemed to have occurred, for instance, in the home State where the leading company of a multinational corporation took the relevant decisions resulting in the damage claimed or where this company failed to supervise its subsidiaries who caused the damage.

¹⁰ In case of transboundary environmental damage, the person seeking compensation may choose to base her claim on the law of the state in which the event giving rise to the damage occurred, rather than on the *lex loci damni*. *Ibid.* Article 7.

happen, for instance, if this company has breached its due diligence obligations to identify, prevent, mitigate, and bring to an end human rights adverse impacts caused by its subsidiary. However, as in the previous case, if the law of a third state applies, the company covered by the Directive might escape liability, as the substantive due diligence provisions of the Directive may not apply.

Finally, the last case is the one in which the damage occurring outside the EU is caused only by a business partner of a company covered by the Directive. In this case, the Directive is clear in stating that the latter cannot be held liable.

From the above considerations, the conclusion can be drawn that if the damage arising from human rights violations occurs in a third state and is caused, solely or jointly, by a subsidiary or a business partner of a company covered by the Directive, the dispute will likely be decided on the basis of the substantive rules on corporate due diligence in force in a non-member State (as the rules of private international law in force in that state may refer to the law of the same or to the law of another third state). These rules, if any, may be deficient, and this will affect the victim's right to reparation.

3. *The Omnibus proposal to amend the CSDDD.*

On 26 February 2025, the Commission adopted the so-called *Omnibus* proposal¹¹ aimed, among other things, at revising the sustainability obligations of companies in various areas, ostensibly reducing the administrative burdens arising from the implementation of EU sustainability rules, strengthening the competitiveness of European companies, and enhancing their investment capacity. The proposal introduces several changes to the Directive that are strongly opposed by several authors for essentially watering down its scope¹².

¹¹ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM(2025)81 final, 26 February 2025 (hereinafter "Omnibus proposal" or "proposal").

¹² For first comments on this proposal see: A. BONFANTI, *EU Corporate Sustainability at a Crossroads: The Omnibus Proposal to Amend the EU Directive on Corporate Sustainability Due Diligence and its Ongoing Negotiation*, in *Diritti umani e diritto internazionale*, 2025, 532-541; OHCHR, *Commentary on the Omnibus Proposal. EU proposal risks backsliding on historic Corporate Sustainability Directive*, May 2025; S. RAVAL-J. BÄUMLER, *Left Behind. How the Omnibus Package Fails Vulnerable Workers from Informal Economies*, in *Verfassungsblog*, 18 May 2025; G. VAN CALSTER, *Legal opinion: how the Omnibus creates uncertainty on civil liability for*

While most of the proposed amendments are outside the scope of this paper, some deserve attention. In particular, one would delete Article 29(1) CSDDD, which requires Member States to provide a civil liability regime for damage caused by breaches of corporate due diligence obligations under the Directive¹³.

In this author's view, the deletion of the provision setting forth a harmonized civil liability regime¹⁴ is one of the most critical issues raised by the proposed reform. Although Member States will continue to be required to ensure that companies that have harmed the environment and human rights provide redress¹⁵, if they fail to voluntarily comply with this obligation, the CSDDD will no longer set out a default civil liability regime. This gap risks weakening the obligation to provide remediation.

As a consequence of the deletion of paragraph 1 of Article 29(2), (4) and (5) of Article 29 would refer solely to national law when it comes to liability for damage caused to a natural or legal person by a failure to comply with the due diligence requirements under the Directive. In brief, for the sake of coherence, any reference to the harmonized civil liability regime would be replaced with a reference to national civil liability regimes.

companies, May 2025, 4; E. CORCIONE, *Meno diritti umani, più competitività? Alcune riflessioni sul pacchetto Omnibus proposto dalla Commissione europea*, in *SIDIBlog*, 17 March 2025; G. PORTONERA, *"Dovere di diligenza" e tutele civili nella Corporate Sustainability Due Diligence directive*, in *Jus-online*, 2025, 242 ff.

¹³ Omnibus proposal, Article 4(12)(a).

¹⁴ Under recital 28 of the proposal, this choice is justified by the need "[T]o limit possible litigation risks linked to the harmonised civil liability regime of Directive (EU) 2024/1760, the specific, Union-wide liability regime currently provided for in Article 29(1) of that Directive should be removed". However, it is submitted that, "At the same time, as a matter of both international and Union law, Member States should be required to ensure that victims of adverse impacts have effective access to justice and to guarantee their right to an effective remedy, as enshrined in Article 2(3) of the International Covenant on Civil and Political Rights, Article 8 of the Universal Declaration of Human Rights, Article 9(3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and Article 47 of the EU Charter of Fundamental Rights. Member States should therefore ensure that, in case a company is held liable for a failure to comply with the due diligence requirements laid down in Directive (EU) 2024/1760, and that where such failure caused damage, victims are able to receive full compensation, which should be granted in accordance with the principles of effectiveness and equivalence, while balancing this through safeguards should prevent against overcompensation".

¹⁵ CSDDD, Article 12.

In addition, the proposal seeks to delete Article 29(3)(d), that is, the provision on legal representation, under which Member States are required to allow victims to be represented in proceedings for compensation by trade unions, non-governmental organizations, and national human rights institutions¹⁶. Recital 28 of the proposal justifies this deletion “[i]n view of the different rules and traditions that exist at national level when it comes to allowing representative actions”¹⁷. Whatever the reason behind this, if adopted, the amendment will weaken the position of the victims of human rights and environmental abuses when they lack the cultural and economic resources to sue companies in foreign jurisdictions. In this connection, one must bear in mind the substantial asymmetry existing between victims of human rights and environmental abuse and the companies targeted by the Directive, which Article 29(3)(d) seeks to counterbalance. Without the legal representation in court of stronger and more organized actors, the barriers to access to justice risk becoming insurmountable.

Finally, the *Omnibus* proposal deletes the sole provision of private international law included in the CSDDD, namely Article 29(7)¹⁸. If accepted, the mandatory application of the civil liability regime provided by the Directive would no longer govern cases where the law applicable to civil liability actions is not the national law of a Member State transposing the Directive. As a consequence, the general rule on the law applicable to non-contractual obligations, especially the *lex loci damni* under Article 4 of the Rome II Regulation, would apply instead.

The proposed deletion of Article 29(7) CSDDD, however, is without prejudice to “the possibility for Member States to provide that the provisions of national law transposing Article 29 of Directive EU 2024/1760 are of overriding mandatory application in accordance with Article 16 of Regulation (EC) No 864/2007, in cases where the law applicable to claims to that effect is not the national law of a Member State”¹⁹.

¹⁶ CSDDD, Article 29(3)(d). *Omnibus* proposal, Article 4(12)(c).

¹⁷ Under recital 28 of the *Omnibus* proposal: “Such deletion is without prejudice to any provision of the applicable national law allowing a trade union, non-governmental human rights or environmental organisation, other non-governmental organisation or a national human rights institution to bring actions to enforce the rights of the alleged injured party, or to support such actions brought directly by such party”.

¹⁸ *Omnibus* proposal, Article 4(12)(f). Under recital n. 28, it is submitted “Furthermore, for the same reason”, that is, the different rules and traditions that exist at national level, “the requirement for Member States to ensure that the liability rules are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of the Member State should be deleted (...)”.

¹⁹ *Ibid.*

Article 16 of the Rome II Regulation is an exception to the general rule of the *lex loci damni* under Article 4. It provides that, irrespective of the law that governs the claim, the EU courts seized of the matter can apply the provisions of the law of the forum in a situation where they are mandatory. Member States may thus choose to consider the provisions transposing Article 29 of the Directive to be of “overriding mandatory application”, but they would no longer be compelled to do so under the Directive.

Moreover, even in the case that a Member State decides to provide that the provisions of national law transposing Article 29 of the Directive are of overriding mandatory application, this will lose much of its meaning if one considers that the scope of Article 29 CSDDD under the proposal would be much narrower than the current version.

In conclusion, this author contends that the proposed amendments to the CSDDD would possibly shield companies covered by the Directive from their duty to compensate for the damage caused by breaches of corporate due diligence obligations. This outcome runs counter to the declared aim of the Directive to offer greater protection to victims of human rights and environmental violations.

4. *Applicable law under the Legally Binding Instrument on Business and Human Rights.*

Currently, no international legal instrument binds States to provide a domestic legal framework on corporate due diligence, including civil liability for related breaches. In addition, the current version of the CSDDD and, even more, the prospective shortcomings ensuing from the *Omnibus* proposal, if ever adopted, leave an important gap in terms of extra-EU corporate accountability. Against this background, this section considers the provisions of the updated draft of the Legally Binding Instrument.

In 2014, a Working Group (the Intergovernmental Open-ended Working Group on Transnational Corporations and Other Enterprises in Relation to Human Rights, hereinafter “Working Group” or “OEIGWG”) was appointed by the Human Rights Council to draft this Instrument²⁰. The Working Group

²⁰ Human Rights Council, *Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/RES/26/9, 14 July 2014.

has already published five versions, which have been used during its annual sessions as a basis for discussion in the ongoing negotiations. Eleven negotiation sessions have already been held²¹.

At the ninth and tenth sessions of the Working Group, the Chair Rapporteur led negotiations based on an updated version of the Legally Binding Instrument (hereinafter “Updated Draft Instrument” or “Instrument”)²². This analysis will focus on the clean version of this updated draft²³.

Briefly, the LBI would oblige States parties to establish certain rules applicable to all business activities, including those of a transnational character²⁴. Among these, companies would be required to carry out corporate human rights due diligence²⁵, as in the CSDDD.

Breaches of the Instrument would give rise to the liability of business enterprises for activities carried out within the territory, jurisdiction, or control of their home State party to the Instrument, in the case of human rights abuses arising from the activities of such enterprises, or from their business relationships,

²¹ The eleventh session of the OEIGWG took place from 20 to 24 October 2025. On 11 July 2024, the Human Rights Council adopted decision 56/116 to enhance the work of the OEIGWG, especially through intersessional thematic consultations, several of which took place between the tenth and the eleventh sessions of the OEIGWG. In October 2025, the Chair Rapporteur published an annex to the summary report on the first, second, and third intersessional thematic consultations, which took place in April-June 2025 (hereinafter “Annex”). He suggested the redrafting of selected provisions (Articles 4 to 11) of the *Updated draft legally binding instrument* (LBI). The Annex is available at the following link: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session11/igwg-11th-summary-intersessional-consultations-annex.pdf>.

²² *Updated Draft legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, July 2023. Articles 4 to 11 of the LBI were negotiated during the tenth session. The so-called “Third revised draft” is the penultimate version of the LBI, which served as the basis for negotiation during the seventh session of the OEIGWG. It is available at the following link: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>.

²³ Without the textual proposals submitted by States during the ninth session of the OEIWG.

²⁴ Updated Draft Instrument, cit., Article 3.

²⁵ Updated Draft Instrument, cit., Article 6(2)(c). Under Article 1(8), due diligence is meant as “the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impact”.

including those of transnational character²⁶. Corporate liability thus covers not only the acts or omissions of the parent company, but also the activities of its subsidiaries or business partners abroad. This is clearly meant to prevent enterprises from escaping their liability by formally complying with their due diligence obligations while allowing abuses to be perpetrated outside their home state territories by their subsidiaries or business partners over whom they exercise control.

Complex issues of private international law, however, risk jeopardizing the functioning of such a system, thus undermining the possibility of effective adjudication²⁷. In addition, these issues give rise to legal uncertainties and competitive disadvantages for companies obliged to provide compensation compared to those not subject to this liability. Indeed, legal proceedings for damages caused by multinational companies brought against subsidiaries or other companies in the value chain may have different outcomes depending on the rules governing jurisdiction and the law applicable to the claim²⁸.

The liability regime under the LBI is complemented by two specific private international law provisions concerning jurisdiction (Article 9) and the applicable law (Article 11), which aim to reduce legal barriers that could ultimately impair access to effective remedies. As other authors in this book have addressed issues governing jurisdiction, here the analysis will focus on the provision regulating the choice of the law.

Article 11 of the LBI includes two sub-paragraphs. Article 11(1) sets forth that all procedural matters that are not regulated by the LBI shall be governed by the law of the State where the claim is being examined. Article 11(2) regulates all matters of substance. It allows victims to request the application of substantive laws that are more advanced in terms of human rights protection,

²⁶ Article 8(1) reads as follows: “Each State Party shall adopt such measures as may be necessary to establish a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their business activities or relationships, including those of transnational character”.

²⁷ See, among others, two cases relating to extraterritorial duties of care, notably *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents)* [2019] UKSC 20, judgment of 10 April 2019 and *Okpabi and others (Appellants) v Royal Dutch Shell and another (Respondents)* [2021] UKSC 3, judgment of 12 February 2021.

²⁸ Council of Europe, Human rights and business, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States, 2 March 2016, available at www.rm.coe.int, paras. 35-36.

as may be the case with the law of the State of the parent company compared to the law of the States of their subsidiaries or their partners. In detail, Article 11(2) establishes the victim's right to request that their claims "be governed by the law of another State", which can be chosen among the *lex commissi delicti*, the *lex loci damni*, or the law of the State where the defendant is domiciled²⁹. In the absence of such a request from the victim, the provision does not set criteria to establish which law governs matters of substance³⁰.

Some shortcomings have been highlighted in this provision. First, it is not clear whether Article 11(2) grants victims *the right to choose* among the above-mentioned applicable laws or, rather, *the right to request* that the forum's courts decide the claim by applying one of these applicable laws. Second, the incipit of the provision narrows the scope of the choice of law rule to matters of substance, "which are not specifically regulated under this (Legally Binding Instrument)". This brings about uncertainty as to the scope of the choice-of-law provision, which does not provide for a clear default governing law.

Among the matters of substance specifically regulated by the LBI, one may consider Article 8 LBI concerning the adoption by States parties of "a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities"³¹. Article 8 LBI may well be implemented differently by States parties, which can adopt their own systems of civil liability, thus increasing uncertainty about the outcome of future disputes.

Despite these shortcomings, if the current version of the Instrument enters into force, it will add a layer of protection *vis-à-vis* the CSDDD by providing the victims with the choice of the law more favourable to their claim.

In 2022, the Chair-Rapporteur of the OEIGWG proposed, to no avail, to

²⁹ See Updated Draft Instrument, cit., Article 11(2): "All matters of substance which are not specifically regulated under this (Legally Binding Instrument) may, upon the request of the victim, be governed by the law of another State where: (a) the acts or omissions have occurred or produced effects; or (b) the natural or legal person alleged to have committed the acts or omissions is domiciled". Brazil submitted reservations on this provision, particularly regarding the fact that the choice is left to the victim. Human Rights Council, *Text of the third revised draft legally binding instrument with the textual proposals submitted by States during the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/49/65/Add.1 28 February 2022, 35.

³⁰ Therefore, the identification of the *lex causae* of a claim for non-contractual damages would be left, where possible, to domestic private international law provisions, to an international agreement or to EU law.

³¹ See ft. 26.

remove Article 11 from the LBI³². Deleting this provision would have left the LBI with no rule governing the law applicable to substantive matters not regulated by the LBI. The negotiating States decided instead to maintain this provision as found in the Third Revised Draft. This decision has been welcomed by authors for its potential to “unify rules of private international law in claims concerning business accountability for human rights abuses”³³.

Recently, the Chair-Rapporteur has proposed redrafting selected provisions, including Article 11, to reflect possible areas of convergence, taking into account the comments and suggestions made by States and other stakeholders during the thematic inter-sessional consultations that took place before the OEIGWG’s eleventh session of negotiation. In particular, he proposed to further restrict the scope of the choice-of-law provision, subjecting such a choice to “the legal principles of the State Party in which the case is adjudicated”³⁴.

Some authors have cast doubt on the value of introducing a choice-of-law provision specific to business and human rights, contending that the inclusion of private international law provisions is inapposite in the context of a human rights treaty, which – it is held – should be focused on the rights to be guaranteed rather than on complex issues of private international law³⁵. They note that issues of jurisdiction and applicable law are already governed by a number of private international law instruments, and *ad hoc* provisions dealing only with specific non-contractual claims connected to business-related activities risk adding complexity to the matter. Moreover, negotiation on the LBI has already lasted several years, with private international law issues being among those that raise objections among States³⁶. Some States would thus prefer a

³² Human Rights Council, Suggested Chair proposals for select articles of the LBI (6 October 2022), UN Doc. A/HRC/WG.16/8/CRP.1, 24 October 2022.

³³ M. KRAJEWSKI-S. REGALIA-O. DAVAANYAM, *Analysis of the UN 2023 Updated Draft Legally Binding Instrument on Business and Human Rights*, Brussels, October 2023, 12.

³⁴ The Chair-Rapporteur added the following new suggested language in italics: “All matters of substance which are not specifically regulated under this (Legally Binding Instrument) may, upon request of the victim, *and subject to the legal principles of the State Party in which the case is adjudicated*, be governed by the law of another State (...)”. See Annex, cit., 25.

³⁵ B. GRAMA-A. DUVAL-A. VAN BAAR-L. ROONDA, *Third Revised Draft on Business and Human Rights: Comments and Recommendations*, ASSER Policy Brief 2021-01, 2021, available at www.asser.nl.

³⁶ Still, during the eleventh session of the Working Group, some States have expressed concern about Article 11(2) See, in this connection, *Document of real-time updates to textual*

framework agreement, which would gather support more easily³⁷.

While the view can be shared that a framework agreement is likely to have a better chance of being concluded in due course, in this author's view, this outcome should not be pursued at the price of renouncing the additional layer of protection that the applicable law provision (as well as the provision on jurisdiction) would grant to victims of corporate human rights abuses.

5. Conclusion.

This paper has compared the relevant provisions on applicable law of the CSDDD and the LBI. The analysis has shown that the LBI, by granting the victims the choice of the law that best favours their claims, is more advanced in terms of victims' right to access to an effective remedy compared to the corresponding rules of the CSDDD. This conclusion will be confirmed if the amendments to CSDDD under the *Omnibus* proposal are adopted.

The analysis also shows that the way forward for an international harmonized legal regime for transboundary civil liability is fraught with difficulty. The sole provision on this matter in the CSDDD risks being deleted following the *Omnibus* proposal, while negotiations on the relevant provisions of the LBI tend to narrow its scope.

This author maintains that, as narrow as it may be, the provision on the applicable law in the LBI is relevant and must be kept for two main reasons. From a theoretical point of view, it demonstrates the determination of the international community not to let corporate violations of human rights go unpunished. In practical terms, in a globalized market, corporate civil liability

proposals on the updated draft legally binding instrument during the 11th session, available at the following link: <chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session11/igwg-11th-textual-proposals-lbi.pdf>. See also, Human Rights Council, Report on the eleventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/61/XX, 24 October 2025, 11.

³⁷ In particular, the USA challenges, among others, the Draft Treaty's "extraterritorial application of domestic laws; and, its creation of wide-ranging liability for an overly broad, ill-defined range of human rights abuses". See Human Rights Council, *Annex to the report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/49/65, 25, available at: <chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.ohchr.org/sites/default/files/documents/issues/business/2022-09-13/igwg-7th-annex-general-statements.pdf>.

provisions need to be enshrined and harmonized at an international level. This is needed to create a sound level-playing field. The CSDDD has proved that if these rules are adopted only at the regional level, their extraterritorial reach is too narrow, leaving only a few companies to bear the burden to compensate for the violation of due diligence obligations. This is the main reason behind the *revirement* that we are witnessing at the EU level, where the important steps that have been taken to set out a harmonized civil liability regime are currently at risk of being watered down in order to protect EU companies from the potential for unfair competition abroad.

THE LAW APPLICABLE TO CLIMATE CHANGE LITIGATION

Silvia Marino

SUMMARY: 1. Introduction: defining climate change litigation. – 2. Applicable legal instruments. – 3. The current state of the art in national Courts and Tribunals. – 4. Categories of potential claims: mitigation – adaptation – compensation. – 5. The impact of the connecting factors. – 6. Overriding mandatory provisions and public policy. – 7. Rules of safety and conduct. – 8. Some final remarks.

1. Introduction: defining climate change litigation.

Climate change litigation can be understood in various ways and the case law shows its interconnectedness with violation of human rights and environmental harm. Following a narrow approach, it raises directly and expressly an issue related to climate change or climate change policy, against a State or a corporation; in a broader definition, climate change can become an additional or secondary concern to the arguments or motivation for the lawsuit¹.

The practice shows the increase of categories and of number of claims, where climate change is an important part of the argument of the claimants, or of the discussions, or in the reasoning. Still, this variety can be unified in a theological interpretation that focuses on the motivation and the final objective of the

¹ R. MARKELL, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, in *Florida Law Review*, 2012, 15; J. PEEL-J. LIN, *Transnational Climate Litigation: the Contribution of the Global South*, in *American Journal of International Law*, 2019, 686; W. KAHL-M.P. WELLER (eds.), *Climate Change Litigation. A Handbook*, München, 2021, 70; I. ALOGNA-C. BILLIET-M. FERMEGLIA-A. HOZHAUSEN, *Climate Change Litigation in Europe, An Introduction to Regional, Comparative and Sectoral Perspectives*, in I. ALOGNA-C. BILLIET-M. FERMEGLIA-A. HOZHAUSEN (eds.), *Climate Change Litigation in Europe*, Cambridge, 2023, 2.

claimants, combating climate change and global warming addressing the State's legislation and/or the companies' behaviours.

Although it is difficult to recognise an autonomous right to a stable climate², to be protected as such, the European Court of Human Rights (hereafter ECtHR) has defined climate change as a specific branch of environmental harm, that causes or risks causing human rights violations³. Although the impact of this definition is limited to the European Area, it has already expressed ramifications on a global scale. In its advisory opinion on the Obligations of States in Respect of Climate Change, the International Court of Justice (hereafter ICJ)⁴ has endorsed the approach of the ECtHR and of other regional Courts on Human Rights⁵, recognising "the interrelationship between human rights obligations and rules concerning the protection of the natural environment" (para. 144) and confirming that "human rights recognized under customary international law form part of the most directly relevant applicable law" for the subject of the advisory opinion (para. 145). Furthermore, addressing other sources of international law and referring again to the *Klimaseniorinnen* judgment, the ICJ considered that "the adverse effects of climate change may impair the effective enjoyment of human rights" (para. 386). Therefore, the ECtHR's definition can be currently retained at the international level, and looks particularly efficient for its directness, shortness and immediate link to human rights standards.

The distinction between a climate change case and an environmental dispute rests on the specificity of the former. Following the current state of the art and practice⁶, it depends on the causes and/or on the events giving rise to damage.

² The most clear formulation is probably envisaged in Principle 1 of the 1972 Stockholm Declaration, contained in the Report of the United Nations Conference on the Human Environment, 5-16 June 1972, <https://docs.un.org/en/A/CONF.48/14/Rev.1>, which states that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.

³ ECtHR, Grand Chamber 9 April 2024, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, application No 53600/20, paras. 436 and 542; ECtHR, Second Section 28 October 2025, *Greenpeace Nordic and Others v. Norway*, application No 34068/21, para 314.

⁴ ICJ, 23 July 2025, advisory opinion on the Obligations of States in Respect of Climate Change, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf>.

⁵ African Court on Human and Peoples' Rights September 2023, *LA LIDHO, LE MIDH, LA FIDH & others v. Republic of Côte d'Ivoire*, application No 041/2016, paras. 175-186; Inter-American Court of Human Rights 27 November 2023, *La Oroya Population v. Peru*.

⁶ See para. 3.

Climate change and global warming are especially caused by greenhouse gases (hereafter GHGs) emissions⁷. International instruments dealing with climate change link the reduction of the two phenomena to the mitigation of States' emissions policy, according to the best scientific evidence⁸. In the EU, this definition is confirmed by further statutory legislation. As meaningful examples, Article 22 Directive 2024/1760⁹ on corporate due diligence, devoted to 'Combating climate change', obliges corporations to issue transition plans for climate change mitigation, with regard to emissions reduction. Regulation 2021/1119¹⁰ on climate neutrality, establishes a framework for the irreversible and gradual reduction of anthropogenic GHGs emissions.

Climate change's specific features do not depend on the nature of the harm, rather on the typology of the event giving rise to it.

Therefore, the core of climate change litigation is the policy change. Finally, private climate change litigation involves only private claims that applies for a change of policy to a corporation, reducing emissions¹¹. This notwithstanding, the focus of the claim, alternatively or cumulatively, can be on the adverse impact on the environment, on the violation of human rights, or the two together, and can include different categories of potential claims¹².

While Private International Climate Change Litigation is quite a novelty¹³, this characterisation requires eventually a specific application to a given context (climate matters) of rules of environmental and human rights litigation. That

⁷ See the EU Parliament Report, Climate change: the greenhouse gases causing global warming, 23 March 2023, <https://www.europarl.europa.eu/topics/en/article/20230316STO77629/climate-change-the-greenhouse-gases-causing-global-warming>.

⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, United Nations, 1998, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

⁹ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, *OJ L* 2024/1760.

¹⁰ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), *OJ L* 243, 9 July 2021, 1-17.

¹¹ G. GANGULY-J. SETZER-V. HEYVAERT, *If at First you Don't Succeed: Suing Corporations for Climate Change*, in *Oxford Journal of Legal Studies*, 2018, 841; A. FOERSTER, *Climate justice and corporations*, in *King's Law Journal*, 2019, 307; S. DE VIDO, *The Privatisation of Climate Change Litigation: Current Developments in Conflict of Laws*, in *Jus Cogens*, 2023, 65.

¹² See para. 4.

¹³ O. BOSKOVIC, *General Report*, in O. BOSKOVIC (ed.), *Localisation of Damage in Private International law*, Leiden, 2025, 61.

mirrors the fact that even the Sustainable Development Goal 2030 No 13, devoted to climate action¹⁴, is, to a certain extent, a specific and explicit application of values underlying SDG 14 on life below water and 15 on life on land¹⁵. Many environmental-related targets are connected with combating climate change.

2. *Applicable legal instruments.*

International Treaties focussing on combating climate change can be divided into two groups. Within the former, the Convention binds the States parties to meet environmental targets, leaving wide appreciation on the means to be used. One example is the United Nations Framework Convention on Climate Change (UNFCCC), whose most important result is the well-known Paris Agreement¹⁶.

The second group establishes rules on corporations' liability for environmental harm caused in production activities. Most of these international Conventions has a specific object, normally outlined by type of damage or of production¹⁷ and provides for strict liability regimes for companies carrying out such activities. Other international Treaties with a broader scope of application had scarce success, such as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No 150)¹⁸, not entered into force despite the need of three ratifications only. In this framework, the EU Directive 2004/35 on environmental damage¹⁹ is noteworthy, due to

¹⁴ Available at: <https://sdgs.un.org/goals>.

¹⁵ E. ÁLVAREZ-ARMAS, *SDG 13: Climate Action*, in R. MICHAELS-V. RUIZ ABOU-NIGM-H. VAN LOON (eds.), *The Private Side of Transforming our World*, Cambridge, 2021, 416.

¹⁶ Adopted on 12 December 2015, available at: https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf.

¹⁷ One example is the International Convention on Civil Liability for Oil Pollution Damage, approved in Brussels on 29 November 1969, under the auspices of the International Maritime Organization. Further on the topic: C. BERNASCONI, *Civil Liability Resulting from Trans-frontier Environmental Damage: A Case for the Hague Conference?*, in *Hague Yearbook of International Law*, 1999, 143.

¹⁸ Opening of the Treaty: Lugano 21 June 1993, available at: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=150>.

¹⁹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ L* 143, 30 April 2004, 56-75, on which: L. BERGKAMP-B. GOLDSMITH (eds.), *The EU Environmental Liability Directive*, Oxford, 2013.

the wide definition of damage in Article 2 and to the undertakings' strict liability. Naturally, it has a limited scope of application, binding "only" EU Member States, and not being capable to a wider acceptance²⁰.

Neither these Conventions, nor the Directive contain Private International Law rules, since they approach environmental protection and combating climate change from the public interest perspective. This is very clear, for example, from Recital 2 of the Directive.

Moreover, there are no universal international instruments, nor ongoing projects or proposals, of Private International Law addressing the issue, or more generally devoted to cross border torts, nor to civil matters more generally. Not even the Hague Conference of Private International Law (hereafter HCCH) succeeded the works for the establishment of a Convention on jurisdiction, applicable law, judicial and administrative cooperation on civil liability for environmental damages²¹. The project was ultimately eliminated from the Hague Conference's agenda.

In this legal framework, next future statutory developments are not foreseeable. Specific climate change-related Private International Conventions seems out of reach and more general treaties on torts, or civil matters, are not conceivable. Therefore, even in the Private International Law field, the EU seems at the forefront, thanks to the unification realised through the conferred competence in civil judicial cooperation. Regulation No 1215/2012 on jurisdiction, recognition and enforcement on judgments in civil and commercial matters²², and the Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation)²³ are applicable. Indeed, following the CJEU's

²⁰ However, legal transplants are possible. The Chinese example is straightforward: J. CHEN, *Modernisation, westernization and globalization: legal transplant in China*, in J. OLIVEIRA-P. CARDINAL (eds.), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Berlin-Heidelberg, 2009, 91-114; R. PEERENBOOM, *Toward a methodology for successful legal transplants*, in *Chinese Journal of Comparative Law*, 2013, 4-20; F. ANLING-W. CANFA-M. TIMOTEO (eds.), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bologna, 2013.

²¹ G. PALAO MORENO, *La responsabilidad civil por daños al medio ambiente*, Valencia, 1998, 119; C. BERNASCONI, *Civil Liability*, cit., 143.

²² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 351, 20 December 2012, 1-32.

²³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31 July 2007, 40-49.

definitions, these claims are civil and commercial²⁴ and must be characterised as non-contractual obligations, since they do not depend on the existence, the performance, the execution or the interpretation of any contract, and there are no obligations freely assumed by one party towards another²⁵. In the U.S.A., too, where actually (public and private) climate litigation was born, claims are based on torts theories of nuisance, trespass and negligence²⁶.

Focussing on the applicable law, Article 7 Rome II Regulation on environmental damage is applicable to private climate change litigation²⁷. Recital 24 suggests a definition of environmental damage centred on natural resources. However, Article 7 has a wider scope of application. It refers to non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage. Therefore, the rule includes both purely environmental harms, and consequent harms to human beings, human rights and/or property. Under this interpretation, climate change litigation is coherent with its understanding as a specific part of environmental harm, which is a necessary element of the delict. The applicability of Article 7 to climate change

²⁴ Indeed, none of the parties of the case exercises public authority (CJUE 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271, para. 41; CJEU 11 April 2013, *Sapir and Others*, C-645/11, EU:C:2013:228, para. 33; CJEU 12 September 2013, case C-49/12 *Sunico and Others*, EU:C:2013:545, para. 34; CJEU 23 October 2014, *flyLAL*, C-302/13, EU:C:2014:2319, para. 31).

²⁵ CJEU 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459; CJEU 17 June 1992, *Handte*, C-26/91, EU:C:1992:268; CJEU 27 October 1998, *Réunion européenne*, C-51/97, EU:C:1998:509.

²⁶ United States Court of Appeals for the Fifth Circuit 14 May 2013, *Comer v Murphy Oil USA*, No 12-60291; United States Court of Appeals for the Ninth Circuit 24 June 2009, *California v. Gen Motors Corp*, No 07-16908; United States Supreme Court 20 May 2013, *Kivalina v. ExxonMobil Corp.*, No. 4:08-cv-01138.

²⁷ The rule has not been conceived for these claims, but for cases such as *Bier* (CJEU 30 November 1976, *Bier*, 21/76, EU:C:1976:166): S. DE VIDO, *The Privatisation*, cit. However, it is drafted in such a wide manner as to cover partly different events, such as climate litigation (M. BOGDAN, *The Treatment of Environmental Damage in Regulation Rome II*, in J. AHERN-W. BINCHY (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, Leiden, 2009, 223; M. SPITZER-B. BURTSCHER, *Liability for Climate Change: Cases, Challenges and Concepts*, in *Journal of European Tort Law*, 2017, 153; F. GIANSETTO, *Changement climatique – Le droit international privé à l'épreuve des nouveaux contentieux en matière de responsabilité climatique*, in *Journal du droit international*, 2018, 512; M.P. WELLER-M. PETERSEN WEINER, *Politischen Prinzipien des Europäischen Kollisionsrechts am Beispiel der Anknüpfung von Klimaklagen nach Art. 7 Rom II-VO*, in C. VON BAR-O.L. KNÖFEL-U. MAGNUS-H.P. MANSELA-A. WUDARSKI (eds.), *Gedächtnisschrift für Peter Mankowski*, Tübingen, 2024, 371 ff.

assumes a double or treble causal link: from the air pollution to the impairment of a natural resource, and a last step to an impact on persons or property. However, this difficulty on the evidence of the causal link relates to the merits of the case and does not prevent the applicability of the rule.

Currently a reform of the Rome II Regulation in the direction of a more specific rule on climate change is not foreseeable, due to mainly two reasons. Firstly, the proposed Article 6a on business-related human rights claims, contained in the Motion for a European Parliament Resolution on corporate due diligence of 2021²⁸ was finally not included in the formal EU Commission proposal. The provision might have had an impact on climate claims, due to its connection to human rights. Its dismissal is too recent to think that it might be proposed again in a near future. Secondly, the EU Commission Report on the application of Regulation No 864/2007²⁹ opens to a debate on a future potential revision of the Regulation. The accompanying working document³⁰ only states that Article 7 “has not caused major problems [...] including [...] (iv) the notion of environmental damage in cases of corporate abuses against human rights” (para. 1.2.2) and informs on different positions of Member States concerning the desirability of a special rule on human rights violations (para. 4). Therefore, its revision does not seem to be a priority.

3. The current state of the art in national Courts and Tribunals.

Research in the Sabin Centre climate cases database³¹ shows that the numbers of climate change litigations are increasing worldwide, but only few cases respond to the features of Private International Climate Change Litigation. The apparently most relevant cases are:

²⁸ Motion for a European Parliament Resolution with recommendations to the Commission on corporate due diligence and corporate accountability, 11 February 2021 – (2020/2129(INL)), available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html.

²⁹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation) {SWD(2025) 9 final}, COM(2025) 20 final, Brussels, 31 January 2025.

³⁰ Commission Staff Working Document accompanying the Document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), SWD/2025/9 final, Brussels, 31 January 2025.

³¹ Available at: <https://climatecasechart.com/>.

1. *Luciano Lliuya v RWE AG*, dismissed. A Peruvian farmer, supported by NGO Germanwatch, filed claims in Germany against RWE, alleging that it knowingly contributed to climate change by GHGs emissions and was therefore partially liable for the melting of a Peruvian mountain glaciers. The plaintiff claimed reimbursement for a portion of the costs expected to incur from setting up flood protections.
2. *Amis de la Terre and Sherpa v Perenco*, decided. The French Supreme Court ruled on the legal standing of the NGOs and on the admissibility of preventive action according to Article 145 of the French Code of Civil Procedure to obtain evidence of the link between Perenco France and the companies operating locally in Congo within the global value chain³².
3. *Milieudefensie et al. v Royal Dutch Shell plc*, pending since 2019. The environmental group Milieudefensie/Friends of the Earth Netherlands and co-plaintiffs file a case against Shell in a Dutch Court alleging its contributions to climate change in violation of its duty of care under Dutch law and human rights obligations. The plaintiffs request the reduction of its CO₂ emissions³³.
4. *Envol Vert et al. v Casino*, pending since 2021. Eleven NGOs sued the French supermarket chain Casino in France for its involvement in the cattle industry in Brazil and Colombia, causing environmental and human rights harms. The plaintiffs seek to compel the defendant to comply with its obligations under the French Law on the Duty of Vigilance³⁴ to establish a detailed compliant vigilance plan; and to compensate Brazilian Indigenous groups for damage.
5. *Asmania et al. v Holcim*, pending since 2022. Four inhabitants of the island of Pari supported by three NGOs have sued Swiss-based company Holcim in Switzerland. The plaintiffs request a compensation for climate change-

³² French Supreme Court 9 March 2022, FR:CCASS:2022:C100199. The two associations announced to file a suit on the merits (joint press release available at: <https://www.asso-sherpa.org/victory-over-the-transnational-corporation-perenco-a-step-forward-in-the-fight-against-opacity-and-for-access-to-justice>), but the present author did not find any further news.

³³ On 13 May 2025, the association Milieudefensie announced new legal proceedings against Shell, alleging that the company 'is in breach of its legal duty of care under Dutch law, due to its continued investment in new oil and gas fields and its inadequate climate policy for the period 2030 to 2050' (Letter to Shell, published at <https://en.milieudefensie.nl/news/this-is-our-letter-to-shell>). As presented here, the eventual claim seems to have as cross border element the place of drilling and of production.

³⁴ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017.

related damages on Pari; the reduction of CO₂ emissions; a financial contribution to adaptation measures on the island³⁵.

6. *Comissão Pastoral da Terra and Notre Affaire à Tous v BNP Paribas*, pending since 2023. Two NGOs claim in a French Court that BNP Paribas violated the French Law on the duty of vigilance of 2017, alleging that the current bank's vigilance plan is not adequate to prevent the violations of human rights, forced labour in cattle farms, deforestation of the Amazon, land-grabbing of protected indigenous territories.
7. *AFIEGO et al. v Total*, pending since 2023 is also centred on the violation of the French Law on the Duty of Vigilance, before a French Court and on a consequent claim for compensation.
8. *Hugues Falys, FIAN, Greenpeace, Ligue des droits humains v TotalEnergies* (The Farmer Case), pending since 2024. A Belgian farmer supported by a no profit association sued in Belgium a corporation based in France under Belgian extra-contractual civil liability. The plaintiffs claim the stop of investment in new fossil fuel projects; the reduction of GHGs emissions, oil and gas production; the adoption of a realistic transition plan; the injunction of a penalty in case of no compliance.

4. *Categories of potential claims: mitigation – adaptation – compensation.*

According to the current state of the art, the core of climate change litigation is composed by requests to order mitigation and adaptation strategies and compensation³⁶, under human rights law, environmental law, or duty of vigilance law.

The term mitigation refers to the reduction of emissions. Mainly the legal scheme is a request of an order or an injunction grounded on non-compliance of international treaties or, in case, national laws on climate and on mitigation policies. *Milieudefensie, Falys* and *Asmania* are examples thereof. Under this category it is also possible to include claims for the compliance with national law providing for environmental plans or mitigation targets, such as the French Law invoked in *Envol Vert, Comissão Pastoral da Terra* and *AFIEGO*.

³⁵ The claim is presented on its own webpage: <https://callforclimatejustice.org/en/>. The Court of First Instance of Zug 17 December 2025, A1 2023 9 declared the lawsuit admissible.

³⁶ G. GANGULY-J. SETZER-V. HEYVAERT, *If at first*, cit., 843; J. PEEL-J. LIN, *Transnational Climate Litigation*, cit., 711; M.P. WELLER-M. PETERSEN WEINER, *Politischen Prinzipien*, cit., 371.

“Adaptation” is mainly understood as a request for reimbursement of costs expected to adapt human life to environmental changes due to global warming, as in *Lliuya* and *Asmania*.

The third category is the classic compensation for damages occurred or to be occurred. *Lliuya*, *Envol Vert* and *AFIEGO* include these kinds of requests.

Amis de la Terre is particular, since it is centred on disclosure, a request of documents or pieces of evidence which are under the disposal of the potentially future defendant. It is an investigative measure in order to display, preserve or establish evidence before any proceedings.

The research has pointed out different cases, based on principal different argumentation, where climate considerations are secondary or peripheral to the arguments of the claimant. Two groups of cases deserve attention.

The first includes requests of order for injunctions and related damages for misleading advertising or greenwashing. Currently, most actions are filed by associations before consumer protection or competition authorities, or national advertisement agencies and thus do not fit perfectly into the definition of private enforcement or private climate change litigation. These authorities are generally not considered as courts in the judiciary. Few cases are brought by a competitor against the another, or by a consumer association against an undertaking, allegedly greenwashing its products or activities. Most of these pending or decided cases do not present cross borders implications. Only two claims with transnational features were detected, since the defendants were not domiciled in the State of the seized court, but the judgments do not address Private International Law issues, do not scrutinise its international jurisdiction and apply directly the *lex fori*³⁷.

The second focuses on the carbon markets, claiming the illicit trading in the voluntary market carbon credits or the enforcement of contractual obligations related to carbon credits. Some cases are pending. The trend deserves attention due to the recent HCCH Carbon Markets Project³⁸.

³⁷ Regional Court of Stuttgart 31 January 2022, *Verbraucherzentrale Baden-Württemberg e.V. v. Commerz Real Fund Management S.à.r.l.*, 36 O 92/21 KfH; Court of First Instance of Frankfurt am Main 26 August 2025, *Deutsche Umwelthilfe v. Apple*, 3-06 O 8/24. In the EU, the claims shall be characterised as a non-contractual obligation, both if an association files the action, according to the judgment CJEU 1 October 2002, *Verein für Konsumenteninformation*, C-167/00, EU:C:2002:555; or if the consumer bought a greenwashed good and claims compensation, following the judgment of the CJEU 22 February 2024, *MA*, C-81/23, EU:C:2024:165 on the installation of a defeat device that reduces the effectiveness of emission control systems.

³⁸ Full information is available at: <https://www.hcch.net/en/projects/legislative-projects/carbon-markets>.

5. *The impact of the connecting factors.*

Article 7 Rome II Regulation³⁹ is a result-selective choice of law rule between the law of the State where the damage occurred (this corresponds to the general rule of Article 4(1)) and that where the event giving rise to it occurred. Such an option, left to the alleged victim only, creates uncertainty on the applicable law for the defendant. A cautious and informed claimant would choose the application of the stricter rule, producing consistency between his/her own interests and the realisation of sustainability principles. It maximises the potential liability and the reparation to be paid by the polluter by choosing the legal system that will lead to more substantial economic compensation and better protects the environment⁴⁰. In so doing, it expresses a favour both towards environmental targets and the protection of the victim⁴¹. Similar rules are provided for in Article 138 Swiss Law on PIL and Article 52(1) Uruguayan General Act on PIL.

³⁹ There might be doubts on the applicability of the Rome II Regulation for continuous harmful events that started before 11 January 2009, date of application of the Regulation (art. 32), at least for the part of them occurred before. According to art. 31, it shall apply to events which occur after its entry into force. The issue was faced in *Lluya* only, but the application of German Private International Law in force before the Rome II Regulation could give the same outputs. However, the reasoning of the Court is not very clear (G. VAN CALSTER, *Lluya v RWE. Some early lessons on the applicable law for climate claims in EU Law (Article 7 Rome II), including observations on 'climate' as 'environmental damage', and a risk of dépeçage in the event of continued torts*, <https://gavclaw.com/2025/06/03/lliuya-v-rwe-some-early-lessons-on-the-applicable-law-for-climate-claims-in-eu-law-article-7-rome-ii-including-observations-on-climate-as-environmental-damage-and-a-risk-of-depeçage-in-th/>). Further on intertemporal regime: G. VAN CALSTER, *Lex ecologia. On applicable law for environmental pollution (Article 7 Rome II), a pinnacle of business and human rights as well as climate change litigation*, in *IPRax*, 2022, 447.

⁴⁰ C. BRIERE, *Le règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ("Rome II")*, in *Journal du droit international*, 2008, 57; C.W. FRÖHLICH, *The private international law of non contractual obligations according to Rome II Regulation*, Hamburg, 2008, 86; T.M DE BOER, *The purpose of uniform choice-of-law rules: the Rome II Regulation*, in *The Netherlands International Law Review*, 2009, 325; H. MUIR WATT, *Rome II et les "intérêts gouvernementaux": pour une lecture fonctionnaliste du nouveau règlement du conflit de lois en matière délictuelle*, in S. CORNELOUP-N. JOUBERT (dirs.), *Le règlement communautaire "Rome II" sur la loi applicable aux obligations non contractuelles*, Paris, 2008, 132; S. VRELLIS, *The law applicable to the environmental damage. Some remarks on Rome II Regulation*, in J. FORNER DELAYGUA-C. GONZÁLES BEILFUSS-R. VIÑAS FARRÉ (coords.), *Entre Bruselas y la Haya, Liber amicorum A. Borrás*, Madrid-Barcelona-Buenos Aires-São Paulo, 2013, 871.

⁴¹ E. GUINCHARD-S. LAMONT-BLACK, *Environmental Law – The Black Sheep in Rome II's Drive for Legal Certainty? Article 7 of Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations in Context*, in *Environmental Law Review*, 2009, 161.

Due to the *Günstigkeitsprinzip* embedded in Article 7, and to the lack of express reference, Article 4(2) and (3) is not applicable in environmental/climate change cases⁴². Since these rules embed different result-oriented principles, they would risk jeopardising the achievement of the ecological target.

The places where the event giving rise to damage and the damage itself occur must be identified.

Following the first-instance decision in *Milieudefensie*, not overturned on appeal⁴³, the causal event is composed by two equally relevant facts, the company business decision to carry the emitting activity and the action to emit itself. If they take place in different States, they can lead to the applicability of two national laws. This distinction has been very useful in the judgment. The Court accepted the implicit choice made by the claimants, according to Article 7, in favour of the place of the decision-making process, leading to the application of the Dutch law⁴⁴.

The application of the law of the “place of the decision” can be the most suitable law where the claim has as object the adoption of mitigation measures⁴⁵: indeed, that law most probably coincides with the law of the place of the establishment of the defendant, where the decision-making process takes place and where a mitigation order might impact on this process and be more easily enforced.

In multistate tortious claims, the challenge rests often on the localisation of the place of the damage. Indeed, the *Mosaikbetrachtung* followed by the CJEU⁴⁶ in the interpretation of Article 7(2) of the Brussels Ia Regulation on jurisdiction is deemed applicable in the scope of application of the Rome II Regulation, too⁴⁷.

⁴² A. FÜCKS, *Article 7 Environmental damage*, in P. HUBER (ed.), *Rome II Regulation*, München, 2011, 203; M. BOGDAN, *The Treatment*, cit., 226; E. GUINCHARD-S. LAMONT-BLACK, *Environmental Law*, cit., 168; on the opposite thesis: W. KAHL-M.-P. WELLER (eds.), *Climate Change Litigation*, cit., 140; M. BOGDAN-M. HELLNER, *Article 7*, in U. MAGNUS-P. MANKOWSKI (eds.), *Rome II Regulation Commentary, European Commentaries on Private International Law*, München, 2019, 295.

⁴³ An Appeal to the Supreme Court is pending.

⁴⁴ G. VAN CALSTER, *Applicable law (Article 4 and 7 Rome II) in the Dutch Milieudefensie v Shell climate ruling. Not quite as momentous as the core message*, at <https://gavclaw.com/2021/05/31/applicable-law-article-4-and-7-rome-ii-in-the-dutch-shell-climate-ruling-not-quite-as-momentous-as-the-core-message/>.

⁴⁵ M.P. WELLER-M. PETERSEN WEINER, *Politischen Prinzipien*, cit., 373.

⁴⁶ CJEU 7 March 1995, *Shevill*, C-68/93, EU:C:1995:61; CJEU 25 October 2011, *eDate*, joined cases C-509/09 and C-161/10, EU:C:2011:685; CJEU 21 December 2021, *Gtflif Tv*, case C-251/20, EU:C:2021:1036.

⁴⁷ E. GUINCHARD-S. LAMONT-BLACK, *Environmental Law*, cit., 169; A. MILLS, *The Application*

In climate change, the harm can occur everywhere. This means that any national law where even a small part of the harm has been suffered (think again to *Lliuya* case) is applicable, at least to that specific part of the loss⁴⁸. Nevertheless, it is possible to reduce this infinite multiplicity. Firstly, the localisation of the consequential damage to a person or to property is not relevant for the determination of the applicable law⁴⁹, it being an indirect damage. Article 4(1) Rome II Regulation and the CJEU's case law on Article 7(2) Brussels Ia Regulation⁵⁰ make it clear that indirect loss is not relevant for Private International Law purposes.

Secondly, in the private enforcement of EU Competition Law cases⁵¹, the CJEU follows a pragmatic approach, focusing on the claim and not on the whole potential impact of the anticompetitive conduct. The cases and the claims are naturally different. However, the same approach in climate change cases would help identifying the harm suffered, which corresponds to the loss claimed. This would avoid spreading the number of potentially applicable laws. Furthermore, the focalisation on the specific claim is important in the determination of the applicable law. Indeed, while alternativity in jurisdiction means a legally acceptable choice in favour of the claimant, multiple applicable laws risk creating uncertainty and practical difficulties, such as cumulation or *dépeçage*. As an example, the connecting factor of the law of the damage in the *Lliuya* case would have led to the application of Peruvian Law, it being the only State where claimed losses are localised, for the sole purposes to claim costs in Peru.

Actually, the judgment in *Lliuya*⁵² does not clearly identify the legal basis for the application of German Law⁵³, were it the selection according to Article 7 in favour of the law of the place of the causal event, understood once more as

of *Multiple Laws Under the Rome II Regulation*, in J. AHERN-W. BINCHY (eds.), *The Rome II Regulation*, cit., 134; M. BOGDAN-M. HELLNER, *Article 7*, cit., 294; U. MAGNUS, *Article 4*, in U. MAGNUS-P. MANKOWSKI (eds.), *Rome II Regulation*, cit., 174.

⁴⁸ J. VON HEIN, *Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims*, <https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/>.

⁴⁹ M. BOGDAN-M. HELLNER, *Article 7*, cit., 294.

⁵⁰ CJEU 11 January 1990, *Dumez*, C-220/88, EU:C:1990:8; CJEU 19 September 1995, *Marinari*, C-364/93, ECLI:EU:C:1995:289; CJEU *Verein für Konsumenteninformation*, cit.

⁵¹ CJEU 5 July 2018, *flyLAL II*, C-27/17, EU:C:2018:533; CJEU 28 July 2019, *Tibor Trans*, C-451/18, EU:C:2019:635.

⁵² Higher Regional Court Hamm 28 May 2025, *Lliuya*, I-5 U 15/17.

⁵³ G. VAN CALSTER, *Lliuya*, cit.

the decision; or Article 14 on freedom of choice⁵⁴.

Indeed, this latter provision allows for choice of law in two cases: due to an agreement entered into after the event giving rise to the damage occurred; or where all the parties are pursuing a commercial activity. The choice shall be expressed or demonstrated with reasonable certainty. Any legal system can be chosen and it can waive the conflict of laws rules in Article 7. However, it is submitted that in climate change litigation barely parties would agree on a law that has no connections with the factual elements of the situation and with the claim.

6. *Overriding mandatory provisions and public policy.*

While the classic theory and application of overriding mandatory provisions are safe in climate change litigation, both in general terms and because of Article 16 Rome II Regulation, the specific EU targets and the new obligations imposed to companies under the CSDDD require some more specific remarks. Article 29(7) of the CSDDD states that the provisions of national law transposing the Article itself, on civil liability of companies, must be of overriding mandatory application if the law applicable to the claim is that of a third Country. The interpretation and the impact of the rules are far from clear⁵⁵. Nevertheless, it does not seem to play a paramount role in climate change litigation. Indeed, Article 29 refers expressly to the failure to comply the obligations enshrined in Articles 10 and 11, on the prevention of “potential adverse impact” and on “bringing actual adverse impacts to an end”, respectively. An adverse impact is ‘an adverse environmental impact or adverse human rights impact’ pursuant to Article 1(d). Combating climate change is treated differently both from the formal point of view (only Article 22 is devoted to it) and

⁵⁴ The defendant’s position is not clearly reported, too, in order to detect its defence, following the different mechanisms of the two provisions, and the possible consequent judicial solution.

⁵⁵ A. BONFANTI, *Corporate Sustainability Due Diligence Directive: A Human Rights-Based Assessment*, in *Rivista del commercio internazionale*, 2024, 857; X. KRAMER-E. SILVA DE FREITAS, *The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects*, <https://conflictoflaws.net/2024/the-corporate-sustainability-due-diligence-directive-pil-and-litigation-aspects/>; S.J. ZETZSCHE, *The EU’s Corporate Sustainability Due Diligence Directive: From Disclosure to Mandatory Prevention of Adverse Sustainability Impacts in Supply Chains*, in *European Journal of Risk Regulation*, 2025, 628.

substantially (obligations established in Article 22 are imposed to a part of the companies targeted by the Directive). Furthermore, the consistent CJEU's case law pushes towards a restrictive interpretation of the notion of overriding mandatory provisions⁵⁶. Therefore, the CSDDD does not impose any harmonisation on the civil liability regimes for violation of Article 22. National rules establishing such liability cannot be considered overriding mandatory provisions pursuant to Article 29(7). This does not exclude their national interpretation as such, following their general definition in Private International Law theory. This remains true even if this provision is to be deleted in the adoption of a new directive amending CSDDD⁵⁷.

Article 29(7) does not exclude the existence of other overriding mandatory provisions, such as national rules on duty of vigilance, or duty of care, or due diligence⁵⁸. These legislations seem to protect high values, that fit with the general theory of mandatory provisions, in that they must safeguard social interests, among others. Definitely, the EU itself is strengthening the protection of social rights in the whole supply chain. Despite this, it would be difficult to qualify a whole national statute on the duty to issue transition plans – or the transition plan as such – as overriding; this effect would possibly only cover the duty to issue a serious and reliable transition plan.

Within the scope of the public policy clause (contained in Article 26 Rome II Regulation), debate can still continue on the effects of punitive damages that might be provided for in the application of a foreign law. However, the new EU effort towards combating climate change does not seem to impact on the theory of public policy, nor on the possibility to order punitive damages, or to apply a foreign law that envisages them. Therefore, there is a national margin of appreciation, recalling, once more, the necessity of strict interpretation of

⁵⁶ CJEU 31 January 2019, *Da Silva Martins*, C-149/18, EU:C:2019:84, para. 29; CJEU 5 September 2024, *HUK-COBURG-Allgemeine Versicherung II*, C-86/23, EU:C:2024:689, para. 30.

⁵⁷ Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM/2025/81 final, 2025/0045(COD), 26 February 2025. With specific regard to art. 29(7): E. PANNEBAKKER, *Under the Omnibus: Corporate Sustainability Due Diligence Directive's rules on civil liability no longer overriding mandatory*, <https://conflictoflaws.net/2025/under-the-omnibus-corporate-sustainability-due-diligence-directives-rules-on-civil-liability-no-longer-overriding-mandatory/>.

⁵⁸ For a wider and updated outline on national legislations on the duty of diligence: <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/>.

this exception within the EU, and a not very positive attitude towards these damages in the CJUE's case law⁵⁹.

The public policy clause can prevent the application of a law, that does not grant high standards of protection. After the implementation of the CSDDD, as amended, in case, this law is most probably a *lex loci damni* of a third Country that does not purport sustainability targets at the same (allegedly high) level as the EU pieces of legislation.

Being the two notions coloured by European values, in any case high EU standards must be taken in consideration, as envisaged, for example, in the CSDDD, in the EU climate law⁶⁰, in the Regulation of emissions trading schemes⁶¹, in the Directive on unfair business-to-consumer commercial practices, as amended⁶².

7. *Rules of safety and conduct.*

Article 17 Rome II Regulation is a key provision, establishing an exception to the standard functioning of the conflict of laws rules. It prescribes to take into consideration the rules of safety and conduct of the place where the event occurred. Perfectly designed and operating for road traffic accidents⁶³, it raises interpretative and applicative difficulties in other fields. Indeed, if the law of the State where the causal event occurred is less protective than others, potentially conflicting, this special category of rules risks running against the objective of

⁵⁹ This is confirmed by the CJEU 4 October 2024, *Real Madrid*, C-633/22, EU:C:2024:843, which fell on a completely different subject matter, but where a balance between fundamental human rights was sought.

⁶⁰ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), *OJ L* 243, 9 July 2021, 1-17.

⁶¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, *OJ L* 275, 25 October 2003, 32-46.

⁶² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *OJ L* 149, 11 June 2005, 22-39.

⁶³ U. MAGNUS, *Article 4*, cit., 199.

Article 7, that is to maximise compensation and to cause deterrence. If the standards in force in the place where the harmful activity occurs are taken into consideration for excluding or reducing liability, Private International Law potential for mitigation will be undermined. Examples could be public administrative law provisions that regulate environmentally damaging activities, administrative permissions or authorisations that allow the activity in the State where the action takes place⁶⁴.

These consequences are hard to reconcile with the objectives of the recent normative developments, especially within EU⁶⁵, and the specificities of climate change litigation. Therefore, the Recommendation of the European Group for Private International Law⁶⁶ suggested that Article 17 Rome II Regulation should not be invoked by the defendants to exonerate or limit their liability. Such rules cannot replace the legal duties established by EU instruments, with specific regard to corporate liability, and cannot be used to evade the application of the duties envisaged.

This means that the highest standard should apply. The transition/sustainability plans, that better realise these targets, could have a sort of extraterritorial effect, meaning that they regulate any activity carried by the company worldwide, regardless of its seat, the law of the State according to which the plan was adopted and the law applicable to the individual claim.

8. *Some final remarks.*

EU Private International Law seems to contain the roots for successful cross-border climate litigation, embedding ecology-related values. The availability of agreements on the choice of law after that the event occurred, the possible

⁶⁴ This is what happened in the Brazilian Airline Companies Cases (Superior Court of Justice 20 January 2020, *Public Ministry of the State of São Paulo v United Airlines and Others and Ministério Público do Estado de São Paulo v KLM*). The company was required to provide compensation for environmental damage, especially with regard to the GHGs emission, but the Court decided that the emissions resulting from the normal exercise of said activity were included in the scope of the governmental authorization.

⁶⁵ The polluter pays principle does not leave room to nuance/soften the liability. It requires strict liability, as recalled in the Explanatory Memorandum of the Rome II Regulation.

⁶⁶ Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international law aspects of the future Instrument of the European Union on Corporate Due Diligence and Corporate Accountability, September 2022.

choice among a predetermined set of potentially applicable laws left to the victim only, the interpretation of the classic limits of the conflict of law embedded with ecological values oriented to sustainability targets allow to state that conclusively the system features all the characteristic to work well and to reach its purposes. The practice does not seem to have unparalleled difficulties in the interpretation and the application of these rules, even if sometimes the grounding is not crystal clear. Nevertheless, it is not yet possible to rest on such a positive conclusion. The judgment in *Lluya* confirms that other difficulties might arise, such as giving the evidence, although prima facie for the purposes of Private International Law⁶⁷, that Peru is the place of the damage of an event occurred in Germany. This only means, however, that some more experience in the judiciary at the international level is needed. The first Courts deciding these cases in Europe face a completely new challenge that risks questioning the standard work and the classic judicial categories. These judgments will lay the foundations for the future, since cross border climate change litigation is slowly increasing in Europe. They will also give implicitly a feedback on the functioning of the system, Private International Law included, on which potential future developments will be conceivable.

⁶⁷ CJEU 28 January 2015, *Kolassa*, C-375/13, paras. 61-63; CJEU 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, para. 45; 7 April 2022, *VA*, C-645/20, para. 42; CJEU 6 July 2023, *BM*, C-462/22, para. 37.

THE RELEVANCE OF SPACE AND TIME TO THE DETERMINATION OF THE LAW GOVERNING TORT LIABILITY FROM CLIMATE ALTERING ACTIVITIES

Caterina Benini

SUMMARY: 1. Introduction. – 2. The relevance of space to the determination of the law applicable to climate change tort liability. – 2.1. Liability arising from commissive conduct. – 2.2. Liability arising from omissive conduct in the proper sense, that is, when the damage is caused by the failure to act in accordance with the law. – 2.3. Liability arising from omissive conduct in the improper sense, that is, when the damage is caused by the failure to act in the way the standard of care would have suggested. – 3. The relevance of time to the determination of the law applicable to climate change tort liability. – 3.1. Climate change tort liability arising from a continuous commissive conduct whose commencement predated 11 January 2009. – 3.2. Liability arising from omissive conduct in the proper sense. – 4. Concluding remarks.

1. *Introduction.*

Climate change affects every human and non-human being existing on Earth. It is also a threat to future generations of human and non-human beings.

It is almost impossible to identify where and when, specifically, the effects of climate change are and will be perceived: climate change manifests itself simultaneously at different locations and has distinctively long-lasting effects.

The omni-spatial and omni-temporal dimension of climate change challenges the way in which climate change-related events are appraised by legal rules, notably where the latter are designed to address events that are both space- and time-specific¹. Rules of this kind are found in the context of both private law and private international law.

Civil liability arises, as a rule, where and when the wrongful conduct of a tortfeasor causes a damage to a victim. In climate change cases, it is not clear

¹ C.V. GIABARDO, *Climate Change Litigation and Tort Law. Regulation through Litigation?*, in *Dir. e proc.*, 2019, 381: “Climate change has a *legally disruptive* effect. Climate change has a destabilizing effect on the traditional legal doctrines and the concept of law”.

where and when the GHG emissions alter the climate and contribute to the extreme meteorological event, or other damaging event, at the origin of the prejudice suffered by the claimant ².

Conflict of law rules, in turn, determine the law applicable to a cross-border non-contractual obligation based on where and when the damage and/or the conduct giving rise to it occurred. Climate change-related cases, which are connected to several – if not potentially all – countries of the world and whose effects manifest gradually over time, challenges the mono-dimensional conception of space and time underpinning conflict of law rules.

Against this background, the question arises of whether it makes still sense for conflict of law rules determining the law applicable to liability arising from climate-altering conducts to be space- and time-specific. Or whether such a reliance on space and time is better to be abandoned when it comes to climate change-related cases. This contribution will plead in favor of the former. To explain the reasons underlying such a position, the paper will firstly examine the relevance of space to the determination of the law applicable to climate change liability (2). Subsequently, it will examine the relevance of time for the same purpose (3). Some concluding remarks will follow (4).

2. The relevance of space to the determination of the law applicable to climate change tort liability.

How do spatial circumstances affect the determination of the law applicable to climate change tort liability cases? The question will be discussed below by examining three groups of climate change tort liability cases, each involving a different type of conduct. The term “conduct”, short for “causal conduct” will be used in the following pages instead of “event giving rise to the damage”, which is the notion used in EU private international law to refer to the conduct which causes the damage ³.

² D.A. KYSAR, *What Climate Change Can Do About Tort Law*, in *Environmental Law*, 2011, 3-4: “Built as it is on a paradigm of harm in which A wrongfully, directly, and exclusively injures B, tort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse, disparate in origin, lagged and latticed in effect, anthropogenic greenhouse emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible”.

³ The terminology used is meant to avoid the misunderstandings that may arise from the use of the term “event”, as this may be taken to refer to the consequence (damage) rather than the antecedent (conduct).

The first group encompasses the situations where the causal conduct consists of a commissive action (2.1). The second group includes cases where the causal conduct is in the form of an omission, consisting in the failure to act in the way imposed by the law (2.2). The third group features cases where the cause of the damage is a failure to comply with the relevant standard of care (2.3). Each of these groups requires different space-related considerations, which is the reason why they deserve to be addressed separately.

Such a conduct-based distinction is grounded on the parties' allegations, and, particularly, in tort cases, on the claimant's reconstruction of the causal chain that connects the defendant's conduct with the damage it suffered. This circumstance is the consequence of the fact that, through conflict of laws, the court determines the law under which deciding the merits of the case. Hence, conflict of law reasoning temporally and logically precedes any decision on the merits, meaning that it must be conducted on the basis of the parties' allegations.

The allegations upon which a court relies when identifying the law applicable to the case may be later dismissed at the merits stage because the court finds them unfounded or not supported by facts (the same could apply for issues of international jurisdiction). This outcome, which is nothing more than the consequence that private international law identifies the relevant legal order for cross-border cases rather than providing for a material regulation, does not undermine the validity of the conclusion reached at the conflict of law stage. A court cannot change its decision on the applicable law when, later, at the merits stage, it realizes that the allegations upon which it reached its decision on the applicable law were unfounded. Once the conflict-of-law issue is decided, the validity of such a decision is, so to speak, crystallized at the time the matter is decided, irrespective of what occurs afterwards.

Similarly, it is not possible to deny the relevance of the distinction made in this section based on the type of conduct which is alleged by the claimant to be the cause of damage only because, during the merits phase, a court finds that the conduct in question cannot be characterized as such. The validity of this distinction remains valid for private international law, irrespective of whether the parties' allegations are later dismissed as incorrect or unpersuasive.

2.1. *Liability arising from commissive conduct.*

This first group encompasses cases where the defendant's liability is said to arise from the fact that, through its greenhouse gas emissions, the defendant contributed to the anthropogenic climate change which intensifies the frequency and force of extreme meteorological events of the type of the one that

is at the origin of the damage suffered by the claimants in their right to life, health, and property.

In these types of cases (as for all the cases analyzed in this paper), the defendant is generally a company. Such a company likely belongs to the group of the so-called Global Carbon Majors, a group of almost 180 companies active in the oil, gas, coal and cement sector, which, according to some scientists, are responsible for the 69% of all industrial emissions released since the start of the industrial revolution⁴.

The claimants, in these cases, are individuals, supported by NGOs, who suffered or may suffer violations of their rights in the country where they reside. The country of their residence/domicile is generally a country particularly exposed to the effects of climate change. This country could either be an EU Member State or a non-EU State. A case of the first type is *Hugues Falys et al. v. TotalEnergies SE*, filed by a Belgian farmer and some NGOs against the French energy and petroleum company TotalEnergies in front of the Court of Tournai, Belgium⁵. A case of the latter type is *Saúl Luciano Lliuya v. RWE*, filed by a Peruvian farmer and mountain guide against the German utility company RWE in front of the Court of Essen, Germany⁶.

When a claim of this type is brought before a court of an EU Member State, the seised court must first assess whether it has jurisdiction over the case based on the applicable jurisdictional rules⁷. In case it has it, it shall determine the law applicable to the case.

⁴ R. HEEDE, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, in *Climate Change*, 2014, 229 ff. An updated list of Global Carbon Majors is available on the website www.carbonmajors.org/index.html.

⁵ The petition was filed on 1 March 2024 and the case is still pending. The memorials are available on the website www.climatecasechart.com. According to the information provided by Geert Van Calster, the hearing was scheduled for 19 and 26 November 2025: www.gavclaw.com/2025/02/23/hugues-falys-v-total-a-climate-claim-engaging-heavily-with-private-international-law/.

⁶ The case was ultimately dismissed by the Hamm Higher Regional Court on 28 May 2025 for evidentiary grounds. However, the Court ruled that major GHG emitters can be held liable under civil law for their specific contributions to the climate crisis. The English version of the decision is available on the website www.rwe.climate-case.org. For an analysis, see F.M. KLEIN-J. PETERS, *New Era of Accountability. The precedent of Saúl Luciano Lliuya v. RWE*, June 2025, available at www.rwe.climate-case.org.

⁷ For an analysis of the relevant jurisdictional rules vesting EU Member States courts with jurisdiction over climate change cases, see O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, 111 ff. and the contributions of E. ALVAREZ ARMAS and L. VALKOVA published in this book.

The relevant rule for this purpose is Article 7 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (“Rome II Regulation”) ⁸. Article 7 sets out a specific conflict-of-law rule for environmental damage which reads as follows:

“The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred”.

This conflict rule is unanimously considered as applicable to the type of climate change tort liability cases discussed in this paper, i.e., cases where an individual complains that his or her rights have been or may be violated “as a result of an environmental damage” constituted by an extreme meteorological event (a flood, a hurricane, a windstorm etc.) which has been intensified in frequency and force (also) by the GHG emissions of the defendant ⁹.

Pursuant to this conflict rule, the claimant can decide to base his or her claim on the law of the country where the causal conduct occurred (*lex loci actus*) ¹⁰. If such a choice of law option is not exercised, the law of the country where the damage was or may be suffered (*lex loci laesionis*), which is the law generally applicable to torts under Article 4(1) of the Rome II Regulation, applies.

The fact that Article 7 gives the claimant the possibility to opt between these two laws suggests that it is common for cases falling under Article 7 to have a causal chain geographically fragmented, with the conduct occurring in one

⁸ Published in the *Official Journal of the European Union*, L 199 of 31 July 2007, 40 ff.

⁹ On the contrary, some doubts have been raised as to the applicability of Article 7 of the Rome II Regulation to cases where the State acts as representative of the community *vis-à-vis* the polluting company asking the damages for the environmental harm or the restitution of costs borne by the State for the adoption of preventive and reparative environmental measures. Elsewhere, it has been argued that such cases cannot be subject to the special conflict rule of Article 7 of the Rome II Regulation (and to the Rome II Regulation in general) if, in the legal order of reference, acting in the defence for the environment is a State’s public prerogative, which does not belong to private individuals. On this, see C. BENINI, *Sui giudizi di responsabilità civile intentati contro i c.d. global carbon majors: riflessioni internazionali a margine della climate change litigation*, in *Jus-Online*, 2024, 193 ff.

¹⁰ As clarified by recital 25 of the Rome II Regulation, it is for the *lex fori* (i.e., the law of the seised court) to determine the form and the time by which such a choice of law is to be made by the claimant.

country and the damage sustained in another. Obviously, when this is not the case, the claimant is left with the sole possibility of having its case governed by the law of the country where both the conduct and the damage took place.

There are no statistical data showing whether, in climate change tort litigation cases, the law of the place of damage or the law of the place of conduct applies more frequently¹¹. The two following circumstances suggest that it is more likely that the law of the place of damage applies.

First, in the lack of a choice in favor of the law of the place of conduct which conforms with the requirements of the law of the *forum*, the law of the place of damage applies by default. This entails that whenever the claimant and its legal representatives are not aware of the possibility granted by Article 7 to opt for the law of the place of conduct¹² or, despite being aware of it, they do not conform with the requirements of the *lex fori*, the law of the place of damage applies¹³.

¹¹ In the European Commission: Directorate-General for Justice and Consumers, British Institute of International and Comparative Law (BIICL) and Civic Consulting, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, Publications Office of the European Union, 2021, no ruling has been reported as having applied specifically Article 7 of the Rome II Regulation. Only two rulings in which Article 7 has been applied have been reported by the national rapporteurs who contributed to the study coordinated by Emmanuel Guinchard on the application of the Rome I and Rome II Regulations by courts of EU Member States. See E. GUINCHARD, *Conclusion*, in E. GUINCHARD (ed.), *Rome I and Rome II in Practice*, Cambridge, 2020, 640.

¹² E. GUINCHARD, *Conclusion*, cit., 640 connects the absence of case law on Article 7 “to a lack of in-depth knowledge of the Regulations by practitioners as Article 7 is rather innovative”. In support of his contention, he refers to a Slovenian case where Article 4 was applied instead of Article 7. For a comment on this case, see J. KRAMBERGER ŠKERL-A. GALIČ, *The Application of the Rome I and Rome II Regulations in Slovenia*, in E. GUINCHARD (ed.), *Rome I and Rome II in Practice*, Cambridge, 2020, 531.

¹³ Article 7 of the Rome II Regulation does not impose on the seised court any duty to inform the claimant of its possibility to opt for the law of the place of conduct, if such a law is more favorable to its interests. If the EU legislator really intends to promote the protection of the environment through the choice of law option granted by Article 7, it should consider adding a duty for the seised court to inform the claimant of its right of option on the applicable law. This duty of information already features some provisions of the Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“Brussels I bis Regulation”). Article 26(2) of this Regulation provides, for instance, that whenever a case relates to insurance, consumer or employment contracts, the seised court must satisfy itself that the defendant is informed of its right to contest its jurisdiction before assuming jurisdiction based on the defendant’s entrance into appearance without contesting jurisdiction. E. GUINCHARD, *Conclusion*, cit., 641 agrees that such addition, either in the Rome II Regulation or in a “Rome 0 Regulation” would be

Second, the law of the place of damage is the law with which the claimant is more familiar, being the law of its own country. It is also geographically closer to the place where the protected interests of the claimant have been violated. Therefore, it is reasonable to expect that the claimant and their legal representatives will opt for the application of a law they know (*lex loci laesionis*) instead of one they reasonably do not (*lex loci actus*), and for the application of the law which reflects the values and interests of the place where the claimant's "legal center of gravity" is located.

Both arguments, however, cannot be extended to cases brought from the global South before courts of the global North¹⁴. In these cases, the claimants – which are always assisted by well-prepared lawyers, who are aware of the choice of law option granted by Article 7 – decide to bring the case in front of EU courts because they aim to take advantage of the more favorable legal conditions existing in these countries when it comes to the protection of human rights violated by the negative effects of climate change. These more favorable conditions include the procedural laws of the *forum* and the substantive laws of the country where the conduct took place. Therefore, in these cases, the claimant generally opts for the application of the law of the country where the conduct took place¹⁵.

When no option is exercised in favor of the *lex loci actus*, the seised court shall apply the *lex loci laesionis* to the merits of the case. Such law (as any other law identified as applicable pursuant to the conflict of law rules of the Rome II Regulation) will regulate the issues listed in Article 15 of the Regulation¹⁶. The "basis and extent of liability" and "the grounds for exemption from liability" are included among them.

useful. *Contra* M. BOGDAN-M. HELLNER, *Article 7: Environmental damage*, in U. MAGNUS-P. MANKOWSKI (eds.), *Rome II Regulation Commentary*, Cologne, 2019, 294, who consider that it is for the procedural law of the forum to determine whether the court is permitted or required to inform the claimant of its options under Article 7.

¹⁴ It is worth noting that, in the last years, an increasing number of cases has been filed in front of courts of the global South. On this recent development, see C. RODRÍGUEZ-GARAVITO, *Human Rights: The Global South's Route to Climate Litigation*, in *American Journal of International Law Unbound*, 2020, 39 ff.

¹⁵ This happened, for instance, in *Lliuya v. RWE* case, where the claimant, supported by the NGO Germanwatch, opted for the application of German law, as the law of the place of conduct. On the advantages deriving to Lliuya from the application of German substantive and procedural law, see J.E. SCHIRMER, *Climate Liability After Lliuya v RWE: Causation and Duty Demystified*, in *Journal of European Tort Law*, 2025, 269-270.

¹⁶ The list of matters indicated under Article 15 is not exhaustive. Hence, further issues could be considered as subject to the application of the *lex causae*.

This entails that it is for the applicable law to identify and regulate the constitutive conditions of liability, i.e., those elements without which a person cannot be held liable. Such elements differ from legal system to legal system. For instance, under Italian private law, tort liability can arise when an unjust damage (*danno ingiusto*), a causal link between the damage and the fact, and fault (or willful misconduct) can be identified¹⁷. Under German and Austrian law, tort liability arises when an unlawful act, a damage, a causal link and fault (or willful misconduct) can be identified¹⁸.

The applicable law also identifies and regulates the grounds for exemption from liability, which, to mirror the expression used above, can be defined as the impeditive conditions of liability, i.e., those facts which can excuse the tortfeasor from liability. Also in this respect, each legal order has its own conditions that exclude liability. Under Italian law, the lawfulness of the conduct is one of them (as written above, the violation of the law is not a constitutive condition of liability, but complying with it is an impeditive condition of liability)¹⁹.

The *lex causae* also regulates grounds of limitation of liability, such as contributory negligence by the victim, which could be defined as modificative conditions of liability, since they alter the extent of the tortfeasor's liability.

In climate change tort liability cases, the law of the place of damage – the place where the rights of the claimant have been or may be violated – identifies and regulates both the constitutive, the impeditive and the modificative conditions of liability. This means that in a case brought in front of the court of State X against a defendant seated in State X which, with all likelihood, emitted GHG emissions in State X, the law under which identifying and regulating the conditions for establishing the defendant's liability towards the claimant will be the law of State Y, where the rights of the claimant have been violated.

This outcome appears aligned with two different goals of the EU legislator. On the one hand, it conforms with the goal of ensuring that a single law applies

¹⁷ Article 2043 of the Italian Civil Code. For an in-depth analysis of the constitutive elements of civil liability, and especially of the unjust damage which is a unique feature of the Italian civil system, see C. CASTRONOVO, *La nuova responsabilità civile*, III ed., Milano, 2006, 6 ff.; F. PIRAINO, "Ingiustizia del danno" e anti-giuridicità, in *Europa e diritto privato*, 2005, 703 ff.

¹⁸ The relevant provision in German law is § 823 BGB, and § 1294 ABGB in Austrian law. For a comparative analysis of the structure of tort liability under these and other legal systems, see U. MAGNUS, *Tort Law*, in J.M SMITS *et al.* (eds.), *Elgar Encyclopedia of Comparative Law*, III ed., Cheltenham, 2023, 491 ff.; C. VON BAR, *Tort Law: National Variety and European Perspective*, in *Europa e diritto privato*, 1999, 327 ff.; C. CASTRONOVO, *La nuova responsabilità civile*, cit., 9-26.

¹⁹ F. PIRAINO, "Ingiustizia del danno" e anti-giuridicità, cit., 746, 754.

to all aspects of non-contractual obligations. In the legislator's view, by vesting the applicable law a wide ambit of application, legal certainty and predictability are fostered²⁰. On the other hand, by giving the applicable law a wide ambit of application, the material goal of environmental protection which underpins the claimant's choice of law option under Article 7 is promoted²¹. This is because if the law chosen by the claimant must regulate all the matters listed in Article 15 of the Rome II Regulation, this creates a significant incentive for polluting companies to conform their behavior to the stricter civil liability standards between those existing at the place of the conduct or the place of the (possibly future) damage. Such a deterrent effect would not have been so significant if the applicable law identified under Article 7 – through the claimant's option, if the option is exercised – was given a narrow field of application.

However functional to these two goals the current *status quo* may be, climate change tort liability gives rise to new social justice needs whose satisfaction by the current regulatory framework deserves to be assessed.

The phenomenon of climate change litigation, to which the tort liability cases discussed in this paper belong, has arisen as a form of reaction against governmental inertia in climate change matters²². This origin indicates that the *raison d'être* of climate change tort litigation is not to provide the claimant with the remedy usually associated with this type of civil litigation, that is compensation for damages. Rather, its main goal is to create impetus for a change in corporate environmental behavior, shape new narratives on what is socially expected from corporations *vis-à-vis* the climate and the environment and, ultimately, urge States to take action²³. In other terms, these lawsuits are formally

²⁰ O. BOSKOVIC, *Le domaine de la loi applicable*, in S. CORNELOUP-N. JOUBERT (eds.), *Le règlement communautaire "Rome II" sur la loi applicable aux obligations non contractuelles*, Paris, 2008, 184. As pointed out by I. PRETELLI, *La legge applicabile alle obbligazioni non contrattuali nel Regolamento "Roma II"*, in A. BONOMI (ed.), *Diritto internazionale privato e cooperazione giudiziaria in materia civile*, Torino, 2009, 426, legal certainty and predictability on the applicable law is also fostered by the EU legislator's choice to exclude the operation of the *renvoi* under Article 24 of the Rome II Regulation.

²¹ Recital 25 of the Rome II Regulation explicitly refer to Article 174 TFEU to justify the choice of law option conferred to the claimants under Article 7.

²² On the several purposes of the climate change litigation, see L. SERAFINELLI, *Responsabilità extracontrattuale e cambiamento climatico*, Torino, 2024, 383 ff.; J. PEEL-H.M. OSOFSKY, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, 2015.

²³ P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *Rivista di diritto internazionale privato e processuale*, 2022, 828 ff.; A. SAVARESI-J. AUZ, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, in *Climate Law*, 2019, 245 ff.

grounded in tort and aim at the payment of damages in favor of the claimant (who is generally chosen by NGOs among several people equally affected by the negative effects of climate change). However, their true and final goal is to induce a change in corporations' polluting behaviors. It speaks volumes, in this respect, that even though Lliuya's claim was ultimately dismissed in May 2025 by the Hamm Regional Higher Court, the NGO supporting the case defined such a judgment "a landmark decision for corporate accountability amidst the climate crisis"²⁴.

If things stand in this way, it is legitimate to ask whether the application of the *lex loci laesionis* to both the constitutive, the impeditive and the modificative conditions of liability align with the *raison d'être* of climate change tort liability, or whether it may create obstacles for the pursuit of the goals underpinning this form of strategic litigation.

To answer this question, it is necessary to first identify how climate change litigation pursues its goals within the structure of tort liability. Indeed, even if the ultimate outcome of the private law case (dismissal or acceptance of the claim) is not dispositive of the strategic goals of the climate change litigation, still a tort claim has been filed. Hence, the chessboard on which the strategic game is played is tort law. Which chess pieces (the queen, the king or the tower, which, out of metaphor, are the decision, if any, on damage, on fault, on unlawful conduct) are those which allow the claimant and the supporting NGO to win the strategy game?

If climate change liability cases intend to change the future behavior of corporations, irrespective of whether the request for payment of damages is accepted or not in the specific case, this disqualifies the judgment on the damage as being the one that allows the strategic goals from being reached. If these goals can be reached also when the court dismisses the case and does not award damages to the claimant, this logically entails that the decision on damage – the violation of the claimant's right – and on damages – the pecuniary compensation for such a violation – is not the axis of the strategic litigation.

Rather, if the strategic goal is to shape the future behavior of the defendant and any other corporation, the decision on the defendant's conduct is the one having the most crucial importance. Depending on what the court will say about the defendant's behavior – whether it was socially expected for it to reduce its emissions, whether it was obliged to do so, which consequences will arise from this, etc. – the supporting NGOs will define the final judgment as "a landmark decision

²⁴ F.M. KLEIN-J. PETERS, *New Era of Accountability*, cit., 3.

for corporate accountability amidst the climate crisis” or not. Indeed, what the court will rule about the defendant’s behavior could be applied, with all necessary adjustments, to corporations based in the same country, acting in the same industry and polluting in the same way the defendant in that specific case did.

The decision on the defendant’s conduct is generally found under the court’s reasoning on the unlawfulness of the conduct, the fault of the defendant and the lawfulness of the conduct as an excuse for the defendant’s action. This is not to say that in every judgment all these elements are addressed. Rather, each court addresses only the requirements that represent conditions of liability under the applicable law. For instance, if the law applicable is Italian law, the court will only address, among the elements indicated above, the defendant’s fault as a constitutive element of liability, and the lawfulness of the conduct as an impeditive element of liability. If the applicable law is Austrian law, out of the three, the court will address the unlawfulness of the conduct and the fault of the defendant as constitutive elements of liability.

Since, therefore, the pursuit of the strategic goals of climate change litigation passes through the court’s decision on the defendant’s conduct, generally enshrined in the court’s decision on the (un)lawfulness of the conduct and the defendant’s fault, it is time now to assess whether the fact that these conditions are subject to a law of a country (*lex loci laesionis*) other than the one where the defendant acted (*lex loci acti*), impedes the strategic goals of this type of litigation from being reached.

As is well known, tort liability performs several functions. In addition to the compensatory function, which aims to restore the legal sphere of the person who suffered the damage, it also performs a deterrent/regulatory function²⁵. By establishing private law sanctions upon those who breach the law and infringe others’ legal spheres, tort liability law aims to influence the individuals’ behavior: if they do not violate the law, they do not incur liability, and, hence, they do not have to pay damages.

One of the assumptions upon which the deterrent effect of private law is based is that the law of a given country is conceived as influencing, through the threat of liability, the behavior of the individuals of that same country. If, for instance, Italian law bans smoking on the public street and establishes that those

²⁵ H. KOZIOL, *Comparative conclusions*, in H. KOZIOL (ed.), *Basic Questions of Tort Law from a Comparative Perspective*, Vienna, 2015, 746 ff., where he underlines that in continental private law systems, nobody denies that private law serves also a secondary deterrent function; G. ALPA, *Le funzioni della responsabilità civile e i danni “punitivi”: un dibattito sulle recenti sentenze della Suprema Corte di Cassazione*, in *Contr. impresa*, 2017, 1084-1086.

who violate this law are subject to civil liability, only individuals who happen to be in Italy will change their behavior to avoid incurring (tort) liability *vis-à-vis* the passers-by negatively impacted by their smoking. When these individuals move from Italy to a country where smoking in public is allowed, they will not refrain from doing so just because Italian law prohibits it.

This “territorial delimitation” of the deterrent effects of private law aligns with the fact that each State is an entity governing through different tools, including the law, a community of individuals living in the same territory. This community of individuals expects that the behaviour of all those who happen to be in their same territory conforms to the behavioral rules of that State. In this sense, the legal order of a State can be understood as an “order of behavior”²⁶ of the people living in this community. These people expect all members of their territorial community to conform to the behavioral rules of this State, so they can live in peaceful coexistence. Private law – and in particular liability law – comes into the picture *ex post*, when one of such behavioral rules has been violated, and establishes when the tortfeasor should compensate the victim of the damage suffered. Hence, liability rules of a given State generally graft onto the violation of the rules of conduct of the same State and establish the consequences of such a violation.

What changes in cross-border cases, where the damage and the conduct occurred in different countries?

In this author’s view, nothing changes for the purposes of the deterrent/regulatory effects of private law. To be able to keep performing its “nudging” function, i.e., influencing the behavior of the individuals with the threat of civil liability, liability rules must always graft onto the rules of conduct existing at the place where the individuals are located. It is only in this place, where the tortfeasor and other possible future tortfeasors participate in the community’s life and take action, that their behavior may be influenced by the threat of the civil liability sanction.

Therefore, if the goal of climate change tort liability litigation is to shape and “nudge” the behavior of emitters, liability rules of the law of the place of damage cannot but graft onto the rules of conduct existing at the place where the emitter is located. Only if liability rules – whether those of the country where the conduct occurred or where the damage occurred – graft onto the rules of conduct of the State where the company releases GHG emissions, the

²⁶ W. WENGLER, *La responsabilità per fatto illecito nel diritto internazionale privato. Ricerca di una nuova sistematica*, in *Annuario di diritto internazionale*, Napoli, 1966 (trad. L. Ferrari Bravo), 14.

behavior of the defendant and of corporations seated in the same country and conducting the same type of activities are nudged in their behavior.

This means that if climate change tort litigation wants to pursue its deterrent/regulatory function, the rules of conduct upon which the defendant's behavior is to be assessed in civil liability proceedings cannot but be those of the country where the defendant's conduct took place.

On the contrary, liability rules establishing the conditions under which the tortfeasor must compensate the victim can be derived interchangeably from the *lex loci leasionis*, the *lex loci acti*, the law of the common residence of the parties (art. 4(2)), the law of the place having a manifestly closer connecting with the facts of the case (Article 4(3)), or the law of any other country chosen by the parties (Article 14).

This distinction stems from the fact that, unlike liability rules, rules of conduct are primarily territorial²⁷. Hence, while any legal system can furnish the former type of rules, the latter must be derived exclusively from the law of the State where the conduct took place²⁸.

All this reasoning boils down to the conclusion that the rules of conduct of the country where the emitting company released climate-altering emissions must be considered in climate change tort liability cases.

When the claimant opts for the application of the *lex loci acti* under Article 7, this choice of law already satisfies this need. However, when the *lex loci leasionis* applies by default, the rules of conduct of the place where the emissions were released can be considered through the private international law technique of the *pris en considération* (als known as local data theory)²⁹. This theory underpins Article 17 of the Rome II Regulation, which provides that:

²⁷ On the distinction between loss-distributing rules (liability rules) and conduct-regulating rules (rules of conduct) see S. SYMEONIDES, *Territoriality and Personality in Tort Conflicts*, in T. EINHORN-K. SIEHR (eds.), *Intercontinental Cooperation Through Private International Law. Essays in Memory of Peter E. Nygh*, The Hague, 2004, 425-426.

²⁸ W. WENGLER, *La responsabilità per fatto illecito nel diritto internazionale privato*, cit., 11 ff. distinguishes between rules regulating the basis of tort liability and rules upon which assessing the unlawfulness of the conduct. Based on this distinction, he recognizes the possibility that the rules for the assessment of the conduct can be taken from a legal order different from the one regulating tort liability.

²⁹ On this theory, see, only, A.A. EHRENZWEIG, *Local and Moral Data in the Conflict of Laws: Terra Incognita*, in *Buffalo Law Review*, 1966, 55 ff., and, most recently, M.P. WELLER, *La méthode tripartite du droit international privé: désignation, reconnaissance, considération*, in *Recueil des Cours*, 2022, 147 ff.

“In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability”.

Pursuant to this technique, the rules of conduct of the country where the emissions were released are taken into account “as a matter of fact” when the court decides on the (un)lawfulness of the defendant’s conduct³⁰ and/or on the defendant’s fault/willful negligence.

Since the rules of conduct in question are “downgraded” to facts³¹, this does not jeopardize the unity of the applicable law³², which is and remains the law identified as applicable pursuant to Article 7 (which, in the case here considered, is the *lex loci laesionis*).

It is for the applicable law (*lex causae*) to establish under which conditions the defendant can be held liable *vis-à-vis* the claimant. If, for instance, the

³⁰ By lawfulness of the defendant’s conduct, reference is made to possible bases of exemption from liability which relate to the defendant’s conduct (for instance, when such a conduct is in accordance with an administrative authorization). Even though they are not so much relevant in the climate change cases discussed in this paper, grounds for limitation of the defendant’s liability based on the victim’s negligent conduct shall be subject to the same treatment given to grounds for exemption from liability. The territoriality-based considerations on the regulatory effects of private law also apply to the victim’s conduct. This entails that, whenever the victim’s contributory negligence is to be assessed as a ground for limitation of liability, the rules of conduct of the place where both parties acted shall be taken into account. The same conclusion is reached, through other argumentative routes, by other authors. See I. BACH, *Article 17: Rules of safety and conduct*, in P. HUBER (ed.), *Rome II Regulation: Pocket Commentary*, Munich, 2011, 368; G. WAGNER, *Die neue Rom II-Verordnung*, in *IPRax*, 2008, 6, arguing that this outcome is necessary in order not to reach absurd conclusions; A. MILLS, *The Application of Multiple Laws Under the Rome II Regulation*, in J. AHERN-W. BINCHY (eds.), *The Rome II Regulation on the Law Applicable to non-contractual Obligations: A New International Litigation Regime*, Boston-Leiden, 2009, 151. *Contra*, based on a literal interpretation of Article 17, S.C SYMEONIDES, *Rome II: A Centrist Critique*, in *Yearbook of Private International Law*, 2007, 164.

³¹ According to M. LEHMANN, *Regulation, Global Governance and Private International Law: Squaring the Triangle*, in *Journal of Private International Law*, 2020, 15, this “downgrade” avoids a conflict of duties between the conduct-regulating rules (that he calls regulatory rules) and the applicable law.

³² I. PRETELLI, *La legge applicabile alle obbligazioni non contrattuali*, cit., 461 acknowledges that the unity of the applicable law is only apparent, as the *lex causae* must be coordinated with other laws, which are competent to regulate parts of the liability sequence (“segmenti della fattispecie concreta”) for reasons which prevail upon those underpinning the Rome II’s conflict of law rules. Among these other laws, the law of the place of conduct is mentioned.

applicable law provides for a case of strict liability, this entails that the rules of conduct of the State of the emissions should be taken into account only to assess the (un)lawfulness of the conduct, as no analysis of negligence is required³³. If the applicable law provides, on the contrary, for a fault-based liability rule, then the rules of conduct of the State where the emissions were released should be taken into account when the court assesses both the unlawfulness of the conduct and the fault of the defendant.

The interplay between the *lex causae* and the rules of conduct can be described as follows: the *lex causae* indicates the conditions under which the defendant can be considered liable. When these conditions feature the unlawfulness and negligence of the defendant's conduct – both requirements connected to the territory and social circle in which the defendant is situated and acts³⁴ – the court must determine whether the defendant's conduct is unlawful and negligent based on elements taken from the legal order of the country where the conduct took place.

These elements are not necessarily legal rules. They could also be social norms that operate as standard setters. This is especially true for negligence. Negligence measures whether someone acted with the care a reasonable person in the same shoes would have adopted; when assessing it, it is common to refer to ethical rules or standards of conduct established by private associations active in the defendant's sector of activity³⁵.

³³ This view is not shared by some scholars who argue that whenever the *lex causae* provides for strict liability, it is never appropriate or useful to take into account the rules of conduct of the place where the tortfeasor acted. This position appears based on the assumption, which is not shared by this author, that it is useful to take into account the rules of conduct of the place where the conduct took place only to assess fault. See G. LÉGIER, *Le règlement "Rome II" sur la loi applicable aux obligations non contractuelles*, in *La Semaine Juridique – Édition générale*, 2007, 20; A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford, 2011, 641; I. BACH, *Article 17*, cit., 367; S. MARINO, *La climate change litigation nella prospettiva del diritto internazionale privato e processuale*, in *Riv. dir. int. priv. proc.*, 2021, 924.

³⁴ C. VON BAR, *Environmental Damage in Private International Law*, in *Recueil des cours*, vol. 268, 1997, 369 (on the unlawfulness of the conduct): "[t]he unlawfulness of behaviour [...] is a purely legal question and consequently can only be determined within the framework of the country in which somebody acts". At 380 (on negligence): "[a]s far as the requirements of liability have as a condition negligent behaviour, it can be necessary [...] to consider the standards of care which are allowed at the place of behaviour. Negligence means something differing from that expected of the reasonable man [...]. Decisive for measuring the standard of care is consequently – in substantive law as in the conflict of laws – the surroundings in which the behaviour in question occurs. This area of life is in so many cases decisively characterized by the spatial surroundings [...]"

³⁵ A. DICKINSON, *The Rome II Regulation*, cit., 641 refers to non-legally binding standards

Additionally, administrative/public law authorisations that specify the behavioural rules to be followed by the defendant in a given case can also be considered as rules of conduct³⁶.

Article 17 of the Rome II Regulation provides that the rules of conduct of the place where the tortfeasor acted shall be taken into account by the seised court “in so far as appropriate”. This entails that the court has full discretion in determining whether to avail itself of Article 17 and the technique adopted thereunder when deciding the case brought before it.

Despite this discretionary language, this author believes that in climate change tort liability cases featured by a geographically fragmented causal chain (damage and conduct occurring in different states), which happen to be regulated by the *lex loci laesionis*, it is *always* appropriate for the court to take into account the rules of the country where the tortfeasor acted.

This small adjustment to the traditional interpretation of Article 17 of the Rome II Regulation is necessary to ensure that climate change litigation effectively reaches its strategic goals, and, particularly, the goal of shaping the behavior of corporations with respect to their GHG emissions policies.

2.2. *Liability arising from omissive conduct in the proper sense, that is, when the damage is caused by the failure to act in accordance with the law.*

This sub-section deals with cases where the causal conduct is alleged to be the failure by the defendant to act in accordance with the law, which is, in essence, an inaction. This type of inaction – which will be called omission in the proper sense – is to be distinguished by the “omission” consisting in the failure to act as the standard of care would have suggested (analyzed below in 2.3).

of behavior, such as professional ethical standards. I. BACH, *Article 17*, cit., refers to private rules, such as FIS rules for conducts occurring on a ski slope, and to ethical standards. The same position is shared with respect to Italian private international law (before the adoption of the Rome II Regulation) by A. DAVÌ, *La responsabilità extracontrattuale nel nuovo diritto internazionale privato*, Torino, 1997, 44, where he refers to social norms or habits followed in the place where the conduct took place.

³⁶ This view is almost unanimously shared by scholars. See S. MARINO, *La climate change litigation*, cit., 922-923; H. OFNER, *Die Rom II-Verordnung – Neues Internationales Privatrecht für außervertragliche Schuldverhältnisse in der Europäischen Union*, in *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung*, 2008, 19; S. LEIBLE-M. LEHMANN, *Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht („Rom II“)*, in *Recht der Internationalen Wirtschaft*, 2007, 725.

This distinction is taken from private law studies³⁷. According to private law scholars, an omission, in the proper sense of the word, exists only when a person is bound by the law to do something and such a person fails to act in the way imposed by the law.

In the absence of such legal obligation, every individual is free to determine their own behavior, provided that they remain within the perimeter of legality and they do not interfere with the protected sphere of others (*neminem laedere*).

In climate change liability, the typical case where the causal conduct is alleged to be an omission in the proper sense is when the claimant alleges that the defendant, by not reducing its climate-altering emissions by a given percentage which was imposed upon it by the law of the country where the defendant has its own production sites³⁸, contributed to the extreme meteorological event that is at the origin of the damage it suffered.

Which law applies to such cases, when they are brought in front of jurisdictionally competent EU courts?

Pursuant to Article 7 of the Rome II Regulation, they can be regulated either by the *lex loci laesionis* – the place where the claimant's right (to health, property, life, etc.) has been or may be violated – either by the *lex loci acti* – the place where the defendant's causal omission took place – provided such law has been chosen by the claimant.

As for the latter place, the question arises where the omission took place.

³⁷ G. ALPA, *La responsabilità civile nel diritto comparato*, Milano, 2024, 293-298; G. CRICENTI, *Il problema della colpa omissiva*, Padova, 2002, 55 ff.

³⁸ To amount to a legal obligation whose violation gives rise to an omission in the proper sense, such an emission reduction obligation shall be binding directly for the companies, and not for the State where the company is situated. An obligation of this kind was the one provided by Article 22 of the Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence ("CSDDD"). This provision read as follows: "Member States shall ensure that companies [bound by the CSDDD] adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement [...]". On 9 December 2025, the Council and the European Parliament stroke a deal on the so-called Omnibus Package. This Package aims to simplify sustainability reporting and due diligence duties for businesses through some modifications to, *inter alia*, the CSDDD. As a result of this such regulatory change, Article 22 of the CSDDD has been deleted. See the press release published on the website of the Council of the EU: www.consilium.europa.eu/en/press/press-releases/2025/12/09/council-and-parliament-strike-a-deal-to-simplify-sustainability-reporting-and-due-diligence-requirements-and-boost-eu-competitiveness/.

Localizing an omission may even sound like an oxymoron, since this exercise requires giving a geographical location to something (an omission) that did not happen and did not result in any action in the real world³⁹.

Because an omission does not leave any trace in the real world, the only way to localize it is to focus on the legal obligation the defendant (allegedly) did not comply with. By understanding which action is required by the law, it is possible to identify the place where such a legal obligation should have been complied with by the defendant. The place where the defendant was required to do something under the law coincides with the place where the defendant omitted to comply with the law: the two places are two sides of the same coin. In this sense, localizing an omission is nothing more than localizing the place where legal compliance is required⁴⁰.

When identifying the place where the defendant was required by the law to do something, the court should check whether the law specifies who is responsible for complying with the obligation in question.

Let us assume, for instance, that the law providing the obligation of a company to cut its GHG emissions by a certain percentage establishes that it is for the board of directors of companies to adopt an emission reduction plan. Such an indication clarifies which organ, within the corporate structure, is responsible for the adoption of the reduction plan. Such an indication makes it much easier to determine where the company had to comply with such a legal obligation. It suffices, for this purpose, to identify where the organ in question is located. This place, which in the example is located at the company's central administration, is the place where the omission took place.

However, when the law does not specify who, within the corporate structure, must comply with a given obligation, nothing prevents the court from identifying the place of legal compliance/omission by focusing on the type of conduct imposed by the law. If, for instance, the law establishes that companies must adopt technical systems to reduce the amount of GHG emissions released by their production sites, the content of such an obligation suggests that the place where legal compliance is required is the place where the production site is located.

³⁹ According to E. RABEL, *The Conflict of Laws. A Comparative Study*, vol. II, Ann Arbor, 1960, 312 the question how to localize an omission has "embarrassed" European writers, who "agree that an omission is committed where a duty to act exists, but disagree on the state entitled to impose this duty. Is it the state where the alleged tortfeasor is present at the time and, therefore, would be able to act bodily? Or where he is domiciled? Or, after all, that of the injury? Or, does the criterion vary according to the circumstances?"

⁴⁰ A. DAVÌ, *La responsabilità extracontrattuale*, cit., 29 writes that the relevant place for omissions is where one had the duty to act.

2.3. Liability arising from omissive conduct in the improper sense, that is, when the damage is caused by the failure to act in the way the standard of care would have suggested.

This sub-paragraph is concerned with the cases where the causal conduct is alleged to be an omission in the improper sense, i.e., a failure to act in the way the standard of care would have suggested.

There are plenty of climate change litigation cases falling in this category. An example is *Greenpeace et al. v. ENI et al.*, filed in front of the Tribunal of Rome⁴¹. In this case, the claimants alleged that the defendant failed to adopt an “ambitious” emission reduction plan insofar as it kept releasing a significant amount of GHG emissions⁴². In the lack of a binding legal obligation upon Italian companies to reduce their emissions by a given percentage, this case is one where the alleged omission is derived from the lack of compliance with the standard of care.

As explained above, the alleged causal conduct in these cases, despite often characterized as “omission” by the claimant, is not an omission in the proper sense. Rather, it is an action which, in the claimant’s view, did not adhere to the standard of care a person in the same shoes of the defendant would have followed.

Proper and improper omissions can be distinguished based on the two following grounds.

First, from a factual point of view, while proper omissions are inactions that leave no concrete traces in the real world, improper omissions are actions leaving traces in the real world that are alleged by the claimant to be not in line with the standard of care.

Second, from a normative point of view, while proper omissions arise from the failure to comply with the law, improper omissions derive from the alleged non-adherence with the standard of care. Such a standard is generally not legal

⁴¹ With judgment No 20381/2025, the Joint Sections of the Italian Supreme Court ruled that Italian courts have jurisdiction over this case, based on Article 4 and 7(2) of the Brussels Ia Regulation. The reference made to Article 7(2) of the Brussels Ia Regulation was a blatant mistake by the Supreme Court, as the defendant is an Italian company. Hence, the requisite of Article 7 that the defendant is domiciled in an EU Member State other than the one of the seised court was not met in this specific case. See Cass. civ., S.U., decision of 21 July 2025, n. 20381, 20-23.

⁴² The claimants alleged that the defendant failed to comply with its duty to reduce its GHG emissions. They derived such a duty from the standard of care applicable to companies, which must behave reasonably if the goal to limit global warming to 1.5 degrees Celsius above pre-industrial levels established by the Paris Agreement is to be reached. See Cass. civ., S.U., decision of 21 July 2025, n. 20381, 4-5, 14-15.

in nature. Rather, it is shaped by the social practices followed in given sectors and social circles.

Whenever a tort case arising from an improper omission allegedly committed by the defendant is brought in front of an EU court, which law shall regulate it?

Based on Article 7 of the Rome II Regulation, the case can be governed by the *lex loci laesionis* or by the *lex loci actus*, if the claimant opts for the application of the latter law.

Again, the question arises: where did the improper omission occur? When answering this question, it is important to bear in mind that the causal conduct in these cases is not an omission. Rather, it is an action which, according to the claimant, does not comply with the relevant standard of care.

Therefore, when it comes to identifying the place where the causal conduct occurred, the court should localize it at the place where the company committed the allegedly negligent action. The circumstance that the claimant considers such action to be negligent, i.e., not conforming with the duty of care a reasonable person would have followed, is irrelevant when localizing the causal conduct for the purposes of private international law.

3. The relevance of time to the determination of the law applicable to climate change tort liability.

In the following section, two categories of climate change tort liability cases will be analyzed, namely those arising from continuous actions whose start predated 11 January 2009 (3.1) and those arising from omissive conduct in the proper sense (3.2).

Both categories of cases appear to raise some time-related issues which may impact the determination of the law applicable to climate change tort liability.

3.1. Climate change tort liability arising from a continuous commissive conduct whose commencement predated 11 January 2009.

Article 31 of the Rome II Regulation provides that: “This Regulation shall apply to events giving rise to damage which occur after its entry into force”. The CJEU clarified that this article means that the Rome II Regulation applies to events whose causal conduct occurred on or after 11 January 2009⁴³.

⁴³ Judgment of 17 November 2011, C-412/10, *Homawoo*, ECLI:EU:C:2011:747, para. 37.

It occurs very often that, in climate change tort cases, the claimant identifies the causal conduct in the defendant's release of a significant amount of GHG emissions in the atmosphere. Such commissive conduct is very peculiar from a temporal point of view. Indeed, it is not a conduct that begins and ends at precisely defined moments in time. Rather, it is continuous conduct which has been pursued since the industrial revolution until today as a side effect of certain activities (extraction of fossil fuels, production of energy, production of cement etc.). As recalled above, some scientists have even been able to calculate the amount of overall GHG emissions released from 1751 until today attributable to certain companies.

When a case of this type is filed in front of an EU court ⁴⁴, does it fall under the temporal scope of application of the Rome II Regulation?

This question may be answered in five different ways, namely that: (i) the Rome II applies if the first segment of the causal conduct occurred on or after 11 January 2009; (ii) the Rome II applies if the last segment of the causal conduct occurred on or after 11 January 2009; (iii) the Rome II applies if the segment of the causal conduct which contributed the most to the damage occurred on or after 11 January 2009; (iv) the Rome II applies if all segments of the causal chain occurred on or after 11 January 2009; or (v) the Rome II applies if only one segment of the causal chain occurred on or after 11 January 2009 ⁴⁵.

When opting for one or the other solution, due consideration should be given to the fact that the Rome II Regulation aims to foster legal certainty and predictability in the identification of the law applicable to cross-border non-contractual obligations ⁴⁶. Hardly the fifth solution indicated above, which consists in applying retroactively the Rome II Regulation to torts whose causal chain started before 11 January 2009, would favor such underlying goals ⁴⁷. The

⁴⁴ This occurred in the *Lliuya* case, where the claimant alleged that, based on Heede's scientific data, the defendant was responsible for 0,47% of the overall amount of GHG emissions released in the atmosphere in the period 1751-2010. See the petition of the case available on the website www.rwe.climate-case.org/en.

⁴⁵ P. MANKOWSKI, *Article 31: Application in Time*, in U. MAGNUS-P. MANKOWSKI (eds.), *Rome II Regulation Commentary*, Köln, 2019, 714.

⁴⁶ Recital 6 Rome II Regulation.

⁴⁷ Such solution appears also to be in contrast with the general rule of non-retroactivity of the law. See, on this, J. BASEDOW, *EU Private Law. Anatomy of a Growing Legal Order*, Cambridge, 2021, 367: "the general rule [in EU law] is non-retroactivity, which prevails in the absence of specific reasons flowing from the text, context or purpose of the provision in question. Moreover, exceptions from that general rule cannot be accepted easily".

retroactive application of the law (including the conflict of law rules of the Rome II Regulation) is, by definition, not predictable nor is it capable of promoting certainty in the regulation of private relationships, both of national and of cross-border nature⁴⁸. Hence, it appears more aligned with the goals underpinning the Rome II Regulation to favor the fourth solution above, namely that, in case of continuous conduct whose start predates 11 January 2009, the Rome II Regulation cannot apply⁴⁹. National conflict of law rules shall apply instead.

Despite this, some scholars support the retroactive application of the Rome II Regulation to torts whose first causal segment occurred before 11 January 2009 and whose last segment occurred after such date. They argue that this solution promotes the widest possible application of the Rome II Regulation⁵⁰, and favors a unitary approach to the climate change tort liability case⁵¹.

As for the former argument, the Rome II Regulation does not require its widest possible application. This is shown by the fact that the Rome II Regulation excludes certain civil and commercial matters from its objective scope of application⁵². This limitation in the objective scope of application of the Rome II Regulation indicates that the EU legislator did not intend this Regulation to completely replace the national conflict of law rules in this area of the law⁵³.

As for the latter, a non-retroactive interpretation of Article 31 of the Rome II Regulation does not subject climate change tort liability cases to a fragmented treatment. Simply, it subjects them to the national conflict of law rules of the seised court.

A fragmented treatment would, on the contrary, follow if continuous torts were conceptually divided into two parts: a first part encompassing the conducts which occurred from 11 January 2009 onwards, and a second part encompassing those which occurred before such date. The first part should be

⁴⁸ That non-retroactivity of the law favors legal certainty, in the sense that it does not disrupt the previously acquired rights of individuals, is acknowledged by R. QUADRI, *Dell'applicazione della legge in generale. Art. 10-15*, Bologna, 1974, 85-86.

⁴⁹ X.E. KRAMER, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European Private International Law Tradition Continued*, in *Nederlands Internationaal Privaatrecht*, 2008, 417; M.P. WELLER-M.L. TRAN, *Climate Litigation Against Companies*, in *Climate Action*, 2022, 6-7.

⁵⁰ MANKOWSKI, *Article 31*, cit., 714.

⁵¹ O. FERACI, *Contenzioso climatico e diritto internazionale privato*, cit., 183-184.

⁵² Article 1(2) Rome II Regulation.

⁵³ A replacement of this kind would run against the principles of subsidiarity and proportionality (Article 5(3)(4) TEU) which regulate the exercise of shared competence by the EU.

subject to the Rome II Regulation, while the second part should be subject to national conflict of law rules⁵⁴.

Such a conceptual fragmentation is not possible nor desirable as all segments of the causal chain constitute a *conditio sine qua non* of the alleged damage within the liability sequence.

Even assuming that such fragmentation is possible, by subjecting the first section of the causal chain to national conflict of law rules and the second section to the Rome II Regulation, the two segments of the causal chain may result being governed by different substantive applicable laws. This creates the risk of contradictory judgments on two parts of the same casual chain, which would lead to absurd outcomes.

3.2. *Liability arising from omissive conduct in the proper sense.*

When the causal conduct is identified by the claimant as a (proper) omission on the part of the defendant, does it fall under the temporal scope of application of the Rome II Regulation?

If it is not easy to localize omissions in space, the same holds true even more for their localization in time. It has already been noted that omissions are, in their nature, inactions, which leave no trace in the real world. Omissions, in themselves, have no geographical and temporal projections. How is it then possible to identify when an omission occurs, for the purposes of assessing whether the Rome II Regulation applies?

Similarly to what has been done with respect to the spatial localization of an omission, it is here contended that, to collocate an omission in time, it is necessary to examine the legal obligation the defendant (allegedly) omitted to comply with. Attention should be paid, in particular, to the moment starting from which such an obligation became binding upon the defendant. Indeed, only when the latter became obliged by the law to do something or to act in a given way, could one frame its failure to do so as an omission. Hence, the moment starting from which a legal obligation becomes binding upon the defendant coincides with the moment when the defendant can be said to have omitted to comply with the law.

⁵⁴ A. HALFMEIER, *Articles 31 and 32 Rome II Regulation*, in G.P. CALLIESS-M. RENNER (eds.), *Rome Regulations Commentary*, III ed., Alphen aan den Rijn, 2020, 900; B. DEN TANDT-M. VERHULST, *The Temporal Scope of the Rome II after Homawoo*, in *European Review of Private Law*, 2013, 298. It seems that this position is shared also by E.M. KIENINGER, *Conflicts of Jurisdiction and the Applicable Law in Domestic Courts' Proceedings*, in W. KAHL-M.P. WELLER (eds.), *Climate Change Litigation. A Handbook*, München, 2021, 139.

If such a moment in time is on or after 11 January 2009, this will trigger the application of the Rome II Regulation and of its conflict of law rules. If it is before such a date, then the applicable law shall be determined pursuant to the national conflict of law rules of the seised court.

4. *Concluding remarks.*

This paper started with the question of whether, because of the omni-spatial and omni-temporal dimension of climate change, space and time still matter when determining the law applicable to climate change tort cases. The previous sections have shown that they do.

In this author's view, the relevance of space and time to conflict of law rules is not a legacy from the past, which will soon be overcome by the omni-spatiality and omni-temporality of the problems of this age (such as climate change and digitalization). Rather, they matter because they belong to the toolbox that private international law uses to react to the challenges of climate change.

Instead of giving up its role as coordinator of different legal orders in the face of a phenomenon that cuts across *all* legal orders in the world at potentially *all* times, private international law avails itself of its techniques – which include space- and time-related considerations – to ensure that the regulation it can offer adequately addresses the social needs of human society against the threat of climate change.

By embedding space-related and time-related considerations within the structure of its own rules, and by finding ways to attach spatial and temporal dimensions to facts which appear to have none, private international law aims to provide the *spatially and temporally right* framework upon which each climate litigation case can be decided.

Providing the right framework does not mean mechanically identifying the applicable law, as if nothing changes if the law of a country is applied instead of the law of another. Rather, it means giving relevance to the law of the country whose territory and people are mostly affected by a given climate litigation case. This, in turn, permits giving voice, in court, to the social needs that this affected human collectivity has in the face of climate change.

All things considered, if space- and time-related considerations allow private international law to function properly, then it is preferable for it to uphold them firmly, even in the face of phenomena such as climate change.

SECTION III

LA DIMENSIONE TRANSFRONTALIERA
DEI PRINCIPI ESG:
LA CIRCOLAZIONE DELLE DECISIONI

SFIDE E SPECIFICITÀ DEL CONTENZIOSO TRANSFRONTALIERO IN TEMA DI CAMBIAMENTO CLIMATICO ED EFFICACIA DELLE DECISIONI STRANIERE

Ornella Feraci

SOMMARIO: 1. L'assenza di una prassi in tema di circolazione delle decisioni climatiche rese all'esito di procedimenti di tipo orizzontale. – 2. Le specificità del contenzioso climatico orizzontale di carattere transfrontaliero: la varietà dei *petita* sostanziali oggetto delle domande giurisdizionali. – 2.1. Le decisioni di accoglimento delle domande giurisdizionali aventi ad oggetto un obbligo di fare. – 2.2. Le decisioni volte a condannare la società convenuta a versare una somma di denaro all'attore. – 3. L'incidenza della determinazione della competenza giurisdizionale nello Stato di origine con riguardo alla localizzazione del *locus commissi delicti*. – 4. La possibile natura collettiva delle azioni climatiche orizzontali. – 5. La scarsa possibilità di accordi transattivi climatici e la loro efficacia transfrontaliera.

1. L'assenza di una prassi in tema di circolazione delle decisioni climatiche rese all'esito di procedimenti di tipo orizzontale.

Sempre più spesso privati (individui e/o associazioni impegnate nella tutela dell'ambiente o dei diritti umani) promuovono azioni dinanzi ai giudici nazionali al fine di invocare la responsabilità climatica delle grandi imprese (c.d. *Carbon Majors fossil fuels emitters*), cui sono imputabili le quote più elevate di emissioni di gas a effetto serra a livello globale (c.d. *contenzioso climatico orizzontale*). Contemporaneamente alla crescita esponenziale delle domande climatiche a livello domestico, su scala mondiale, negli ultimi anni, si registra altresì una tendenza dei privati ad avviare anche giudizi climatici aventi un'esplicita dimensione transfrontaliera (*contenzioso climatico orizzontale di carattere transfrontaliero*), tesi a far valere la responsabilità extracontrattuale delle imprese convenute per i danni derivanti dagli effetti avversi del cambiamento climatico di tipo antropogenico. Il contenzioso climatico orizzontale, come anche quello verticale (c.d. *public climate change litigation*), ossia promosso da privati nei confronti

degli enti pubblici, ha una dimensione eminentemente strategica, essendo teso non solo a comporre un conflitto tra le parti della controversia, ma, più in generale, a indurre l'impresa convenuta ad adottare *business models* effettivamente sostenibili, in grado di contrastare le conseguenze negative del cambiamento climatico. In questo senso, il giudizio civile in questione mira a promuovere un obiettivo riformatore e il valore politico della causa prescinde dall'esito finale del procedimento¹. Giudizi climatici di questo tipo sono idonei quindi da soli a fare pressione sulle imprese alla luce anche della prospettiva di un danno reputazionale e/o finanziario per le stesse, anche solo indirettamente derivante dalla mera pendenza del giudizio o direttamente discendente da eventuali sentenze di accertamento della responsabilità.

Sebbene il fenomeno in rilievo sia in costante crescita, non si registra ancora, a livello internazionale, una prassi concernente la circolazione transfrontaliera delle decisioni rese nell'ambito di questo specifico filone giurisprudenziale².

Le ragioni di questo stato dell'arte possono essere rintracciate nella combinazione di due diversi fattori.

Il primo attiene all'ontologia del contenzioso climatico orizzontale a carattere transfrontaliero, in particolare a due delle specificità che lo caratterizzano e di cui parlerò diffusamente nei prossimi paragrafi, ossia alla varietà dei *petita* che formano l'oggetto delle domande climatiche in rilievo, da un lato, nonché alla generale tendenza degli attori a incardinare l'azione dinanzi ai giudici dello Stato in cui l'impresa convenuta è domiciliata, dall'altro.

Il secondo elemento concerne il carattere ancora embrionale e incerto del contenzioso in esame. Questa linea di attivismo giurisdizionale risulta infatti ancora piuttosto incerta negli esiti. Sono infatti vari gli ostacoli che possono minare la fruttuosità pratica delle azioni orizzontali, il cui esito dipende, in larga misura, dal diverso grado di duttilità delle norme processuali applicate (quali, ad esempio, quelle volte a disciplinare nel foro la legittimazione ad agire per la tutela del bene pubblico e collettivo protetto – il clima – attraverso azioni collettive) e dal contenuto delle norme privatistiche di volta in volta materialmente

¹ Così P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in M. FRULLI (a cura di), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea*, Napoli, 2023, 199 ss., e in *Riv. dir. int. priv. proc.*, 2022, 831 ss.

² Il presente scritto riproduce riflessioni già sviluppate, in modo più ampio, nell'ambito del mio lavoro monografico, dal titolo *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, pubblicato nel quadro del progetto di ricerca nel quale si inserisce anche il presente volume collettaneo. Per una visione complessiva e più estesa del fenomeno in esame rinvio, pertanto, in generale, a tale studio.

invocate³. Lo strumentario rimediale offerto dal diritto nazionale nei rapporti tra privati è solitamente rinvenuto nelle regole sulla responsabilità civile, in assenza di relazioni di mercato tra le parti coinvolte nel giudizio, nella regola sul *duty of care*, ricavata sulla base sia di norme civilistiche interne sia di parametri normativi tratti dal sistema convenzionale di tutela dei diritti umani, nonché, infine, talora, nelle regole civilistiche nazionali dettate in materia di proprietà.

Nello sforzo di superare questo dato iniziale negativo, è possibile tuttavia trarre alcuni elementi utili a supportare una riflessione scientifica sulle sfide e specificità del contenzioso climatico rispetto alla questione dell'efficacia delle decisioni straniere, attraverso l'osservazione dei casi, già decisi (o ancora pendenti), dai (dinanzi ai) giudici degli Stati *lato sensu* europei, ossia degli Stati membri dell'Unione europea o di Stati terzi, geograficamente riconducibili al continente europeo e vincolati da un regime internazionale parallelo (la Convenzione di Lugano del 2007, applicabile nei rapporti tra Stati membri dell'Unione e Norvegia, Islanda e Svizzera⁴) a quello uniforme dettato dal regolamento (UE) 2012/1215 sulla competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni nella materia civile e commerciale (c.d. Bruxelles I-*bis*). Se assumiamo come prospettiva di analisi del fenomeno in esame quella dei giudici degli Stati membri, la questione della circolazione transfrontaliera di decisioni rese all'esito di giudizi climatici di tipo orizzontale risulta ad oggi variamente regolata: ossia, a seconda dei casi, dalle norme del regolamento Bruxelles I-*bis* sopra evocato, dalla Convenzione di Lugano del 2007, dalle norme contenute nella Convenzione de L'Aja del 2 luglio 2019, sul riconoscimento e l'esecuzione delle decisioni straniere in materia civile e commerciale (d'ora in avanti: Convenzione de L'Aja del 2019), alla quale tutti gli Stati membri sono vincolati sul piano internazionale, o infine, in via residuale, dalle norme nazionali dello Stato membro richiesto.

Lo stadio di sviluppo del giudizio climatico o il suo esito negativo contribuiscono a spiegare l'assenza di una prassi in tema di circolazione transfrontaliera delle decisioni climatiche: alcuni giudizi, infatti, si trovano in una fase ancora troppo anticipata del procedimento di primo grado, come nella causa *Falys c. TotalEnergies*⁵ (d'ora in poi: *Falys*), allo stato ancora pendente dinanzi al giudice

³ Cfr. per una ricognizione complessiva dei profili materiali connessi alla responsabilità extracontrattuale invocata in questi giudizi: L. SERAFINELLI, *Responsabilità extracontrattuale e cambiamento climatico*, Torino, 2024.

⁴ Convenzione concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale conclusa a Lugano il 30 ottobre 2007.

⁵ *Hugues Falys, FIAN, Greenpeace, Ligue des droits humains v. TotalEnergies*, <https://climatecasechart.com/non-us-case/hugues-falys-fian-greenpeace-ligue-des-droits-humainsv-totalenergies-the-farmer-case/>. Si veda anche il sito della causa: <https://www.thefarmercase.be>.

belga (Tribunale commerciale di Tournai) e sulla quale è attesa una decisione tra la fine del 2025 e l'inizio del 2026. Lo stesso vale per il caso *Asmania e altri c. Holcim*⁶ (d'ora in avanti: *Asmania*), giudizio promosso in Svizzera dinanzi al Tribunale distrettuale del cantone di Zugo da alcuni abitanti dell'isola indonesiana di Pari contro la società Holcim – colosso mondiale nella produzione del cemento nonché uno dei 50 maggiori emettitori di CO₂ a livello globale – e che, nel momento in cui si scrive, si trova nelle prime fasi del giudizio di primo grado. In altri casi, invece, la domanda è stata rigettata nel merito, come è di recente avvenuto in *Lliuya c. RWE*⁷ (d'ora in avanti: *Lliuya*).

Non si tratta però soltanto di una questione legata ai tempi di svolgimento di taluni contenziosi e al rigetto nel merito della domanda di altri. Sulla mancata formazione di una prassi sulla circolazione transfrontaliera delle decisioni climatiche hanno inciso, a mio avviso, anche due specificità del contenzioso in esame.

2. *Le specificità del contenzioso climatico orizzontale di carattere transfrontaliero: la varietà dei petita sostanziali oggetto delle domande giurisdizionali.*

Il primo profilo che contribuisce a spiegare l'assenza di una prassi in materia e che rappresenta una delle peculiarità del contenzioso climatico orizzontale di carattere transfrontaliero in atto attiene alla natura delle domande giudiziarie oggetto del contenzioso in esame, ossia alla varietà dei *petita sostanziali* che formano l'oggetto delle azioni di specie.

⁶ *Asmania et al. v. Holcim*, <https://climatecasechart.com/non-us-case/four-islandersof-pari-v-holcim/>. L'azione è stata avviata da quattro pescatori dell'isola di Pari, nell'oceano Pacifico occidentale indonesiano, la cui vita è seriamente minacciata dal progressivo innalzamento del mare derivante dal cambiamento climatico.

⁷ Cfr. https://www.climatecasechart.com/document/luciano-lliuya-v-rwe-ag_dd33. Con tale azione, un agricoltore nonché guida di montagna peruviano, sig. Saul Luciano Lliuya, aveva citato in giudizio dinanzi al Tribunale di Essen, in Germania, la società tedesca RWE, che rappresenta il più grande produttore tedesco di energia elettrica, sostenendo che, a causa del surriscaldamento globale, il ghiacciaio che sovrasta il lago Palcacocha nella cordigliera delle Ande Peruviane, situato sopra il villaggio dell'attore, si sta progressivamente sciogliendo, con il rischio di favorire valanghe nonché una possibile esondazione del lago oltre la diga di protezione, che distruggerebbe la cittadina sottostante, nonché l'abitazione dello stesso Lliuya. Con sentenza del 28 maggio 2025, la Corte d'appello regionale ha rigettato nel merito la domanda, non ritenendo provato il rischio di un danno concreto alla proprietà dell'attore; essa, tuttavia, ha affermato la possibilità che le *Carbon Majors*, come RWE, possano essere dichiarate responsabili per le loro condotte climateranti sulla base del diritto tedesco invocato come applicabile nella fattispecie. Cfr. Oberlandesgericht 5 U 15/17 OLG Hamm. La sentenza è definitiva, non essendo ammessi ulteriori mezzi di ricorso in base al diritto processuale civile tedesco applicabile.

Le domande in questione, infatti, pur condividendo una comune dimensione extracontrattuale (*tort-based claims*), invocano, di volta in volta, strumenti rimediali diversi, secondo uno schema complessivo che può essere essenzialmente ricondotto a tre diverse finalità.

Possono infatti aversi, in primo luogo, azioni dirette ad affrontare le cause del cambiamento climatico. Tali azioni mirano a ottenere risarcimenti in forma specifica per danno derivante dal *climate change*, essendo dirette ad assicurare, congiuntamente alla richiesta di risarcimento danni o anche autonomamente, un impegno della società convenuta a realizzare una sensibile riduzione della quantità di emissioni climalteranti nell'atmosfera entro un certo periodo di tempo (c.d. *mitigation measures*). In tale evenienza la domanda giudiziale è tesa così ad accordare all'attore tutele rimediali di tipo inibitorio.

In secondo luogo, le cause climatiche in esame possono essere tese a gestire le conseguenze (effettive o potenziali) del cambiamento climatico, ossia i danni che ne derivano o che potrebbero in futuro derivarne, stabilendo le responsabilità di natura extracontrattuale della società convenuta e condannando quest'ultima al relativo risarcimento dei danni (economici e non-economici⁸), presenti o futuri, cagionati ai singoli e a gruppi di persone dai fenomeni atmosferici derivanti dal riscaldamento terrestre (c.d. *compensation claims for climate-related damages* o *polluter pays claims*). A tale riguardo, le azioni climatiche orizzontali in esame possono mirare a ottenere un risarcimento per equivalente, ossia un provvedimento giudiziario teso a imporre all'impresa convenuta di contribuire finanziariamente alla realizzazione di misure di protezione dei beni e delle persone minacciate dai potenziali effetti avversi del *climate change*, per un importo proporzionale alla quota di responsabilità climatica gravante sull'impresa (c.d. *adaptation claims*). Solitamente, infatti, tale richiesta di riparazione è formulata in termini di "responsabilità *pro quota*", venendo ossia commisurata alla quantità di emissioni prodotta dall'impresa convenuta calcolata su base percentuale a livello mondiale (*share of global greenhouse gas emissions*), conformemente alle risultanze scientifiche elaborate sul punto⁹.

⁸ Il danno non economico in questo settore designa perdite di valore di natura non commerciale ma tuttavia significative per le persone interessate, come, ad esempio, la perdita di biodiversità o di un territorio a causa dell'innalzamento del livello del mare derivante dal *climate change*.

⁹ Si vedano in proposito le risultanze dello studio scientifico di R. HEEDE, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers 1854-2010*, in *Climate Change*, 2014, 229 ss.; M. GRASSO-R. HEEDE, *Time to pay the piper: Fossil fuel companies' reparations for climate damages*, in *One Earth*, 2023, 459 ss. Cfr. altresì: <https://carbonmajors.org/briefing/The-Carbon-Majors-Database-26913>.

Infine, possono essere promosse azioni che perseguono contemporaneamente una combinazione dei due suddetti approcci: i *petita* sostanziali appena menzionati possono cioè essere combinati tra loro, formando l'oggetto di un'unica domanda.

2.1. *Le decisioni di accoglimento delle domande giurisdizionali aventi ad oggetto un obbligo di fare.*

Se osserviamo gli scenari appena sopra evocati nel campo di osservazione geografico selezionato, è possibile, in primo luogo, evidenziare alcune implicazioni giuridiche attinenti al profilo dell'efficacia transfrontaliera delle decisioni. Rispetto a sentenze di accoglimento di domande tese a ottenere una sensibile riduzione complessiva delle emissioni climalteranti imputabili all'impresa convenuta (obbligo di *facere*), occorre rilevare che, per la natura ingiuntiva e incoercibile della misura giudizialmente invocata, tali decisioni non richiedono l'attivazione di un successivo procedimento di esecuzione all'estero. Nell'ipotesi di un mancato adempimento spontaneo di un provvedimento giurisdizionale di carattere inibitorio da parte dell'impresa rimasta soccombente nello Stato di origine non si pone infatti l'esigenza di attivare un giudizio all'estero di esecuzione della decisione, al fine di dichiarare quest'ultima idonea a costituire titolo per dare luogo ad esecuzione forzata nello Stato richiesto, posto, come accennato, che il provvedimento ingiunge obblighi non coercibili in forma specifica. Ciò emerge con estrema evidenza nel caso *Milieudéfensie et alii c. Royal Dutch Shell* (d'ora in avanti: *Shell*)¹⁰, ove la sentenza di primo grado resa dalla Corte distrettuale de L'Aja, il 26 maggio 2021¹¹, ha condannato la Royal Dutch Shell a ridurre il volume complessivo di tutte le sue emissioni (ambito 1, 2 e 3) di CO₂ nell'atmosfera (e del suo gruppo) “*due to the business operations and sold*

¹⁰ Cfr. https://www.climatecasechart.com/document/milieudéfensie-et-al-v-royal-dutch-shell-plc_c3e4?q=shell. Con atto di citazione del 5 aprile 2019 l'associazione olandese per le questioni ambientali Milieudéfensie e altre ONG operanti nei Paesi Bassi (Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief e ActionAid), unitamente a 17.395 individui, cittadini olandesi, hanno avviato una causa nei confronti di Royal Dutch Shell plc (RDS), società madre del gruppo Shell, dinanzi alla Corte distrettuale de L'Aja. La convenuta è una società di diritto inglese con sede legale (*registered office*) a Londra e sede operativa principale all'Aia, nei Paesi Bassi. Da tale Stato Shell gestisce, in qualità di società madre, il gruppo Shell e le sue controllate, assumendo le decisioni strategiche aziendali, inclusa la policy climatica.

¹¹ Per il testo in inglese della sentenza si rinvia a https://www.climatecasechart.com/documents/milieudéfensie-et-al-v-royal-dutch-shell-plc-judgment_4679?q=shell.

energy-carrying products” di almeno il 45% entro il 2030 rispetto ai livelli del 2019. Tale sentenza, com’è noto, è stata di recente riformata in secondo grado, con decisione del 12 novembre 2024¹², nella quale la Corte di appello de L’Aja ha stabilito che non è possibile imporre a Shell uno specifico obbligo giuridico di riduzione e che, rispetto agli obblighi relativi agli ambiti 1 e 2, Shell ha compiuto passi soddisfacenti in vista del raggiungimento del proprio obiettivo di riduzione (più severo) del 45% di emissioni entro il 2035 rispetto ai valori del 2016. Il giudizio è attualmente pendente dinanzi alla Corte suprema olandese.

2.2. *Le decisioni volte a condannare la società convenuta a versare una somma di denaro all’attore.*

Diversamente, le decisioni tese a condannare l’impresa convenuta a versare una somma di denaro in favore dell’attore (individuale o collettivo), a titolo di risarcimento per il danno climatico cagionato allo stesso o a titolo di misura preventiva di carattere riparatorio, per il rischio che un danno da cambiamento climatico possa verificarsi nei confronti dell’attore, avendo effetti di natura esecutiva, potrebbero, in caso di inadempimento spontaneo, dare luogo a un procedimento di esecuzione dinanzi al giudice di un diverso Stato, ove l’impresa convenuta possieda beni suscettibili di esecuzione forzata. Tale considerazione vale tuttavia solo in linea di principio. Se si considera infatti la prassi esistente, allorquando gli attori hanno chiesto una condanna di tipo risarcitorio, per il ripristino dello *status quo ante* o per la messa in sicurezza dei luoghi e dei beni privati minacciati da un danno climatico potenziale (anche eventualmente in combinazione con la domanda principale di natura ingiuntiva), hanno domandato solitamente una somma modesta (se commisurata alle effettive capacità economiche della società convenuta), calcolata sulla base della percentuale di responsabilità gravante sull’impresa rispetto all’insieme globale delle emissioni di gas ad effetto serra realizzate dalle *Carbon Majors* nell’atmosfera (sistema del “*fair share*”). Questa soluzione è accolta, ad esempio, in *Lliuya*, ove l’attore aveva chiesto al giudice tedesco di determinare “that the respondent is liable, proportionate to its level of impairment (share of global greenhouse gas emissions), to cover the expenses for appropriate safety precautions in favour of the claimant’s property from a glacial lake outburst flood from Lake Palcacocha. The defendant is supposed to have contributed

¹² Per il testo inglese della sentenza si rinvia a https://www.climatecasechart.com/documents/milieudefensie-et-al-v-royal-dutch-shell-plc-judgment_7bfb?q=shell.

to this state to a degree of 0.47 per cent, proportional to its share of worldwide greenhouse gas emissions”¹³.

Lo stesso metodo di formulazione della domanda risarcitoria è stato seguito anche nel caso *Asmania*, ove gli attori, oltre alla domanda di riduzione delle emissioni (da ambito 1 a 3) dell'intero gruppo Holcim entro il 2030 e il 2040¹⁴, hanno chiesto alla società convenuta di contribuire finanziariamente alla realizzazione delle misure di adattamento sull'isola di Pari, al fine di riparare e prevenire i danni subiti dagli attori per effetto dell'innalzamento del livello del mare generato dal cambiamento climatico, in proporzione al contributo complessivo della società e del suo gruppo al *global warming*, ossia in una misura pari allo 0,42%. Laddove in futuro il giudice svizzero dovesse accogliere le domande risarcitorie degli attori, si potrebbe ipotizzare, quindi, in caso di mancato adempimento spontaneo, uno spazio per un'esigenza di esecuzione della relativa decisione in Stati membri dell'Unione ove la Holcim è collegata.

In alternativa, la richiesta di una condanna risarcitoria nelle azioni climatiche in rilievo può avere un ammontare simbolico, non essendo la domanda volta a ottenere il ristoro economico del danno climatico materialmente subito dall'attore quanto piuttosto un drastico e fattivo mutamento di atteggiamento delle condotte industriali dell'impresa, in linea con gli obiettivi di tutela del clima terrestri sanciti a livello internazionale. Ciò trova chiara espressione in *Falys*¹⁵, ove l'attore ha infatti chiesto la condanna della società TotalEnergies, società europea di diritto francese con sede legale a Parigi, a pagare un risarcimento dei danni “*pour la partie du dommage passé et futur qui n'est pas réparable en nature*”, pari ad 1 Euro, a titolo di pregiudizio materiale, per i diversi episodi climatici estremi subiti dall'azienda agricola dell'attore dal 2016 al 2022 e per la riduzione del bestiame e di un ulteriore Euro a titolo di pregiudizio morale. Inoltre, Falys ha chiesto, a titolo principale, che venga ingiunto alla società convenuta “*pour prévenir la survenance d'un dommage futur et certain, dont une partie est déjà réalisée*”, di interrompere immediatamente gli investimenti nei suoi progetti d'energia fossile (gas e petrolio); ridurre le emissioni di gas ad effetto serra legati alla produzione e alla fornitura di energia fossile di almeno il 60% entro il 2030 rispetto ai livelli del 2023; ridurre la produzione di petrolio e gas di

¹³ Cfr. atto di citazione *Lliuya*, traduzione inglese.

¹⁴ A titolo di condanna di natura inibitoria, gli abitanti dell'isola indonesiana hanno chiesto al giudice svizzero di ingiungere a Holcim di ridurre le proprie emissioni di CO₂ del 43% entro il 2030 e del 69% entro il 2040 rispetto alle emissioni del 2019, in linea con l'obiettivo stabilito dall'Accordo di Parigi sulla limitazione del riscaldamento globale a 1,5 gradi.

¹⁵ Cfr. atto di citazione *Falys*, 128.

percentuali consistenti e progressive entro il 2030, il 2040 e il 2050¹⁶; adottare e comunicare all'attore un piano di transizione "realista", inclusivo dei suddetti obiettivi, fondato sulle migliori conoscenze scientifiche attuali e allineato agli obiettivi dell'Accordo di Parigi¹⁷.

Occorre infine osservare che il Sig. Falys ha inoltre accompagnato la richiesta dell'ordine ingiuntivo sopra dettagliato con la richiesta, di natura accessoria, di condannare la società TotalEnergies, a titolo di *astreinte*, in conformità all'art. 1385-*bis* del *Code judiciaire* belga, corrispondente a una penalità di mora pari a 1 milione di euro, per ogni mese di ritardo nell'adempimento della suddetta prestazione principale¹⁸. Tale istituto, di derivazione francese, assurge, com'è noto, a tecnica di coercizione indiretta, ossia d'induzione all'adempimento mediante una pressione sul convenuto a tenere il comportamento dovuto, ma opera anche come strumento sanzionatorio, di applicazione giudiziale. In caso di accoglimento della domanda attorea, pertanto, potrebbe essere necessario avviare in Francia, ove la TotalEnergies è domiciliata, un procedimento di esecuzione limitato al capo della futura decisione belga, volto a condannare la suddetta impresa al pagamento dell'*astreinte*.

Con riguardo all'eventuale esigenza di eseguire in uno Stato membro un provvedimento di *astreinte*, ossia una misura coercitiva indiretta finalizzata all'attuazione di obblighi di *facere* disposti dal giudice di un diverso Stato membro, avente natura ancillare e subordinata all'ordine ingiuntivo principale (nel caso di specie, quello volto a imporre la riduzione delle emissioni climalteranti dell'impresa), l'art. 55 del regolamento Bruxelles I-*bis* – che sarebbe applicabile al caso di specie, essendo la situazione puramente intra-europea e ricadente nel campo di applicazione dello strumento – stabilisce che "le decisioni emesse in uno Stato membro che dispongono il pagamento di una penalità sono esecutive nello Stato membro richiesto solo se l'ammontare di quest'ultima è stato definitivamente fissato dall'autorità giurisdizionale d'origine"¹⁹. L'esecutività della decisione in esame

¹⁶ In particolare, Falys ha chiesto che la società riduca la sua produzione di petrolio del 47% entro il 2030, del 75% entro il 2040 e del 90% entro il 2050 rispetto ai livelli del 2020; la sua produzione di gas del 47% entro il 2030, del 75% entro il 2040 e dell'85% entro il 2050 rispetto ai livelli del 2020.

¹⁷ Cfr. atto di citazione *Falys*, 128.

¹⁸ "Assortir l'ensemble de ces injonctions d'une *astreinte* d'un million d'euros par mois de retard à respecter les injonctions à intervenir", così atto di citazione *Falys*, 129. L'esigenza di prevedere un'*astreinte* per l'attore è giustificata "vu l'attitude générale de TE et son absence manifeste de volonté de mettre en oeuvre une réelle stratégie de transition" (*ibidem*, 127).

¹⁹ E. VALLINES GARCÍA, *Article 55*, in M. REQUEJO ISIDRO (ed.), *Brussels I bis. A commentary*

sarebbe dunque subordinata alla definitività della liquidazione. Siffatta penalità di mora potrebbe peraltro essere contenuta in un provvedimento separato da quello di natura inibitoria di carattere principale o in un capo della decisione climatica: in tale seconda ipotesi, si dovrà richiedere, ove necessario, l'esecuzione in altro Stato membro, della sola parte contenente l'*astreinte*, sulla base dell'art. 55 del suddetto regolamento. Tale norma, tuttavia, lascia impregiudicate le modalità della liquidazione delle misure in questione, cosicché sul punto si dovrà rinviare alla legislazione nazionale dei singoli Stati membri.

3. *L'incidenza della determinazione della competenza giurisdizionale nello Stato di origine con riguardo alla localizzazione del locus commissi delicti.*

Una seconda specificità del contenzioso climatico orizzontale di tipo transfrontaliero, che può essere rinvenuta nell'ambito della prassi ricadente, ai fini della determinazione della giurisdizione internazionale, nel campo di applicazione del regolamento Bruxelles I-*bis* o in quello parallelo della Convenzione di Lugano del 2007, e che incide altresì sull'assenza, allo stato, di una prassi in tema di circolazione all'estero della decisione climatica, attiene alla soluzione raggiunta sul piano della competenza giurisdizionale nello Stato di origine della decisione con riguardo alla questione della localizzazione del *locus delicti*. Può infatti esservi un maggiore interesse a eseguire all'estero una decisione climatica avente ad oggetto una condanna pecuniaria, laddove essa sia stata emessa dal giudice del foro speciale del *locus commissi delicti* (enunciato dall'art. 7, n. 2 del regolamento Bruxelles I-*bis* o dall'art. 5, n. 3 della Convenzione di Lugano del 2007), allorquando, in particolare, quest'ultimo sia stato identificato nel luogo del danno, essendo verosimile che in tale Stato l'impresa soccombente non abbia beni significativi da sottoporre a esecuzione forzata. In particolare, in tale evenienza potrebbe essere conveniente avviare un procedimento di esecuzione della decisione di condanna nel diverso Stato ove si trova la sede dell'impresa e dove verosimilmente è localizzato un numero consistente di beni. Tuttavia, nel momento in cui si scrive, si registra un

on Regulation (EU) No 1215/2012, Cheltenham UK-Northampton MA, USA, 2022, 744 ss.; J. FITCHEN, *The Enforcement of Penalty Provisions in Member State Judgments (Art. 55)*, in A. DICKINSON-E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, 2015; X. KRAMER, *Article 55*, in U. MAGNUS-P. MANKOWSKI (eds.), *European Commentaries on Private International Law: Brussels I bis Regulation*, Colonia, 2016.

solo caso in cui il potere di *jus dicere* è stato determinato sulla base del foro speciale del regolamento (o della Convenzione di Lugano del 2007), nella sua declinazione di *locus damni*. In *Falys*, infatti, l'attore ha promosso l'azione dinanzi al giudice del luogo del danno, il quale, nel caso di specie, era occorso in Belgio, ove si trova l'azienda agricola dell'attore, la quale nel corso degli anni era stata ripetutamente danneggiata dai ricorrenti fenomeni climatici estremi. Resta oltretutto controverso, sul piano del diritto internazionale privato, rinvenire con esattezza i contorni geografici del *locus damni* richiesto dal foro speciale in esame, ai fini della determinazione della giurisdizione in questo contesto²⁰. Nei giudizi climatici in rilievo, infatti, la conseguenza dannosa occorsa sul piano della sfera giuridica degli attori costituisce tecnicamente il portato indiretto dell'inquinamento atmosferico prodotto dall'eccessivo rilascio di gas a effetto serra di origine antropica, dai quali deriva un eccesso di concentrazione di anidride carbonica che, combinata con altri fattori, anche di natura ambientale, non sempre prevedibili e diffusi anche su un lungo arco temporale, si traduce infine nell'aumento delle temperature terrestri da cui poi dipenderanno eventi climatici estremi o a lenta insorgenza, idonei a cagionare danni alla vita umana e alla natura terrestre. Ciò che esprime il carattere eccezionale del fenomeno e che lo distingue, a mio avviso, dal classico danno ambientale transfrontaliero²¹, ai fini del trattamento delle situazioni di specie sia sotto il profilo dell'individuazione della legge applicabile sia sotto il profilo della determinazione della competenza giurisdizionale.

Qualora, invece, l'attore avesse optato, in base alla teoria dell'ubiquità enunciata, com'è noto, rispetto al suddetto titolo speciale, dalla nota sentenza *Mines de Potasse d'Alsace*²², in favore del giudice dell'azione, in forza delle diverse teorie sulla localizzazione del *locus actus* operanti nel quadro del regolamento

²⁰ Sul punto rinvio a O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 131 ss.

²¹ Cfr. O. FERACI, *ibidem*, 37 ss.

²² Corte giust., 30 novembre 1976, *Mines de potasse d'Alsace SA*, causa C-21/76, ECLU:EU: C:1976:166. Tale sentenza ha interpretato la nozione di "luogo dell'evento dannoso", rilevante ai fini del foro speciale in tema di responsabilità da fatto illecito, enunciato nell'art. 5, n. 3 della Convenzione di Bruxelles del 27 settembre 1968 sulla giurisdizione, il riconoscimento e l'esecuzione delle decisioni nella materia civile e commerciale (oggi nell'art. 7, n. 2 del regolamento Bruxelles I-bis). Secondo tale orientamento laddove l'evento causale sia localizzato in uno Stato membro diverso da quello dove si verifica il danno, l'attore di un giudizio di responsabilità civile transfrontaliero può radicare l'azione, a sua scelta, sia dinanzi al giudice del luogo della condotta lesiva (*locus actionis*) sia dinanzi al giudice del luogo dove si verificano le conseguenze dannose (*locus damni*).

Bruxelles I-*bis*²³ (e, per estensione, nell'ambito della Convenzione di Lugano del 2007), gli scenari potrebbero essere diversificati. Laddove il foro sia fatto coincidere con il luogo della decisione aziendale, non vi sarebbe un interesse concreto a chiedere l'esecuzione della decisione climatica in un altro Stato, posto che il *locus actionis* in quel caso coinciderebbe in concreto con la sede dell'amministrazione centrale della società convenuta. Al contrario, potrebbe esservi spazio per la circolazione transfrontaliera della decisione laddove invece il *locus actionis* sia stato individuato nel luogo in cui siano localizzati in modo prevalente gli impianti di emissioni di gas ad effetto serra, potendo tale Stato non coincidere con quello di domicilio della società rimasta soccombente.

Pare tuttavia improbabile che nella prassi venga invocato il foro del *locus commissi delicti* nella sua accezione di luogo della condotta lesiva, alla luce delle difficoltà di concretizzazione di quest'ultimo criterio nel contesto dei giudizi climatici in rilievo. Le criticità in proposito sono infatti legate, da un lato, alla natura plurale delle azioni lesive rilevanti, e, dall'altro, all'assenza di una prossimità spaziale, temporale e causale tra i fattori generatori dell'evento dannoso e il danno climatico. Sotto il primo profilo, infatti, l'illecito civile contestato con tali domande è caratterizzato dalla circostanza che il fatto generatore di responsabilità non è unitario, né è chiaramente identificabile, ma è piuttosto costituito da un fascio di condotte umane (e di fattori ambientali), nei quali si colloca il rilascio di emissioni climalteranti contestato all'impresa convenuta. Una tale condotta, anche se parziale, resta, tuttavia, una circostanza di collegamento spaziale utile ai fini della determinazione della competenza giurisdizionale, ma richiede di selezionare il grado di incidenza o il carattere "principale" di una data attività umana. Dall'altro, la responsabilità climatica azionata civilmente è caratterizzata da una complessa catena causale intercorrente tra l'emissione e il danno climatico ove l'evento causale materialmente responsabile del danno lamentato è anche grandemente sconnesso dall'evento dannoso sotto il profilo temporale e spaziale ma anche causale, per le ragioni appena esposte.

È del resto un dato di fatto che, nella materia climatica, in linea con quanto avviene nell'ambito dei giudizi sulla *social corporate accountability*, gli attori fondino la competenza giurisdizionale facendo solitamente ricorso al foro generale del domicilio del convenuto (enunciato dall'art. 4 del regolamento Bruxelles I-*bis* e dall'art. 2 della Convenzione di Lugano del 2007), come interpretato alla luce dell'art. 63 dello stesso regolamento (o del corrispondente art. 60 della Convenzione), ossia da intendersi, in via alternativa, come luogo o della sede statutaria o

²³ Cfr. *supra*, nota 21.

dell'amministrazione centrale o del centro di attività principale dell'impresa.

La circolazione transfrontaliera delle decisioni rese all'esito di giudizi climatici orizzontali può essere condizionata infine da due ulteriori peculiarità del contenzioso climatico orizzontale, che si traducono a loro volta in sfide sotto il profilo dell'efficacia delle decisioni straniere.

4. *La possibile natura collettiva delle azioni climatiche orizzontali.*

Un primo profilo di peculiarità del contenzioso in esame concerne la possibile natura collettiva delle azioni proposte. Tale aspetto può suscitare infatti tensioni con il regime normativo applicabile, di volta in volta, al riconoscimento e all'esecuzione all'estero della decisione, sia rispetto all'operatività di talune cause ostative all'efficacia transfrontaliera della decisione sia rispetto alla prospettiva dell'esecuzione di accordi transattivi.

Laddove i provvedimenti adottati all'esito di un procedimento climatico collettivo, condotto dinanzi al giudice di uno Stato membro (o terzo), richiedano di essere eseguiti in un diverso Stato membro, la natura collettiva del giudizio di origine potrebbe creare tensioni, a seconda dei casi, come visto, con il regime normativo uniforme dettato in tema di circolazione delle decisioni straniere dal regolamento Bruxelles I-bis²⁴, dalla Convenzione di Lugano del 2007, dalla Convenzione de L'Aja del 2019 o con la disciplina sull'efficacia delle decisioni nazionali dello Stato membro interessato, applicabile in via residuale.

Se ci limitiamo a osservare il fenomeno con riguardo ai tre sistemi normativi sopra richiamati (regolamento Bruxelles I-bis, Convenzione di Lugano del 2007 e Convenzione de L'Aja del 2019), possono essere rilevate criticità comuni.

Nonostante nessuno dei tre regimi evocati contenga norme specifiche in materia di azioni collettive, non vi è dubbio che le decisioni rese rispetto ad azioni collettive da parte di giudici di Stati membri o terzi (vincolati dalle due suddette convenzioni) siano regolate dalle norme generali dettate in materia di efficacia delle decisioni straniere dal regolamento Bruxelles I-bis (nei rapporti intra-europei), dalla Convenzione di Lugano (nei rapporti tra Stati membri e Norvegia, Svizzera e Islanda) o dalla Convenzione de L'Aja del 2019 (nei rapporti tra uno Stato terzo, contraente della Convenzione, diverso dai

²⁴ Cfr. E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea: quale spazio per la tutela collettiva?*, in *Riv. dir. int. priv. proc.*, 2023, 848 ss., spec. 904 ss.; O. FERACI, *Questioni internazionaliprivatistiche in tema di cross-border collective redress nello spazio giudiziario europeo*, in *Riv. dir. int.*, 2013, 913 ss., spec. 937 ss.

tre Stati sopra menzionati e uno Stato membro dell'Unione europea), quale che sia la loro denominazione formale, in forza della nozione ampia di decisione accolta dai tre strumenti.

Rispetto alle decisioni rese in relazione ad azioni collettive, potrebbero sorgere problemi in ordine alla possibilità di invocare alcune cause ostative al riconoscimento e all'esecuzione, in particolare l'ordine pubblico processuale e il contrasto tra decisioni ²⁵.

A tale riguardo, alla luce della diversità sostanziale e procedurale delle normative nazionali in tema di *collective redress*, la tensione con l'ordine pubblico potrebbe porsi rispetto a decisioni rese da giudici di Stati membri o terzi all'esito di procedimenti di tutela collettiva che abbiano caratteristiche procedurali o effetti particolarmente diversi da quelli dei meccanismi di tutela collettivi in vigore nello Stato membro richiesto. Ciò non sarebbe tuttavia un esito automaticamente obbligato, in forza della mera difformità regolatoria tra procedimenti, ma andrebbe piuttosto ricondotto a ipotesi di lesione manifesta di un principio fondamentale dell'ordinamento, da valutarsi in concreto ²⁶. A tale riguardo, la domanda di esecuzione in uno Stato membro di decisioni collettive rese all'esito di procedimenti fondati su un meccanismo di *opt-out* potrebbe sollevare criticità laddove lo Stato membro richiesto preveda meccanismi di tutela collettiva che contemplano l'adesione espressa dei membri del gruppo ²⁷. In tale ipotesi, si potrebbe prospettare la violazione dell'ordine pubblico processuale, ossia una violazione dei diritti conferiti alle parti processuali ai sensi dell'art. 6 della CEDU e dell'art. 47 della Carta dei diritti fondamentali dell'Unione europea, sul presupposto che nel giudizio di origine non sia stato assicurato il corretto svolgimento del contraddittorio e/o del principio in forza del quale il giudicato vincola solo le parti che hanno effettivamente partecipato al giudizio. Tuttavia, tale esito sembra dover essere ridimensionato alla luce della circostanza che anche nei sistemi

²⁵ In sede di revisione del regolamento n. 44/2001 era stato inizialmente prospettato di non abolire l'*exequatur* alla luce della frammentazione delle legislazioni nazionali degli Stati membri in tema di *collective redress*. Sui rischi derivanti dalla rimozione dei controlli intermedi derivanti dall'abolizione dell'*exequatur* rispetto alla circolazione delle decisioni rese su azioni collettive si veda Z.S. TANG, *Consumer Collective Redress in European Private International Law*, in *Journ. Priv. Int. Law*, 2011, 131-132.

²⁶ Cfr. J.T. NOWAK, *Representative (Consumer) Collective Redress Decisions in the EU: Free Movement or Public Policy Obstacles?*, in B. HESS-K. LENAERTS (eds.), *The 50th Anniversary of the European Law of Civil Procedure*, Baden-Oxford-Luxembourg, 2020, 402-404.

²⁷ M. STÜRNER, *Collective and Mass Litigation in Europe Model Rules for Effective Dispute Resolution*, in A. STADLER-E. JEU-LAND-V. SMITH (eds.), *Collective and Mass Litigation in Europe: Model Rules for Effective Dispute Resolution*, Cheltenham, 2020, 307.

giudiziari basati sulla creazione automatica della classe, viene solitamente richiesta l'adesione espressa dei membri che non sono domiciliati nel foro ²⁸.

In secondo luogo, alla luce del rischio che possano sorgere, rispetto a procedimenti collettivi, azioni tra loro parallele, in sede di esecuzione della decisione climatica potrebbero verificarsi, con una maggiore frequenza rispetto alle azioni individuali, profili di contrasto tra decisioni. Potrebbe essere così chiesto il diniego dell'esecuzione di una decisione climatica dinanzi a un giudice di uno Stato membro, per effetto di un contrasto con un provvedimento giurisdizionale che sia già stato reso in tale Stato con riguardo a una controversia instaurata tra le stesse parti ²⁹. Una tale evenienza sarebbe il risultato di un malfunzionamento delle norme tese a coordinare i procedimenti paralleli sul piano sia della litispendenza internazionale sia della connessione internazionale, sulla base del regolamento Bruxelles I-*bis*, della Convenzione di Lugano del 2007 o delle norme nazionali ³⁰. Come ho già osservato in altra sede ³¹, ciò dipenderebbe dalle difficoltà legate all'individuazione del requisito dell'identità soggettiva, dal carattere facoltativo della disciplina della connessione nonché dalla discrezionalità di apprezzamento dei giudici rispetto a procedimenti pendenti in Stati terzi. Più complessa da verificare nel contesto qui in esame sarebbe invece l'ipotesi di un contrasto della decisione climatica *de quo* con una precedente decisione resa dal giudice di un diverso Stato tra le stesse parti e sulla stessa materia, allorché tale decisione abbia le condizioni necessarie per essere riconosciuta nello Stato membro richiesto ³². A fronte di tali criticità, in passato era stato suggerito di aggiungere alle cause ostative dettate dall'allora art. 34 del regolamento n. 44/2001 una specifica previsione per consentire al giudice dello Stato membro richiesto di rifiutare il riconoscimento e

²⁸ Così E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea*, cit., 906. Sul punto si veda anche G. BERTOLINO, *L'"opt-out" nell'azione risarcitoria collettiva. Una contrarietà davvero giustificata? Analisi del dibattito e prospettive di riforma*, in *Riv. trim. dir. proc. civ.*, 2016, 475 ss.

²⁹ Cfr. art. 45, lett. c) del regolamento Bruxelles I-*bis*; art. 34, n. 3, della Convenzione di Lugano; art. 7, par. 1, lett. e) della Convenzione de L'Aja del 2019.

³⁰ Cfr. artt. 29-34 del regolamento Bruxelles I-*bis*; artt. 27-30 della Convenzione di Lugano del 2007.

³¹ Cfr. sulle questioni legate al coordinamento tra azioni collettive parallele in ambito climatico le riflessioni svolte in O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 169 ss.

³² Cfr. art. 45, lett. d) del regolamento Bruxelles I-*bis*; art. 34, n. 4, della Convenzione di Lugano del 2007; art. 7, par. 1, lett. f) della Convenzione de L'Aja del 2019.

l'esecuzione di una decisione straniera resa in relazione ad un'azione collettiva ogniquale volta essa fosse risultata contraria ad altra decisione pronunciata sulla medesima violazione, ma fosse stata avviata da un diverso attore collettivo dinanzi a un giudice di un diverso Stato membro³³. Tale profilo di tensione non potrebbe essere risolto neppure ricorrendo al limite dell'ordine pubblico, essendo stato chiarito dalla Corte di giustizia che tale eccezione non può essere invocata in relazione a profili di incompatibilità tra una decisione straniera e una decisione nazionale³⁴.

5. *La scarsa possibilità di accordi transattivi climatici e la loro efficacia transfrontaliera.*

Infine, sul regime normativo relativo all'efficacia transfrontaliera di decisioni straniere potrebbe influire anche l'eventualità che il procedimento climatico si sia concluso con un accordo transattivo tra le parti, soprattutto laddove l'azione di specie abbia una natura collettiva³⁵. Ciò darebbe luogo a una "transazione giudiziaria", ossia a un accordo volto a definire una controversia e approvato dall'autorità giudiziaria di uno Stato o concluso dinanzi allo stesso nel corso di un procedimento³⁶. Tale eventualità tuttavia, a nostro avviso, potrebbe verificarsi, se del caso, soltanto rispetto a domande meramente risarcitorie, posto che l'impegno di mitigazione del cambiamento climatico richiesto dagli attori all'impresa convenuta colliderebbe per la sua stessa ontologia con soluzioni negoziate e necessariamente ridimensionate. A tale riguardo, nei rapporti tra Stati membri, occorre evidenziare che le norme sull'esecuzione delle decisioni straniere dettate dal regolamento Bruxelles I-bis risultano applicabili anche alle "transazioni giudiziarie" esecutive nello Stato membro di origine³⁷. La loro

³³ M. DANOV, *The Brussels I Regulation: Cross-border Collective Redress Proceedings and Judgments*, in *Journ. Priv. Int. Law*, 2010, 359 ss., spec. 388 ss.

³⁴ Corte giust., 4 febbraio 1988, causa C-145/86, *Hoffmann*, ECLI:EU:C:1988:61, par. 21.

³⁵ Sul punto si rinvia a A. STADLER, *Collective settlements*, in A. STADLER-E. JEU-LAND-V. SMITH (eds.), *Collective and Mass Litigation in Europe: Model Rules for Effective Dispute Resolution*, cit., 233 ss.

³⁶ Art. 2, lett. b) del regolamento Bruxelles I-bis. In argomento si rinvia a O. LOPES PEGNA, *L'efficacia transfrontaliera degli accordi di composizione della lite nel contenzioso in materia di principi ESG*, nel presente volume.

³⁷ Cfr. art. 53 dello stesso regolamento in tema di efficacia di transazioni giudiziarie esecutive nello Stato membro di origine.

esecuzione inoltre potrà essere negata soltanto per contrarietà con l'ordine pubblico³⁸.

A questo riguardo può venire in rilievo la questione se una transazione giudiziale resa da un giudice di uno Stato membro rispetto a un'azione collettiva possa essere considerata come una decisione giudiziaria ai fini del contrasto di decisioni, rilevante ai fini del diniego dell'esecuzione, ossia se, essa possa impedire, per ragioni di inconciliabilità logica, il riconoscimento e l'esecuzione di una decisione straniera che verta sulla stessa violazione e che sia stata resa tra le stesse parti. Nel regolamento Bruxelles I-*bis*, la circostanza che la dichiarazione di esecutività di una transazione giudiziaria possa essere negata o revocata solo se l'esecuzione dell'atto pubblico è manifestamente contraria all'ordine pubblico dello Stato membro richiesto implica una risposta negativa al quesito appena evocato. La Corte di giustizia ha del resto negato che una transazione giudiziale possa essere equiparata ad una decisione di cui all'art. 32 del regolamento n. 44/2001 precisando che "le transazioni giudiziarie rivestono infatti carattere essenzialmente contrattuale, nel senso che il loro contenuto dipende innanzitutto dalla volontà delle parti"³⁹.

Nella prassi, tuttavia, può risultare talora incerta la distinzione tra decisione e transazione giudiziaria ai fini del regolamento. Tale aspetto emerge con riguardo alle conciliazioni collettive, le quali richiedono un procedimento di omologazione che non si esprime soltanto in un'attività formale di certificazione della regolarità dell'atto ma che, al contrario, implica una sostanziale pronuncia sul merito⁴⁰.

Analogo regime normativo a quello appena menzionato risulta nel contesto della Convenzione di Lugano del 2007⁴¹. Parimenti, l'art. 11 della Convenzione de L'Aja del 2019 dispone che "le transazioni giudiziali approvate dal

³⁸ Cfr. art. 58 del regolamento Bruxelles I-*bis*.

³⁹ Corte giust., 2 giugno 1994, causa C-414/92, *Solo Kleinmotoren*, ECLI:EU:C:1994:221, par. 17-18.

⁴⁰ E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea*, cit., 909.

⁴¹ Cfr. art. 58 della Convenzione di Lugano del 2007: "Le transazioni concluse davanti al giudice nel corso di un processo ed aventi efficacia esecutiva nello Stato d'origine vincolato dalla presente convenzione hanno efficacia esecutiva nello Stato richiesto alle stesse condizioni previste per gli atti pubblici. Il giudice o l'autorità competente dello Stato vincolato dalla presente convenzione presso cui è stata conclusa una transazione rilascia, su richiesta di qualsiasi parte interessata, un attestato utilizzando il formulario riportato nell'Allegato V della presente convenzione".

giudice di uno Stato contraente o concludere dinanzi a tale giudice nel corso di un procedimento, che hanno la stessa efficacia esecutiva di una decisione nello Stato di origine, sono eseguite ai sensi della presente Convenzione allo stesso modo di una decisione”. Anche nel quadro del testo convenzionale è accolta una nozione ampia di decisione, intendendo come tale qualsiasi decisione giudiziaria assunta sul merito, a prescindere dalla denominazione impiegata, con l’esclusione, tuttavia, dei provvedimenti cautelari ⁴².

Una soluzione giudiziaria concordata tra le parti della controversia deve essere in ogni caso tenuta distinta dall’ipotesi di un “*mediated settled agreement*”, di tipo stragiudiziale, realizzato attraverso l’intervento di un mediatore e impiegato per la risoluzione di controversie commerciali di carattere internazionale, posto che per le finalità strategiche perseguite dal contenzioso orizzontale in esame, più volte ricordate, e la risonanza mediatica del caso, una tale evenienza ci pare più irrealistica della transazione giudiziaria. Tali accordi esulano dal campo di applicazione materiale del regolamento Bruxelles I-*bis* e delle Convenzioni di Lugano e de L’Aja. Tuttavia, la Direttiva 2008/52/CE del Parlamento e del Consiglio del 21 maggio 2008 relativa a determinati aspetti della mediazione in materia civile e commerciale, stabilisce che il contenuto di un accordo risultante dalla mediazione, reso esecutivo in uno Stato membro, dovrebbe esser riconosciuto e reso esecutivo negli altri Stati membri in conformità alla disciplina stabilita dal regolamento n. 44/2001, rinvio da intendersi oggi riferito al regolamento (UE) 2012/1215 (considerando n. 20 della Direttiva) ⁴³.

In futuro, laddove la *United Nations Convention on International Settlement Agreements Resulting from Mediation* del 20 dicembre 2018 (nota come *Singapore Convention*) ⁴⁴ dovesse registrare un maggiore consenso a livello internazionale, con l’adesione anche degli Stati membri dell’Unione europea, tale accordo potrebbe venire in rilievo ai fini della circolazione transfrontaliera di accordi transattivi anche in ambito climatico ⁴⁵.

⁴² Cfr. art. 3, par. 1, lett. b) della Convenzione de L’Aja del 2019.

⁴³ In argomento si rinvia a O. LOPES PEGNA, *L’efficacia transfrontaliera degli accordi*, cit.

⁴⁴ La *Convenzione di Singapore* è attualmente in vigore tra 18 Stati contraenti; di essi non fanno parte gli Stati membri dell’Unione europea. Cfr. in proposito l’*UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* del 2018.

⁴⁵ Ma vedi i dubbi sollevati a tal riguardo da O. LOPES PEGNA, *L’efficacia transfrontaliera degli accordi*, cit.

LA COMPETENZA INTERNAZIONALE QUALE PRESUPPOSTO PER L'EFFICACIA DELLE DECISIONI STRANIERE: NOTE SUL CONTENZIOSO IN TEMA DI *DUE DILIGENCE*

Pietro Franzina

SOMMARIO: 1. Il concetto di competenza internazionale. – 2. Oggetto e articolazione di questo scritto. – 3. La ragion d'essere del requisito della competenza internazionale. – 4. Il possibile modo di operare del requisito della competenza internazionale. – 5. La competenza internazionale nella *Judgments Convention*. – 6. La *Judgments Convention*: caratteri generali e filtri giurisdizionali. – 7. Le decisioni in tema di sostenibilità secondo la *Judgments Convention*. – 8. Considerazioni conclusive.

1. *Il concetto di competenza internazionale.*

L'efficacia di una sentenza straniera dipende dalle condizioni stabilite dalle norme di diritto internazionale privato dello Stato in cui ne sono invocati gli effetti, ossia lo Stato "richiesto". Pur variando da paese a paese, tali condizioni rispecchiano delle preoccupazioni comuni. Una di queste riguarda la provenienza della decisione. Quasi tutti i sistemi internazionalprivatistici statali, come molti strumenti convenzionali o sovranazionali, esigono che la decisione promani da uno Stato che, nella valutazione dello Stato richiesto, costituisce la sede appropriata del giudizio. Occorre, in altre parole, che la causa così definita rientri nella competenza c.d. internazionale dello Stato d'origine¹.

La verifica della competenza internazionale differisce, per la funzione assoluta e i parametri impiegati, dalla valutazione che i giudici dello Stato d'origine sono

¹ V. in generale F. SALERNO, *Lezioni di diritto internazionale privato*², Milano, 2022, 213 ss.; F. MOSCONI-C. CAMPIGLIO, *Diritto internazionale privato e processuale – Parte generale e contratti*, XI ed., Torino, 2024, 398 ss.; P. DE VAREILLES SOMMIÈRES-S. LAVAL, *Droit international privé*, XI ed., Paris, 2023, 479 ss.; S. GÖSSL-F. KIENLE, *Grundkurs Internationales Privat- und Zivilverfahrensrecht*, München, 2025, 318.

stati chiamati a compiere, a suo tempo, per verificare la propria competenza giurisdizionale, cioè per sincerarsi di avere il potere di decidere la causa. Ai fini della riconoscibilità della sentenza, infatti, non interessa sapere che cosa disponessero le norme dello Stato d'origine circa la *potestas iudicandi* dei relativi giudici né se tali norme siano state puntualmente osservate. Preme solo stabilire se la causa presenti con lo Stato d'origine un nesso ritenuto adeguato ai fini dell'attribuzione di efficacia alla decisione resa in relazione ad essa. In breve, mentre la competenza giurisdizionale compendia le condizioni alle quali i giudici di un certo Stato sono abilitati a definire nel merito la causa di cui siano investiti, la competenza internazionale descrive una delle qualità che una decisione deve rivestire per produrre effetto in uno Stato diverso: una qualità per così dire geografica, perché determinata dalla natura e dall'intensità dei legami fra la causa e il giudice che l'ha pronunciata².

La diversa funzione assegnata alle due declinazioni del concetto di competenza spiega come mai la competenza giurisdizionale obbedisca alle norme dello Stato d'origine, mentre per quella internazionale valgano le norme dello Stato richiesto. Per essere resa, una decisione deve rientrare fra quelle che i giudici dello Stato d'origine sono abilitati ad emettere, mentre per essere efficace in uno Stato diverso, deve presentare i caratteri indicati a questo scopo da tale diverso Stato.

La competenza giurisdizionale è detta anche diretta. Quella internazionale, invece, è nota anche come competenza indiretta, perché viene in gioco solo quando una sentenza è stata resa, cioè dopo che il giudice che l'ha resa ha esplicitamente o implicitamente ritenuto di avere il potere di pronunciarsi sul caso, e serve a valutare, a posteriori, se quel giudice intrattenesse con la causa un nesso sufficiente ai fini della riconoscibilità della decisione nello Stato richiesto.

2. *Oggetto e articolazione di questo scritto.*

Nelle pagine che seguono si darà conto innanzitutto, in generale, del senso e del modo di operare del requisito della competenza internazionale quale presupposto per l'efficacia delle decisioni straniere. Saranno brevemente esaminate a questo fine alcune delle norme che prescrivono tale condizione. Si avrà riguardo, per questo, alle norme della Convenzione de L'Aja del 2 luglio 2019 sul riconoscimento e l'esecuzione delle sentenze straniere in materia civile o

² P. FRANZINA, *Introduzione al diritto internazionale privato*, III ed., Torino, 2025, 300 ss.

commerciale (la c.d. *Judgments Convention*), attualmente in vigore per l'Unione europea nei rapporti con il Regno Unito, l'Ucraina e l'Uruguay, e ormai prossima a vincolare anche l'Albania, Andorra e Montenegro³.

L'attenzione si volgerà, in seguito, al ruolo che il requisito della competenza internazionale può giocare nel contenzioso civile sulla sostenibilità nell'esercizio dell'attività di impresa. Il riferimento è, in particolare, ai procedimenti civili a carattere internazionale in cui si fa questione della responsabilità di un'impresa per aver omesso di adottare le misure – di prevenzione, informazione, supporto, monitoraggio, etc. – tese ad impedire che un'altra impresa, legata alla prima, commetta una violazione dei diritti umani o leda degli interessi collettivi, tipicamente in materia ambientale⁴.

Le azioni in tema di omessa *due diligence* rivestono spesso un dichiarato carattere strategico. Non servono, o almeno non servono primariamente, a far conseguire all'attore il beneficio immediato che il provvedimento richiesto è di per sé in grado di offrire (un risarcimento, ad esempio, o il ripristino delle condizioni anteriori al verificarsi di un danno ambientale), ma a promuovere l'affermarsi di prassi sostenibili. Con i procedimenti in parola, l'attore – spesso non a caso sostenuto da enti della società civile impegnati nella promozione di interessi collettivi – si propone di indurre l'impresa convenuta, ed eventualmente altre nelle stesse condizioni, a rivedere i modelli produttivi esistenti. Si tratta, in questo senso, di un contenzioso il cui successo corrisponde per gli interessati all'impatto che la decisione produce sui processi e le abitudini di una certa impresa o di un certo settore, più che sull'attitudine della decisione

³ La Convenzione è entrata in vigore sul piano internazionale il 1° settembre 2023. Nel sito web della Conferenza de L'Aja di diritto internazionale privato (<http://hcch.net>) si trova il testo della Convenzione, nelle versioni facenti fede (inglese e francese), assieme allo stato delle ratifiche e delle adesioni e alla relazione esplicativa di F. Garcimartín Alférez e G. Saumier. Sulla Convenzione v. in generale M. WELLER *et alii* (a cura di), *The HCCH 2019 Judgments Convention – Cornerstones, Prospects, Outlook*, Oxford, 2022, nonché R.A. BRAND-M.S. COFFEE-P. HERRUP, *The 2019 Hague Judgments Convention*, Oxford, 2023; v. altresì D. GODDARD-P. BEAUMONT, *Recognition and Enforcement of Judgments in Civil and Commercial Matters*, in P. BEAUMONT-J. HOLLIDAY (a cura di), *A Guide to Global Private International Law*, Oxford, 2022, 407 ss.

⁴ V. in generale, anche per ulteriori riferimenti, P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *Riv. dir. int. priv. proc.*, 2022, 828 ss. V. altresì R. MICHAELS-S. ZEH, *Sustainability and Private International Law*, in M. SANTOS SILVA *et alii* (a cura di), *Routledge Handbook of Private Law and Sustainability*, London, 2024, 479 ss.; A. BONOMI, *Business and Human Rights: Issues of Private International Law*, in A.R. ZIEGLER-D. CANAPA-M.I. CARDOZO (a cura di), *Business and Human Rights – Emerging Challenges, Issues, and Trends*, Leiden, 2024, 291 ss.

a far conseguire all'attore il particolare bene della vita a cui questi ritiene di avere diritto.

Lo scritto intende stabilire se le norme sul riconoscimento delle decisioni, in particolare per il modo in cui trattano la questione della competenza internazionale, siano in grado di ampliare tale impatto o rischino, invece, di ridurlo.

3. La ragion d'essere del requisito della competenza internazionale.

Le norme che regolano il riconoscimento e l'esecuzione delle decisioni straniere sottendono, in generale, due spinte politiche di fondo.

La prima, che per brevità si chiamerà espansiva, riflette il desiderio dello Stato richiesto di aprire il proprio ordinamento alle decisioni straniere, sul presupposto che tale apertura giovi allo sviluppo delle relazioni transfrontaliere e accresca l'effettività delle posizioni giuridiche dei singoli. Agevolando la circolazione delle sentenze, lo Stato richiesto facilita, in effetti, il godimento dei diritti che si ricollegano a tali relazioni. Un atteggiamento aperto verso le sentenze straniere mitiga, se non elimina del tutto, gli ostacoli che l'internazionalità della situazione potrebbero altrimenti frapporre alla realizzazione dei diritti individuali. Il diritto del venditore a conseguire il prezzo delle merci fornite al compratore, come il diritto della vittima di un fatto illecito a ottenere la riparazione del danno patito rischiano, infatti, di ridursi a un mero nome se la pronuncia che accerti la fondatezza di tali pretese e disponga in ordine al loro soddisfacimento risulti confinata, nei suoi effetti, all'ordinamento dello Stato d'origine. Senza adeguate garanzie circa la spendibilità di tali posizioni attraverso le frontiere, gli interessati sarebbero verosimilmente indotti a non intraprendere attività di respiro internazionale: le loro posizioni, pur formando l'oggetto di un provvedimento giudiziale, potrebbero risultare inattuabili in certi paesi, o presentare una fisionomia diversa a seconda del paese nel quale vengano invocate.

La spinta opposta, che si potrebbe definire difensiva, svela invece la preoccupazione dello Stato richiesto di preservare l'identità e la funzionalità del proprio ordinamento contro le determinazioni portate da una sentenza straniera. Non ci si può attendere che lo Stato richiesto si apra alle pronunce di autorità straniere senza preoccuparsi delle implicazioni che tali pronunce potrebbero avere sulle dinamiche del proprio ordinamento. Si impongono, allora, delle salvaguardie tese ad evitare che una decisione straniera, se riconosciuta, metta in discussione i principi cardine dell'ordinamento dello Stato richiesto o pregiudichi gli effetti dei provvedimenti che i giudici locali potrebbero avere già reso, o essere prossimi a rendere, sulla medesima lite o una lite connessa. Per lo Stato

richiesto, riconoscere una sentenza straniera significa, in effetti, fare propri gli accertamenti e i comandi che si rinvergono in tale sentenza, attribuendovi una forza di cui gli stessi sono di per sé sprovvisti. Ciò non si giustifica se i valori di cui la pronuncia straniera è portatrice non si conformano a quelli dello Stato richiesto, o se il riconoscimento contrasta ad altro titolo con l'ordine che quest'ultimo Stato intende vedere affermato localmente.

Il contemperamento delle spinte ora tratteggiate si presta ad essere descritto come un esercizio di *trust management*⁵. Lo Stato richiesto si schiude a provvedimenti di autorità straniera, improntati a regole processuali diverse dalle proprie e decisi nel merito in base a regole sostanziali anch'esse potenzialmente diverse da quelle impiegate dai giudici locali solo se quei provvedimenti possono essere considerati l'equivalente funzionale di una decisione dello Stato richiesto: in breve, solo se quei provvedimenti meritano la fiducia di quest'ultimo Stato.

I presupposti a cui lo Stato richiesto subordina l'attribuzione di effetti alle sentenze straniere corrispondono, per l'appunto, alle condizioni in presenza delle quali una simile fiducia appare giustificata.

Spetta allo Stato richiesto delineare tali presupposti nel merito e fissare le modalità della loro verifica. Nel merito, le condizioni possono essere più o meno gravose, in funzione, appunto, del grado di fiducia che sul piano generale ed astratto lo Stato richiesto ritiene di poter accordare al genere di sentenze di cui trattasi (quelle pronunciate dai giudici di un certo Stato e in una data materia, per esempio). Le regole procedurali a cui è soggetta la verifica di tali condizioni possono a loro volta prefigurare controlli più o meno rigorosi e pervasivi. Lo Stato richiesto potrebbe esigere un vaglio sistematico della ricorrenza delle condizioni prescritte, ma potrebbe anche presumere il rispetto, disponendo che il riconoscimento si produca in modo automatico (cioè, senza che si renda necessario nello Stato richiesto alcun procedimento), salva la possibilità di un accertamento giudiziale della sussistenza di tali condizioni.

La competenza internazionale del giudice dello Stato d'origine si colloca fra le condizioni in discorso. La provenienza della sentenza da un certo Stato piuttosto che da un altro concorre a definire il grado di fiducia che la stessa merita presso lo Stato richiesto. Una sentenza è, per definizione, l'espressione delle prerogative sovrane dello Stato per conto del quale è stata resa. In assenza di

⁵ Il concetto è inteso in questo contesto nei termini delineati da M. WELLER, "Mutual Trust": *A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?*, in *Recueil des cours*, vol. 423, 2022, 67 ss., cioè come forma di bilanciamento fra apertura e controllo.

norme internazionali generali, ogni Stato definisce i limiti di tali prerogative, per quanto lo riguarda. Vi provvede mediante le proprie regole sulla competenza giurisdizionale. È possibile, così, che i giudici di uno Stato siano abilitati in base alle proprie norme a statuire su una domanda che le norme di un altro Stato – lo Stato richiesto, in ipotesi – considerano, invece, collegato in modo insufficiente col primo paese. Le scelte normative che ogni Stato compie a questo riguardo riflettono una varietà di considerazioni⁶. Fra queste, principalmente, la preoccupazione di agevolare la realizzazione dei diritti dei singoli (senza un agevole accesso alla giustizia quei diritti possono ridursi a meri nomi); lo scrupolo di offrire a tutte le parti, compreso il convenuto, la garanzia effettiva di un processo equo (il convenuto, chiamato a difendersi davanti a un giudice irragionevolmente distante dagli elementi della causa, potrebbe vedersi preclusa nei fatti l'opportunità di far valere le proprie ragioni); il desiderio di vedere attuate in modo pieno certe politiche legislative ritenute importanti (uno Stato potrebbe voler attribuire ai propri giudici il compito di pronunciarsi sulle situazioni in cui vengono in gioco le norme sostanziali, da esso stabilite, di cui sente di dover assicurare l'osservanza con particolare zelo e uniformità).

Stando così le cose, quando le sensibilità dello Stato d'origine e quelle dello Stato richiesto divergono, onde il primo autorizza i suoi giudici a trattare delle cause che il secondo ritiene appartenere alla sfera giurisdizionale di uno Stato diverso, o di cui intende riservare la cognizione ai propri giudici, la sentenza resa nello Stato d'origine non soddisfa, per la sua provenienza, le condizioni per essere riconosciuta nello Stato richiesto. Darvi effetto equivarrebbe, per lo Stato richiesto, a far proprio il prodotto di un procedimento "geograficamente" ingiusto, o inopportuno: un procedimento che, stando ai parametri dello stesso Stato richiesto, avrebbe dovuto svolgersi altrove, perché così esigevano, ai suoi occhi, gli interessi dell'attore, le garanzie dovute al convenuto o l'aspettativa di un'attuazione piena ed effettiva di certe politiche ritenute importanti.

4. Il possibile modo di operare del requisito della competenza internazionale.

Sul piano operativo, il controllo della competenza internazionale del giudice dello Stato d'origine può obbedire a schemi diversi. Ogni Stato definisce i propri. Non è peraltro inconsueto che coesistano in un medesimo ordinamento due o più schemi, la cui operatività dipenda dal tipo di procedimento all'origine

⁶ P. FRANZINA, *Introduzione al diritto internazionale privato*, cit., 51 s.

della decisione (contenzioso, volontario) o dalla natura delle posizioni giuridiche oggetto della causa (status familiari, diritti di credito, etc.). Sotto un diverso profilo, poi, le norme di fonte interna tendono a differire da quelle di origine convenzionale o sovranazionale: le ultime obbediscono quasi sempre a una logica di reciprocità, dettando le condizioni a cui gli Stati da esse vincolati si impegnano ad attribuire efficacia alle decisioni degli altri Stati egualmente soggetti ad esse, laddove le prime operano, per forza di cose, unilateralmente, definendo le condizioni alle quali le sentenze straniere sono ammesse a produrre effetto nello Stato richiesto senza poter dire alcunché circa l'approccio che altri Stati potrebbero riservare alle decisioni rese nello Stato richiesto.

Non è possibile dar conto in questa sede della varietà di approcci seguiti in quest'ambito, né proporre un'analisi critica, o anche solo una comparazione⁷.

Interessa, invece, la relazione che le norme sulla efficacia delle decisioni elaborate a livello interno, o in testi uniformi, intrattengono con le regole sulla competenza diretta⁸. Se è vero, infatti, che le norme sulla competenza internazionale assolvono una funzione diversa da quella assegnata alle norme sulla competenza diretta, è frequente che le norme del primo insieme si servano, ai loro fini, di indicazioni ricavabili dalle seconde. Nulla impedisce, in effetti, che lo Stato richiesto, per valutare la competenza internazionale del giudice dello Stato richiesto, prescriva di impiegare, o almeno di ispirarsi, ai criteri che presiedono, nello Stato richiesto, alla disciplina della competenza giurisdizionale.

Vengono impiegate a questo riguardo due tecniche principali.

La prima fa leva su criteri attributivi della competenza diretta che lo stesso Stato richiesto qualifica come imperativi: se in base a quei criteri la causa decisa all'estero soggiace alla giurisdizione dello Stato richiesto, la sentenza straniera è condannata per ciò solo a non essere riconosciuta. Segue questo modello, ad esempio, la legge di diritto internazionale privato della Macedonia⁹. Gli artt. 65 ss. della legge, nel dettare le norme di competenza diretta di cui devono servirsi i giudici macedoni, qualificano alcune di tali norme come attributive di una giurisdizione "esclusiva": è tale, ad esempio, la giurisdizione attribuita dall'art. 67 della legge in relazione ai procedimenti riguardanti la validità di un

⁷ Per uno sguardo di insieme v. T. DOMEJ, *Recognition and Enforcement of Judgments (Civil Law)*, in J. BASEDOW *at alii* (a cura di), *Encyclopedia of Private International Law*, Cheltenham, 2017, 1471 ss., e A. BRIGGS, *Recognition and Enforcement of Judgments (Common Law)*, *ivi*, 1479 ss.

⁸ Sul tema v. di recente, in generale, R. GARNETT, *Foreign Judgments and the Relationship between Direct and Indirect Jurisdiction*, in *Int. Comp. Law Quart.*, 2025, 649 ss.

⁹ Per una traduzione in inglese, v. *Encyclopedia of Private International Law*, cit., 3473 ss.

diritto di proprietà intellettuale registrato in Macedonia. Ebbene, l'art. 104 della legge, esclude la riconoscibilità di una sentenza straniera che abbia statuito su una domanda rientrante nella giurisdizione esclusiva, nel senso ora spiegato, delle autorità della Macedonia.

La seconda tecnica, invece, opera per così dire in positivo. Una sentenza straniera è riconoscibile, quanto alla provenienza, quando il giudice che l'ha resa poteva vantare sulla domanda una competenza (diretta) conforme ai criteri contemplati dalle norme sulla competenza (egualmente diretta) dello Stato richiesto. In pratica, viene giudicata meritevole di riconoscimento una sentenza resa da un giudice che intrattenga con la causa un legame analogo a quello che – nello Stato richiesto, secondo le regole sulla competenza diretta ivi in vigore – permetterebbe ai giudici dello stesso Stato richiesto di pronunciarsi sul caso. È quanto avviene nel sistema italiano di diritto internazionale privato in forza dell'art. 64, lett. a), della legge 31 maggio 1995, n. 218, là dove si dispone che una sentenza straniera è ammessa a produrre effetti in Italia quando “il giudice che l'ha pronunciata poteva conoscere della causa secondo i principi sulla competenza giurisdizionale propri dell'ordinamento italiano”¹⁰. Analogamente dispone il § 328 della *Zivilprozessordnung* tedesca, nella parte in cui esclude la riconoscibilità della sentenza straniera “wenn die Gerichte des Staates, dem das ausländische Gericht angehört, nach den deutschen Gesetzen nicht zuständig sind”¹¹. Un orientamento non dissimile, anche se caratterizzato da un più ampio grado di discrezionalità, sottende l'art. 46, par. 1, lett. c), della legge spagnola 30 luglio 2015, n. 29, sulla cooperazione giuridica internazionale in materia civile¹². Le sentenze straniere, vi si stabilisce, sono prive di effetti in Spagna se la competenza del giudice dello Stato d'origine non si fonda su “una conexión razonable” fra tale Stato e la causa: una simile connessione si presume esistente quando il giudice dello Stato d'origine abbia “basado su competencia judicial internacional en criterios similares a los previstos en la legislación española”.

Nei testi convenzionali e sovranazionali il quadro è più articolato. Occorre distinguere, infatti, fra strumenti c.d. semplici, che si limitano a stabilire le condizioni alle quali uno Stato è tenuto a dare effetto alle decisioni rese in uno Stato diverso, anch'esso vincolato dallo strumento in questione; e strumenti

¹⁰ V. in generale O. LOPES PEGNA, *L'accertamento della “competenza internazionale” del giudice straniero ai sensi della legge n. 218/1995*, in *Riv. dir. int.*, 2024, 77 ss.

¹¹ Su tale disposizione, v. per tutti C SCHÄRTL, *Das Spiegelbildprinzip im Rechtsverkehr mit ausländischen Staatenverbindungen*, Tübingen, 2005.

¹² V. in argomento, fra gli altri, F. GARCIMARTÍN ALFÉREZ, *Derecho internacional privado*, VII ed., Cizur Menor, 2023, 284 ss.

c.d. doppi, che regolano tanto la circolazione delle decisioni fra gli Stati che ne sono soggetti quanto la competenza giurisdizionale delle relative autorità.

Gli strumenti del primo genere operano sul presupposto che gli Stati da essi vincolati si servono di regole sulla competenza diretta fra loro non omogenee: i criteri utilizzati negli strumenti semplici per vagliare la competenza internazionale del giudice dello Stato d'origine, per forza uniformi, sono dunque delineati da tali strumenti *ex novo*, per i propri fini, e non coincidono – se non al limite tendenzialmente o accidentalmente – a quelli impiegati negli Stati interessati per regolare la competenza diretta dei propri giudici. Gli strumenti doppi, invece, si accostano al problema della competenza internazionale del giudice che ha reso la decisione alla luce delle regole da essi stessi introdotte per disciplinare la competenza giurisdizionale. Alcuni strumenti doppi subordinano l'efficacia delle decisioni provenienti da uno Stato vincolato da un tale strumento alla condizione che, nella specie, le autorità di tale Stato si siano conformate, a suo tempo, alle regole attributive stabilite dallo strumento stesso. Obbedisce a questo schema, per esempio, la Convenzione de L'Aja del 23 novembre 2007 sull'esecuzione internazionale delle obbligazioni alimentari dovute ai minori e altre forme di mantenimento familiare¹³. Vi si stabilisce che uno Stato contraente è tenuto a dare effetto alle decisioni pronunciate in un altro Stato contraente se conformi all'uno o all'altra delle basi giurisdizionali elencate a questo fine nell'art. 20 della Convenzione. Altri strumenti si astengono dal richiedere una verifica della condizione in discorso (o la chiedono solo in casi eccezionali), confidando che gli Stati vincolati si conformino, in generale, alle regole uniformi sulla competenza giurisdizionale. Illustra questo approccio il regolamento (UE) 2012/1215 del 12 dicembre 2012 sulla competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale (Bruxelles I-bis)¹⁴, a norma del quale le sentenze rese in uno Stato membro dell'Unione europea producono automaticamente i loro effetti, anche esecutivi, negli altri Stati membri, a meno che non ricorrano delle circostanze ostative tassativamente indicate, fra le quali non ricorre – se non in casi particolari¹⁵ – la mancata osservanza delle disposizioni dello stesso regolamento concernenti la competenza diretta.

¹³ Entrata in vigore sul piano internazionale il 1° gennaio 2013, la Convenzione vincola attualmente l'Unione europea e una trentina di altri Stati. Per il testo e lo stato delle ratifiche delle adesioni si veda il sito *web* della Conferenza de L'Aja, citato in precedenza.

¹⁴ GUUE L 351 del 20 dicembre 2012, 1 ss.

¹⁵ Art. 45, par. 1, lett. e).

5. *La competenza internazionale nella Judgments Convention.*

Giova ora calare i rilievi generali svolti sin qui in un contesto specifico, analizzando un testo particolare in tema di efficacia delle decisioni straniere e il modo in cui vi viene trattata la questione della competenza internazionale.

Lo sguardo si volgerà alla già citata Convenzione de L'Aja del 2019 sul riconoscimento e l'esecuzione delle decisioni in materia civile o commerciale (di seguito *Judgments Convention*). La *Judgments Convention* mira a facilitare la circolazione internazionale delle decisioni dettando regole uniformi sui presupposti ai quali uno Stato contraente è tenuto a riconoscere, ed eventualmente eseguire, le sentenze pronunciate in un altro Stato contraente nelle materie oggetto della Convenzione stessa, e sulle ragioni – tassativamente elencate – che giustificano il diniego di un tale riconoscimento. Non si tratta di una Convenzione doppia, nel senso spiegato in precedenza. Nulla dispongono le sue norme in merito alla competenza giurisdizionale dei giudici degli Stati contraenti. La Convenzione regola esclusivamente il riconoscimento e l'esecuzione delle decisioni. Tratta della competenza dei giudici dello Stato d'origine al solo scopo di stabilire se una decisione resa da tali giudici goda, per la sua provenienza, del riconoscimento garantito dalla Convenzione stessa: cioè se lo Stato richiesto, parte della Convenzione, sia tenuto in base ad essa a dare effetto a tale decisione.

La scelta di considerare la Convenzione de L'Aja del 2019 ai fini dell'analisi proposta in queste pagine riflette due considerazioni, legate fra loro. Per un verso, la Convenzione è il primo strumento recante un corpo di regole uniformi di respiro generale concernenti la circolazione internazionale delle sentenze. Frutto di un negoziato ambizioso (anche se costellato di compromessi), la Convenzione attinge a soluzioni tecniche proprie di diverse tradizioni giuridiche. Come tale, funge da naturale punto di riferimento per chi intenda ricostruire lo stato dell'arte delle regole in quest'ambito in un'ottica globale. Per un altro verso, la *Judgments Convention*, pur essendo in vigore per il momento solo per Stati piuttosto omogenei sotto il profilo economico-sociale e geopolitico, è uno strumento a vocazione universale. Elaborata in seno alla Conferenza de L'Aja di diritto internazionale privato, un'organizzazione che conta oltre novanta membri, la Convenzione è stata pensata per incontrare l'interesse di Stati di ogni regione del mondo. Per quanto interessa in questa sede, non è dunque improbabile che, nel tempo, possa entrare in vigore per Stati che occupano una collocazione assai diversa nelle attuali catene globali del valore: Stati in cui sono stabilite le imprese che orientano gli sbocchi finali dei prodotti che vedono la luce lungo le catene (in breve, gli Stati nel Nord globale) e Stati in cui si svolgono materialmente le attività nell'ambito delle quali possono manifestarsi le

violazioni all'origine del contenzioso della sostenibilità (in sintesi, gli Stati del Sud globale). La Convenzione si candida dunque a mettere in relazione fra loro, con riguardo alla circolazione delle sentenze, gli Stati a vario titolo interessati dal contenzioso della sostenibilità: lo Stato i cui giudici sono investiti delle cause in tema di *due diligence*, quelli in cui si concentrano i processi decisionali e/o la clientela delle imprese convenute, quelli in cui ci si aspetta di vedere materializzati i benefici economici e sociali che il contenzioso della sostenibilità ambisce a produrre.

6. *La Judgments Convention: caratteri generali e filtri giurisdizionali.*

La Convenzione de L'Aja del 2019 si applica alle decisioni rese "in materia civile e commerciale", con alcune esclusioni, come le decisioni concernenti l'attività delle forze armate e le attività di "law enforcement", cioè di polizia e di sicurezza pubblica.

Le norme della Convenzione vengono in rilievo quando si fa questione, in uno Stato contraente, del riconoscimento o dell'esecuzione in una decisione resa da un giudice di un altro Stato contraente. L'applicabilità della Convenzione presuppone peraltro che nei rapporti fra lo Stato d'origine e lo Stato richiesto risultino soddisfatte anche le particolari condizioni stabilite dall'art. 28, sulla "bilateralizzazione" dei diritti e degli obblighi nascenti dalla Convenzione: in breve, occorre che nessuno dei due Stati abbia dichiarato di opporsi a che la ratifica o l'adesione comportino l'instaurarsi di relazioni con l'altro Stato a norma della Convenzione.

Sono equiparate alle decisioni, nel quadro della Convenzione, le transazioni giudiziarie, cioè gli accordi raggiunti fra le parti nella cornice di un procedimento giudiziario o approvati da un giudice, a patto che le norme dello Stato d'origine vi attribuiscono la stessa efficacia esecutiva attribuita a una decisione.

Per essere riconosciuta, ed eventualmente eseguita, in forza della Convenzione, una decisione deve obbedire ai requisiti di cui agli artt. 5 e 6. Lo Stato richiesto può nondimeno rifiutarne l'efficacia per le ragioni elencate tassativamente all'art. 7: ad esempio, perché nel procedimento svoltosi nello Stato d'origine non è stato rispettato il diritto al contraddittorio iniziale, nei termini precisati all'art. 7, par. 1, lett. a), o perché il riconoscimento produrrebbe degli effetti incompatibili con l'ordine pubblico dello Stato richiesto.

I requisiti che la decisione deve soddisfare ai fini del riconoscimento attengono alla competenza internazionale dei giudici dello Stato d'origine. L'art. 5 elenca, a questo fine, una serie di "filtri" o "basi" giurisdizionali: connessioni

tipizzate fra il foro e la lite che la Convenzione reputa appropriate agli effetti del riconoscimento¹⁶. Una decisione è riconoscibile a norma della Convenzione se è resa in uno Stato con cui la causa presentava un collegamento conforme ai tipi elencati, salve solo le ragioni ostative dell'art. 7.

L'art. 5 detta una ventina di filtri, riconducibili a tre categorie.

Alcuni fanno leva sul rapporto intercorrente fra il convenuto e lo Stato da cui promana la decisione: così, ad esempio, ai sensi dell'art. 5, par. 1, lett. a), una decisione è riconoscibile se lo Stato in cui è stata pronunciata è quello in cui la persona nei cui confronti vengono invocati gli effetti della sentenza aveva la residenza abituale quando è divenuta parte del procedimento.

Altri filtri rispecchiano l'esistenza di un legame obiettivo fra la lite e lo Stato in cui questa è stata decisa. Si tratta di filtri operanti per classi omogenee di controversie, delimitate in ragione della materia. L'art. 5, par. 1, lett. j), ad esempio, indica come riconoscibile una sentenza che abbia statuito su un'obbligazione extracontrattuale derivante da morte, lesioni fisiche, danno alle cose o perdita di cose, se la condotta, attiva o omissiva, che costituisce la causa diretta del danno si è svolta nello Stato di origine.

Appartengono alla terza categoria di filtri alcune connessioni fondate sulla volontà delle parti del procedimento, o della parte nei cui confronti la sentenza viene poi invocata. Si colloca in quest'ambito l'art. 5, par. 1, lett. m), della Convenzione, che qualifica come riconoscibile la decisione resa da un giudice designato in un accordo concluso per iscritto, o anche solo provato per iscritto che non sia un accordo che pretenda di attribuire al giudice scelto una competenza esclusiva: se l'accordo è esclusivo vale, infatti, nei rapporti fra gli Stati che ne sono parti, un altro strumento elaborato in seno alla Conferenza de L'Aja di diritto internazionale privato, la Convenzione de L'Aja del 30 giugno 2005 sugli accordi di elezione esclusiva del foro¹⁷.

Non esiste una gerarchia fra le basi giurisdizionali previste dalla Convenzione. Perché sussista in capo allo Stato richiesto l'obbligo di riconoscere ed eventualmente eseguire una data decisione è sufficiente che questa soddisfi uno qualsiasi dei filtri previsti. Può del resto accadere che rispetto a una medesima decisione risultino sussistere non una ma più basi giurisdizionali. Una decisione resa in relazione a un illecito cagionato da una condotta occorsa nello Stato contraente X che abbia condannato al risarcimento una persona

¹⁶ V. in generale P. FRANZINA, *The Jurisdictional Filters*, in M. WELLER *et alii* (a cura di), *The HCCH 2019 Judgments Convention*, cit., 41 ss.

¹⁷ Il testo della Convenzione si legge, assieme alle informazioni sulle ratifiche e le adesioni nel sito web della Conferenza de L'Aja di diritto internazionale privato, citato in precedenza.

avente la propria residenza abituale nello stesso Stato X risulterà riconoscibile nello Stato contraente Y perché così dispongono, indifferentemente, l'art. 5, par. 1, lett. a) e lett. j) della Convenzione. L'applicabilità della seconda disposizione, pur riferita a un novero ristretto di fattispecie (le decisioni in materia di obbligazioni extracontrattuali), non esclude l'impiego della prima, di respiro generale.

Se una decisione non soddisfa i requisiti della Convenzione, lo Stato richiesto non è tenuto ad attribuirvi efficacia in forza della Convenzione. Come precisa l'art. 15, la Convenzione non impedisce allo Stato richiesto di riconoscerla ad altro titolo, in particolare in base alle proprie norme interne. Si sottrae alla regola ora indicata solo uno dei filtri giurisdizionali previsti dalla Convenzione: ai sensi dell'art. 6, una decisione che abbia statuito su diritti reali immobiliari è riconosciuta ed eseguita se, e solo se, l'immobile è situato nello Stato di origine. A differenza delle basi giurisdizionali dell'art. 5, quella ora ricordata ha carattere esclusivo, nel senso che preclude la riconoscibilità in uno Stato contraente delle decisioni relative a diritti reali su immobili situati in un altro Stato contraente ove rese in uno Stato diverso.

La verifica della competenza internazionale dei giudici dello Stato d'origine non è incisa dalle valutazioni svolte dai giudici dello Stato d'origine circa la loro competenza giurisdizionale. Non importa, dunque, se per dichiararsi muniti di giurisdizione abbiano fatto leva sulle circostanze valorizzate dalla Convenzione ai fini del riconoscimento: il solo dato che interessa in sede di verifica della competenza internazionale è se fra il foro e la controversia esistesse un legame riconducibile a quelli contemplati dalla Convenzione. Per ragioni analoghe, ove la competenza diretta dei giudici dello Stato d'origine sia stata apprezzata da questi ultimi sulla scorta di criteri omologhi a quelli della Convenzione, le constatazioni da essi compiute circa i fatti rilevanti (ad esempio, in merito al fatto che la condotta all'origine dell'illecito extracontrattuale si sia svolta nello Stato del foro) non vincolano le autorità dello Stato richiesto allorché si tratti di verificare la riconoscibilità della sentenza¹⁸. In definitiva, la valutazione della competenza internazionale è del tutto indipendente, nello Stato richiesto, dalla disamina compiuta nello Stato d'origine per accertare la sussistenza della competenza giurisdizionale.

Se una decisione si compone di parti separabili, perché dotate di una sufficiente autonomia logico-giuridica, nulla impedisce che il riconoscimento di tale decisione, come ricorda l'art. 9 della Convenzione, sia limitato ad una o più di

¹⁸ P. FRANZINA, *The Jurisdictional Filters*, cit., 46.

quelle parti, in particolare là dove le condizioni per il riconoscimento non siano riunite per la parte rimanente.

7. *Le decisioni in tema di sostenibilità secondo la Judgments Convention.*

È piuttosto raro, nella prassi, che si discuta della circolazione internazionale delle decisioni emesse in procedimenti civili in tema di sostenibilità. Non sono molti, in quest'ambito, i procedimenti che si concludono con una decisione di merito: nelle vicende note alle cronache è relativamente frequente che le parti riescano a raggiungere una soluzione transattiva della controversia¹⁹. Il timore che il protrarsi del giudizio possa accrescere il danno reputazionale dell'impresa convenuta contribuisce verosimilmente a spiegare una certa propensione al negoziato.

La questione della riconoscibilità delle sentenze rese nelle azioni in tema di *due diligence* presenta, nondimeno, un interesse non trascurabile. Per un verso, infatti, le condizioni alle quali una tale sentenza può produrre effetto in uno o più Stati diversi da quello d'origine possono incidere in misura non piccola sulla stessa definizione di una soluzione amichevole della lite: l'impresa convenuta, al momento di calcolare le conseguenze dell'ipotetico accoglimento delle domande proposte nei suoi confronti non potrà verosimilmente mancare di interrogarsi sulla probabilità che la decisione produca effetto in paesi dove il suo patrimonio, le sue attività o la sua reputazione potrebbero maggiormente risentirne. Per un altro verso, giova ricordare che, quando le domande proposte nei confronti di un'impresa sono respinte per ragioni di merito, la decisione che accerti l'infondatezza di tali domande preclude, se riconosciuta in un dato Stato, le eventuali iniziative che l'attore promuova nei riguardi del medesimo convenuto in tale Stato.

¹⁹ Un esempio recente riguarda il procedimento avviato da ClientEarth nei confronti di Danone per avere quest'ultima omesso di adottare le misure necessarie a mitigare la diffusione degli involucri di plastica usati per i suoi prodotti. L'accordo transattivo raggiunto nel 2025 fra le parti ha posto fine al procedimento a fronte dei seguenti impegni di Danone: aggiornare nel proprio piano di *due diligence* la valutazione dei rischi connessi all'uso della plastica; accrescere gli sforzi tesi a ridurre detti rischi, ad esempio promuovendo il riuso degli involucri in questione; rendere pubblica la "plastic footprint" dei prodotti Danone, in funzione di una migliore visibilità del problema da parte di consumatori e *stakeholders*; l'organizzazione di incontri periodici per i successivi tre anni fra Danone e alcune organizzazioni non governative ai fini del monitoraggio delle azioni intraprese. Si veda S. DOWNES, *Plastics Court Case Settled: What Has Danone Agreed to Do?*, nel sito *Sustainability Magazine*, <https://sustainabilitymag.com> (25 febbraio 2025).

Negli Stati in cui la riconoscibilità di una sentenza straniera dipenda dalla competenza internazionale del giudice che l'ha resa, occorre di fatto stabilire, per quanto qui interessa, se le connessioni fra il foro e la lite soddisfino le condizioni stabilite a questo proposito dallo Stato richiesto. Nel prisma della Convenzione de L'Aja del 2019 sul riconoscimento e l'esecuzione delle decisioni in materia civile o commerciale, la verifica appena evocata tende a condurre a risposte variegate. Si considerino i tre scenari descritti di seguito.

Il primo scenario comprende i procedimenti promossi nello Stato in cui l'impresa in questione – spesso la principale società operativa del gruppo – risulta stabilita. Le decisioni emesse nel quadro di simili procedimenti in uno Stato contraente soddisfano agevolmente il requisito della competenza internazionale ai sensi della *Judgments Convention*. Se si tratta di una decisione che accerta la responsabilità dell'impresa e dispone nei suoi confronti le condanne conseguenti, viene in gioco il già citato art. 5, par. 1, lett. a), della Convenzione, che valorizza la residenza abituale della persona contro cui è chiesto il riconoscimento. Come precisa l'art. 3, par. 2, della Convenzione, la residenza abituale di una persona giuridica è nello Stato in cui tale persona ha la sua sede statutaria, quello secondo la cui legge l'ente è stato costituito, quello in cui si trova la sua amministrazione centrale e quello in cui si trova il centro d'attività principale dell'ente stesso²⁰. Una stessa persona giuridica può dunque risiedere abitualmente in più Stati, agli effetti della Convenzione: quello della sua sede statutaria, quello in cui si trova la sua amministrazione centrale, etc. Per essere riconoscibile ai sensi dell'art. 5, par. 1, lett. a), è sufficiente che la decisione sia stata resa in uno qualsiasi degli Stati ora evocati.

Il secondo scenario su cui interessa soffermarsi corrisponde ai casi in cui la responsabilità di un'impresa per omessa *due diligence* viene fatta valere non già nello Stato in cui questa è stabilita, ma in quello in cui si sono verificate le condotte che un'adeguata vigilanza avrebbe invece dovuto prevenire. Come nello scenario precedente, l'ipotesi che conviene esaminare è quella che si verifica

²⁰ Le declinazioni del concetto di residenza abituale accolte dall'art. 3 corrispondono a quelle generalmente impiegate per identificare lo Stato investito del potere (e della responsabilità) di controllare l'operato di una persona giuridica nel diritto internazionale dei diritti umani: v. in questo senso, per esempio, il *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, adottato dal Comitato sui diritti economici, sociali e culturali delle Nazioni Unite il 10 agosto 2017, E/C.12/GC/24, par. 26. Si veda peraltro l'art. 9 del *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, ancora in discussione, che, nella versione del 2023, include nella nozione di domicilio a fini dello strumento anche lo Stato in cui l'impresa in questione possiede i suoi "principal assets".

quando una simile responsabilità sia invocata da una o più persone danneggiate da tali condotte, o da chi ne rappresenti gli interessi sul piano collettivo.

Nel quadro della Convenzione, la riconoscibilità di una decisione che accerti una responsabilità di questo genere riposa in modo specifico sulla norma, già citata, stabilita all'art. 5, par. 1, lett. j), sulle decisioni in materia di obbligazioni extracontrattuali. Come si è accennato in precedenza, tuttavia, tale disposizione si applica alle sole decisioni concernenti obbligazioni derivanti da morte, lesioni fisiche, danno alle cose o perdita di cose ("death, physical injury, damage to or loss of tangible property"). Già questa limitazione rischia di ridurre sensibilmente l'utilità pratica dell'art. 5, par. 1, lett. j), nel quadro del contenzioso sulla sostenibilità, data l'ampia varietà di interessi che la diligenza richiesta a un'impresa serve, in ultima analisi, a preservare. In questo senso, ricadono nella sfera di applicazione della norma le decisioni che accertino la responsabilità di un'impresa per la mancata vigilanza su condotte sfociate nella morte o nella compromissione dell'integrità fisica di una o più persone, oppure nella perdita di valore di terreni a seguito di inquinamento, o di altri beni, distrutti o danneggiati in occasione di eventi evitabili. È invece dubbio se rientri nel perimetro della previsione una decisione che accerti la mancata vigilanza di un'impresa rispetto all'assoggettamento dei dipendenti di un'altra impresa, controllata dalla prima, a forme di lavoro non degno, quando i comportamenti attribuibili a tale seconda impresa consistano, ad esempio, nell'imposizione di orari di lavoro irragionevolmente lunghi o nel diniego del diritto alle ferie, e non si siano immediatamente tradotti in lesioni fisiche a carico dei dipendenti interessati.

A prescindere dalla limitazione ora descritta, l'art. 5, par. 1, lett. j), della *Judgments Convention* presenta comunque un'utilità scarsa, se non nulla, nello scenario in esame. Per essere riconoscibile ai sensi della norma citata, la condotta, anche omissiva, all'origine del danno dev'essersi svolta nello Stato in cui la decisione stessa promana. Una condizione, questa, che può dirsi soddisfatta nell'ipotesi in cui l'impresa convenuta abbia direttamente agito nello Stato in cui sono stati patiti i danni oggetto della decisione o abbia svolto in tale paese l'attività direttiva, gestionale e di controllo nell'ambito della quale avrebbe dovuto conformarsi agli obblighi di vigilanza in discussione. Ipotesi, entrambe, non frequenti. Nel caso, più probabile, in cui il danno occorso nel paese A venga attribuito alle omissioni di un'impresa stabilita o operante nel paese B, che nel medesimo paese è solita prendere le sue decisioni, la condizione posta dall'art. 5, par. 1, lett. j), della Convenzione risulterà per regola non soddisfatta: l'omissione eventualmente accertata dal giudice risulterà localizzabile nello Stato B, uno Stato diverso da quello in cui la decisione è stata pronunciata.

A considerazioni diverse può portare, in qualche caso, la norma che si legge all'art. 5, par. 1, lett. d), della Convenzione. Vi si dispone che la decisione è riconoscibile ai sensi della Convenzione se il convenuto aveva una succursale, un'agenzia o qualsiasi altra sede d'attività senza personalità giuridica distinta nello Stato di origine al momento in cui è divenuto parte del procedimento nello Stato d'origine, a patto che la domanda accolta dalla decisione tragga origine dalle attività di detta succursale. In sostanza, se un'impresa stabilita nello Stato X possiede una sede d'attività nello Stato Y, e una decisione pronunciata nello Stato Y accerti la responsabilità di detta impresa per aver mancato ai suoi doveri di diligenza, tale decisione dovrà ritenersi efficace negli Stati contraenti della *Judgments Convention*, a norma dell'art. 5, par. 1, lett. d), allorché la responsabilità ascritta all'impresa in questione discenda dalle condotte, attive o omissive, della sede di attività. È raro che si verifichi la condizione appena descritta, giacché una sede d'attività, ai sensi della norma in esame, è un'articolazione organizzativa di un'impresa operante in più paesi, che però resta unica: deve trattarsi di un'articolazione dotata di un certo grado di autonomia, ma è pur sempre la propaggine di un ente in sé unitario. Ebbene, le omissioni nelle quali si concreta una violazione dei doveri di *due diligence* interessano, solitamente, le politiche che un'impresa definisce unitariamente per l'insieme delle proprie attività, ovunque queste si svolgano e a prescindere dal fatto che in uno o più paesi l'impresa stessa abbia dato vita a una struttura locale dotata di una certa indipendenza nella gestione degli affari. Ove ciò accada, l'omissione – se accertata – sarà in genere attribuibile all'impresa nel suo complesso e non a questa o quella sede locale. Il ricorso all'art. 5, par. 1, lett. d), della Convenzione risulterà allora escluso.

Il terzo scenario a cui preme fare cenno abbraccia i casi in cui vengano convenute più imprese, nello Stato in cui una di esse opera o è stabilita, e si lamenti la responsabilità di entrambe, per aver concorso al verificarsi di un danno con condotte attive o omissive. La decisione che accerti la responsabilità dell'impresa che abbia nello Stato d'origine della decisione stessa la propria residenza abituale, ai sensi dell'art. 3, par. 2, della Convenzione, risulterà riconoscibile a norma dell'art. 5, par. 1, lett. a), della *Judgments Convention*, sopra esaminato. Ad analoghe conclusioni si giunge, stavolta in base all'art. 5, par. 1, lett. j), della Convenzione, per la decisione con cui sia accertata la responsabilità dell'impresa, fra quelle convenute, la cui condotta, attiva o omissiva, si sia svolta nello Stato d'origine della decisione, sempre che il danno in discussione rientri fra quelli a cui la norma convenzionale sulle obbligazioni extracontrattuali intende applicarsi.

Nella misura in cui, invece, la decisione riguardi la responsabilità di un'altra delle imprese convenute, la *Judgments Convention* rischia di non rivestire alcuna utilità. Manca infatti nella Convenzione un filtro giurisdizionale che dia rilievo ai legami intercorrenti fra le domande proposte nei confronti delle diverse persone coinvolte come convenuti in un medesimo procedimento. Pertanto, ove l'attore si avvalga nello Stato d'origine di una norma sulla competenza giurisdizionale che gli permetta di agire nei confronti di più convenuti davanti a un medesimo giudice, a motivo dei nessi fra le domande proposte nei riguardi degli stessi, la decisione che accolga tali domande non soddisfa le condizioni previste dalla Convenzione per l'insieme dei convenuti: per quelli che non sono stabiliti nello Stato d'origine, o non vi hanno tenuto la condotta loro rimproverata, la Convenzione non appronta alcuno specifico criterio di competenza internazionale. La decisione non sarà dunque riconoscibile ai sensi della Convenzione. Circolerà negli Stati contraenti, ai sensi della Convenzione, limitatamente ai capi – se separabili – riguardanti gli altri convenuti, ma per il resto non beneficerà della Convenzione (pur restando ferma, come visto, la possibilità di un riconoscimento integrale, come precisa l'art. 15 della Convenzione, se in tal senso dispongano altre norme sull'efficacia delle sentenze straniere, segnatamente di fonte interna, in vigore nello Stato richiesto).

Si noti che in ognuno degli scenari ora considerati, la pronuncia con cui i giudici di uno Stato contraente abbiano rigettato nel merito le domande dell'attore sono riconoscibili negli altri Stati contraenti a norma dell'art. 5, par. 1, lett. c), della *Judgments Convention*. In base a tale disposizione, infatti, il requisito della competenza internazionale può dirsi soddisfatto *de plano* allorché la decisione di cui si discute venga invocata nei confronti della parte che ha instaurato il giudizio²¹. In pratica, investendo della domanda i giudici di un certo Stato, l'attore si vede preclusa la possibilità di invocare, ai fini della Convenzione, che lo Stato in questione non costituisce la sede appropriata del contenzioso.

²¹ Alcune delle vicende che hanno alimentato in questi anni il contenzioso della sostenibilità si sono concluse con pronunce di rigetto accompagnate dalla condanna degli attori al versamento di spese processuali per importi ragguardevoli. Si noti che ai sensi dell'art. 3, par. 1, lett. b), della Convenzione le decisioni ammesse ad essere riconosciute ed eseguite in forza della Convenzione sono efficaci, nello Stato richiesto, anche con riguardo al capo relativo alle spese. Per un esempio recente di azione in materia di sostenibilità conclusasi con un'importante condanna alle spese a carico dell'attore soccombente, si veda la pronuncia con cui nel 2024 la Corte Federale Australiana ha posto fine alla controversia sul progetto di un gasdotto da costruire nelle acque antistanti la costa settentrionale dell'Australia: v. in proposito, per tutti, *Environmental Defenders Office to pay \$ 9m in costs to Santos over Failed Challenge to Barossa Gas Project*, nel sito *The Guardian*, <https://www.theguardian.com> (16 gennaio 2024).

La ricognizione proposta sin qui può riassumersi come segue. Con l'eccezione delle decisioni rese nello Stato in cui l'impresa convenuta ha la sua sede, la sua amministrazione centrale o il suo centro di attività principale, le decisioni con cui sia accertata in uno Stato contraente della Convenzione de L'Aja del 2019 una responsabilità per omessa *due diligence* hanno, in genere, poche *chances* di essere riconosciute negli altri Stati contraenti ai sensi della Convenzione, non essendo agevole vedere soddisfatto in relazione ad esse il requisito della competenza internazionale. Sono invece pressoché sistematicamente riconoscibili in forza della Convenzione, sotto questo profilo, le pronunce che, rigettando nel merito le doglianze dell'attore, escludono l'esistenza di una simile responsabilità.

8. *Considerazioni conclusive.*

La tutela giurisdizionale offerta dagli Stati a quanti lamentino una lesione dei loro diritti causata da attività di impresa non sostenibili fa parte dei mezzi mediante i quali quei medesimi Stati adempiono i loro obblighi internazionali circa la protezione dei diritti fondamentali e la salvaguardia dell'ambiente.

Le condizioni alle quali è permesso ai singoli di accedere a tale tutela variano da Stato a Stato, secondo le rispettive norme sulla competenza giurisdizionale. In ambito europeo tali norme sono in parte uniformi: il regolamento Bruxelles I-*bis*, sopra citato, detta i criteri a cui devono attenersi i giudici degli Stati membri quando, in assenza di una proroga espressa della competenza, si faccia questione della responsabilità di un'impresa domiciliata in uno Stato membro. Al di fuori dello scenario ora indicato, e in mancanza di altre norme uniformi, le regole che disciplinano la competenza a statuire sulle azioni in materia di mancata *due diligence* differiscono talora sensibilmente da uno Stato all'altro.

Per le ragioni illustrate nelle pagine precedenti, questo stato di cose rischia di limitare la stessa circolazione delle decisioni con cui dette azioni vengono definite, di fatto riducendone l'impatto. Al di là dei casi in cui l'efficacia delle decisioni è rimessa a regole che dispensano dalla verifica della competenza internazionale dei giudici dello Stato d'origine, il permanere di divergenze fra i vari Stati sul terreno della competenza diretta riduce le probabilità che uno Stato possa dare ingresso a una pronuncia resa altrove. La stessa Convenzione de L'Aja del 2019 sul riconoscimento e l'esecuzione delle decisioni in materia civile o commerciale, che pure costituisce il più avanzato strumento di applicazione

generale e di respiro universale in questo campo, mostra come l'impiego di certi criteri di competenza diretta in uso in certi Stati, come il foro del litisconsorzio passivo o il foro degli illeciti civili nella declinazione relativamente ampia accolta in Europa col regolamento Bruxelles I-*bis*, non assicura la "esportabilità" delle pronunce rese sulla scorta di quei criteri.

Le proposte recenti della dottrina volte ad estendere l'ambito della giurisdizione degli Stati membri rispetto alle domande in tema di diritti umani e interessi collettivi in campo ambientale, avanzate soprattutto nel dibattito che ha accompagnato l'elaborazione della direttiva (UE) 2024/1760 del 13 giugno 2024 relativa al dovere di diligenza delle imprese ai fini della sostenibilità²², e che investe ora i suoi possibili seguiti²³, possono certo migliorare l'effettività della tutela prestata in questo campo nella cornice dell'Unione europea (cioè ad opera di giudici di Stati membri, con provvedimenti capaci di circolare pressoché senza ostacoli all'interno dello spazio giudiziario europeo), mentre non mutano il quadro che si registra attualmente sul piano universale. Se rese in base a titoli poco "condivisi" sul piano internazionale, le decisioni ottenute nell'Unione rischiano di non essere riconosciute al di fuori dell'Unione stessa.

Il quadro non migliorerebbe in modo significativo ove aumentasse – come pure è auspicabile – il numero degli Stati parti della *Judgments Convention*. Una disponibilità generalizzata del criterio della residenza abituale della parte nei cui confronti viene invocata la decisione, di cui all'art. 5, par. 1, lett. a), comporterebbe certo dei vantaggi. Gli altri criteri previsti dalla Convenzione, tuttavia, a partire dall'art. 5, par. 1, lett. j), sulle obbligazioni extracontrattuali, sono delineati in termini tali da poter operare solo per una parte limitata del contenzioso della sostenibilità. Oltre a ciò, la Convenzione, come si è osservato, non valorizza quale possibile criterio di competenza indiretta il foro del litisconsorzio passivo. Né, tanto meno, la Convenzione prevede che possa circolare in base alle sue norme una decisione resa in un foro "di necessità", cioè in uno Stato i cui giudici, pur in assenza di nessi geografici significativi con la lite, abbiano eccezionalmente ritenuto di poter decidere la causa in ragione del fatto che una declinatoria, nelle circostanze, esporrebbe l'attore a un diniego di giustizia, che lo Stato in questione ritiene di dover scongiurare, pena

²² GUUE L 2024/1760 del 5 luglio 2024.

²³ V. per tutti, da ultimo, E. BENVENUTI, *Giurisdizione in materia civile e commerciale nei confronti di convenuti domiciliati in Stati terzi e interessi materiali dell'Unione europea*, Milano, 2025, 329 ss.

altrimenti la compromissione, nei fatti, dei diritti in discussione²⁴.

Per superare lo stato di cose attuale occorrerebbe un'accresciuta consapevolezza, fra gli Stati, del valore della cooperazione nella gestione di interessi in fondo comuni come la promozione delle attività di impresa sostenibili e la protezione dei diritti umani e degli interessi collettivi che tali attività possono di fatto mettere a repentaglio, se svolte, appunto, in modo non sostenibile.

Alla cooperazione sul piano sostanziale, in funzione della messa a punto di parametri di sostenibilità armonizzati, ove possibile, e di obblighi di *due diligence* di portata non solo regionale, dovrebbe accompagnarsi una cooperazione riferita alla tutela giurisdizionale offerta in ambito civile a chi subisca le conseguenze di attività non sostenibili. Una cooperazione, dunque, che riduca le divergenze che ora si registrano sul terreno delle norme di competenza diretta e che, parallelamente, per questa via, diminuisca il rischio che le decisioni emanate in uno Stato possano vedersi negato il riconoscimento e l'esecuzione in uno Stato diverso in ragione della loro provenienza, cioè per l'incompetenza internazionale dei giudici dello Stato d'origine.

Se è vero che il regime sostanziale della sostenibilità sembra destinato a presentare ancora a lungo una forte connotazione nazionale o regionale (per il diverso grado di sviluppo delle condizioni economiche dei vari Stati, per la diversa sensibilità verso i temi della sostenibilità nella società civile dei vari paesi), non è irragionevole pensare che possano essere avviate delle iniziative tese ad accrescere, magari anche solo di poco, la fiducia dei singoli Stati verso le pronunce dei giudici civili degli altri Stati in questo campo: tra gli Stati pronti a pretendere dalle proprie imprese l'osservanza di specifici doveri di *due diligence* e gli Stati in cui il rispetto di quei doveri dovrebbe produrre degli effetti tangibili vi è, infatti, almeno sulla carta, una certa convergenza di interessi.

È lecito pensare che una tale convergenza possa essere sfruttata per dar vita a nuove opportunità di dialogo inter-giurisdizionale fra tali Stati, anche sul

²⁴ Le norme che riconoscono la possibilità di fondare la competenza sulla "necessità" di provvedere esigono in genere che all'attore sarebbe precluso avviare all'estero un procedimento teso a far valere i suoi diritti, o che una sua iniziativa in questo senso sarebbe inidonea a fornirgli la tutela richiesta. Sul concetto di foro di necessità, alla luce dell'esperienza maturata in alcuni sistemi internazionalprivatistici nazionali e nel diritto internazionale privato dell'Unione europea, v., per tutti, M. KÜBLER-WACHENDORFF, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, Tübingen, 2021, 11 ss. In modo più specifico, sull'utilizzo della tecnica nel contenzioso della sostenibilità, v. O. BOSKOVIC, *Extraterritoriality and the Proposed Directive on Corporate Sustainability Due Diligence, A Recap*, in *Journ. Private Int. Law*, 2024, 121 ss.

terreno della circolazione delle decisioni, magari in parallelo con la promozione della Convenzione de L'Aja del 2019, se è vero che quest'ultima, pur con i limiti esaminati, aspira a buon diritto a fungere da "grammatica" universale di questa parte del diritto internazionale privato e a porre così le premesse per iniziative di armonizzazione più coraggiose²⁵.

²⁵ P. FRANZINA, *The Jurisdictional Filters*, cit., 69.

GIUSTO PROCESSO, DANNI PUNITIVI E FRODE ALLA LEGGE: IL RUOLO DEL LIMITE DELL'ORDINE PUBBLICO

*Giovanni Chiapponi**

SOMMARIO: 1. Introduzione. – 2. I diversi regimi di circolazione. – 3. I motivi di diniego. – 3.1. La clausola dell'ordine pubblico. – 3.2. Diritto al giusto processo. – 3.3. Spostamento fraudolento della competenza in frode alla legge. – 3.4. Danni punitivi. – 4. Alcuni casi studio. – 4.1. Il caso *Herrera Rios*. – 4.2. Il caso *Texaco Oil Company e Chevron contro Lago Agrio*. – 5. Osservazioni conclusive.

1. *Introduzione.*

Il contenzioso in materia di principi ESG¹ si alimenta di procedimenti civili

* Le opinioni espresse nel presente scritto sono esclusivamente riconducibili alla responsabilità dell'autore e non riflettono necessariamente la posizione ufficiale della Corte di giustizia dell'UE.

¹ I principi in materia ambientale, sociale e di *governance* (c.d. principi “ESG”) si relazionano al ruolo delle imprese multinazionali nella protezione dei diritti umani e dell'ambiente; tali principi mirano precisamente ad imporre a dette imprese un dovere di diligenza che permetta di prevenire e ridurre i rischi per l'individuo e l'ambiente derivanti dalle loro attività. In proposito, è da rilevarsi come a livello internazionale siano previste numerose misure di *soft law*, quali la dichiarazione tripartita dell'ILO sui principi riguardanti le imprese multinazionali e la politica sociale, le linee guida dell'OCSE per le imprese multinazionali, il patto globale delle Nazioni Unite, i principi guida delle Nazioni Unite su imprese e diritti umani. Su tali misure di *soft law* si sono innestate in tempi recenti misure legislative, a livello nazionale (ad esempio, la legge francese del 27 marzo 2017, n. 2017-399 relativa all'obbligo di vigilanza delle società madri e delle imprese committenti e la legge tedesca del 16 luglio 2021, n. 46 sugli obblighi di vigilanza aziendale nelle catene di valore) e dell'UE [direttiva (UE) 2024/1760 del Parlamento europeo e del Consiglio, del 13 giugno 2024, relativa al dovere di diligenza delle imprese ai fini della sostenibilità e che modifica la direttiva (UE) 2019/1937 e il regolamento (UE) 2023/2859 (Testo rilevante ai fini del SEE) GU L 2024/776, 1-58], con cui si è cercato di regolamentare gli obblighi in materia di principi ESG.

avviati nei confronti di una o più imprese² indicate come responsabili della violazione di diritti umani fondamentali, o, in generale, della lesione di interessi collettivi, in particolare, in campo ambientale, sociale e di *governance*, causate da condotte commissive o omissive collegate alla loro attività economica³.

Si può pensare, ad esempio, a cause relative alla responsabilità dell'impresa convenuta per gravi danni ambientali, che l'attore riconduca alle scelte dell'impresa o all'omessa adozione da parte di quest'ultima di adeguate misure di prevenzione⁴; ad un contenzioso concernente l'apporto fornito dall'impresa convenuta ad alterazioni ambientali di portata globale, in particolare a carico

² Il contenzioso promosso nei confronti di Stati e altri soggetti pubblici a tutela di interessi collettivi in campo ambientale e sociale non è qui preso in considerazione.

³ P. FRANZINA, *Il contenzioso civile transazionale sulla corporate accountability*, in *Riv. dir. internaz. priv. e proc.*, 2022, 828. La letteratura sull'argomento è vasta, si vedano, *ex multis*, R. MICHAELS-S. ZEH, *Sustainability and private international law*, in M. SANTOS SILVA-A. NICOLUSSI-C. WENDEHORST-P. CODERCH-M. CLÉMENT-F. ZOLL (a cura di), *Routledge handbook of private law and sustainability*, Londra, 2024, 479 ss.; M.P. WELLER-L. TRAN, *Climate Litigation against companies*, in *Climate Action*, 2022, 1 ss.; GRIMHEDEN-D. WALLIS, *Business and human rights: access to justice and effective remedies (with input from the EU Agency for fundamental rights)*, in *Report of the European Law Institute*, 2022, 1 ss.; R. MICHAELS-V. RUIZ ABOU-NIGM-H. VAN LOON, *The private side of transforming our world. UN sustainable development goals 2030 and the role of private international law*, Antwerpen, 2021, 1 ss.; A. BONFANTI, *Accesso alla giustizia per violazioni dei diritti umani sul lavoro lungo la catena globale del valore: recenti sviluppi nella prospettiva del diritto internazionale privato*, in *Giorn. dir. lav. rel. ind.*, 2021, III, 369 ss.; C. GLINSKI, *Corporate social responsibility and corporate liability for environmental damage*, in B. POZZO-V. JACOMETTI (a cura di), *Environmental loss and damage in a comparative law perspective*, Cambridge, 2021, 111 ss.; C. KESSEDJIAN, *Questions de droit international privé de la responsabilité sociétale des entreprises: rapport général*, in C. KESSEDJIAN-H. CANTU RIVERA (a cura di), *Private international law aspects of corporate social responsibility*, Cham, 2020, 3 ss.; G. VAN CALSTER, *The role of private international law in corporate social responsibility*, in E. LEES-J. VIÑUALES (a cura di), *The Oxford handbook of comparative environmental law*, Oxford, 2019, 1139 ss.; M.P. WELLER-L. HÜBNER-L. KALLER, *Private international law for corporate social responsibility*, in *Max Planck Institute for Comparative and International Private Law Research Paper Series*, 2018, 1 ss.; J.H. VAN LOON, *Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters*, in *Uniform Law Review*, 2018, II, 298 ss.

⁴ Ci si può riferire, ad esempio, alla causa *Milieudefensie e altri c. Royal Dutch Shell* (si vedano in tal senso le seguenti decisioni: Corte distrettuale de L'Aja, 26 maggio 2021, ECLI:NL:RBDHA:2021:5337; Corte d'appello de L'Aja, sentenza 12 novembre 2024, ECLI:NL:GHDHA:2024:2100) e la causa pendente *Hugues Falys, FIAN, Greenpeace, Ligue des droits humains c. TotalEnergies* promossa il 23 marzo 2024 dinanzi al Tribunale commerciale di Tournai.

del clima⁵; o, ancora, a procedimenti sulla responsabilità dell'impresa convenuta per la mancata adozione di cautele volte a garantire la sicurezza degli ambienti di lavoro e, più in generale, la dignità stessa del lavoro⁶.

Situandosi lo svolgimento dell'attività economica d'impresa lungo le c.d. catene globali del valore⁷, si viene a determinare una dispersione geografica degli elementi della lite che caratterizzano il contenzioso ESG facendo emergere una forte componente transfrontaliera in cui vengono alla luce importanti questioni internazionalprivatistiche tra cui quelle relative al riconoscimento e all'esecuzione transfrontaliera di sentenze su cui sarà incentrato il presente scritto.

In proposito, è da rilevarsi come si registri attualmente una crescente domanda di accesso alla giustizia in materia ESG che sfocia in un numero sempre maggiore di procedimenti instaurati contro gruppi societari⁸. Il fenomeno è particolarmente accentuato in campo ambientale ove i giudici nazionali si dichiarano sempre più frequentemente competenti a statuire sulla giustiziabilità degli obblighi climatici internazionali, garantendo così la tutela dei diritti fondamentali ad essi connessi⁹.

Una volta che il giudice di un determinato Stato si sia riconosciuto competente e abbia adottato una decisione in materia ESG nei confronti di una o più imprese, riconoscerla ed eseguirla nel territorio di un altro Stato potrebbe risultare necessario per garantirne l'effettività e l'efficacia che diversamente rischierebbe di rimanere *tamquam non esset*.

In particolare, le decisioni volte a condannare la società convenuta a versare

⁵ A titolo di esempio, si vedano la causa *Lliuya c. RWE* (in proposito si citano le seguenti decisioni: Tribunale di prima istanza di Essen, 15 dicembre 2016, n. 2 O 285/15; Corte regionale superiore di Hamm, 28 maggio 2025, n. 5 U 15/17) e la causa (pendente) introdotta nel 2022 dinanzi al Tribunale di Zug, *Asmania e altri c. Holcim*.

⁶ Vedasi in tal senso la causa *Jabir e altri c. KiK Textilien und Non-Food GmbH* (Tribunale di prima istanza di Dortmund, 10 gennaio 2019, caso n. 7 O 95/15) e la causa *Nestlé USA, Inc. c. Doe* (Corte suprema americana, 17 giugno 2021, n. 593 U. S. 628).

⁷ Come evidenziato da P. FRANZINA, *Il contenzioso civile transazionale sulla corporate accountability*, cit., 831, "l'espressione è usata per descrivere una forma di organizzazione dell'attività produttiva che, discostandosi dal modello dell'integrazione verticale, poggia su una trama di relazioni contrattuali fra imprese indipendenti, a ciascuna delle quali fa capo una fase del processo di produzione del valore".

⁸ Ciò è senz'altro dovuto alle misure legislative adottate in materia ESG in ambito nazionale ed europeo, si veda *supra*, nota 1.

⁹ Da ultimo si segnala l'ordinanza della Cass. s.u., 21 luglio 2025, n. 13085; si richiamano altresì i casi citati *supra*, note 5 e 6.

una somma di denaro all'attore a titolo di risarcimento per aver violato i suoi diritti fondamentali in materia ESG, avendo effetti di natura esecutiva, potrebbero, in caso di inadempimento spontaneo, dare luogo a un procedimento di esecuzione dinanzi al giudice di un diverso Stato, ove l'impresa convenuta possieda beni suscettibili di esecuzione forzata nel territorio di detto Stato.

Detta necessità potrebbe, ad esempio, sorgere nel caso di esecuzione all'estero di una decisione di condanna pecuniaria, resa dal giudice del *forum delicti*, quando l'impresa soccombente non sia in possesso di beni significativi da sottoporre a esecuzione forzata nel territorio di detto Stato. In tale evenienza l'attore potrebbe avviare un procedimento per eseguire la decisione di condanna nel diverso Stato ove si trova la sede dell'impresa e dove verosimilmente si situa un numero consistente di beni ¹⁰.

Un'altra esemplificazione dell'esigenza di procedere all'esecuzione di una sentenza in altri Stati potrebbe, peraltro, concretizzarsi qualora, sulla base della teoria dell'ubiquità, il *locus actus* venga individuato nel luogo in cui siano localizzati in modo prevalente gli impianti di produzione di un'impresa; in tal caso la giurisdizione adita potrebbe non coincidere con il domicilio della società soccombente dove quest'ultima detenga i beni da assoggettare ad esecuzione ¹¹.

2. I diversi regimi di circolazione.

Volendosi porre nella prospettiva degli Stati membri dell'UE, il mio contributo intende riferirsi, sia all'ipotesi in cui i provvedimenti giurisdizionali in materia ESG con necessità di circolare vengano emessi dal giudice di un diverso Stato membro, sia all'evenienza in cui le decisioni *de quibus* vengano rese dall'autorità giurisdizionale di uno Stato terzo ¹².

Per quanto riguarda la situazione intra-europea, le decisioni emesse negli Stati membri sono riconosciute ed eseguite nel territorio dell'UE secondo le

¹⁰ In proposito, si veda O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, 264.

¹¹ O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, cit., 264-265.

¹² Per una visione d'insieme dei vari sistemi, si veda M. REQUEJO ISIDRO, *Recognition and enforcement of judgments*, in B. HESS-M. WOO-L. CADIET-S. MENÉTREY-E. VALLINES GARCÍA (a cura di), in *Comparative procedural law and justice*, part XIV, chapter 7, 2024, 1 ss.

norme previste dal regolamento (UE) 2012/1215¹³; diversamente le sentenze provenienti da Paesi terzi circolano sulla base di quanto stabilito da accordi multilaterali o bilaterali conclusi tra gli Stati interessati¹⁴ o dai differenti regimi nazionali¹⁵.

Il regolamento Bruxelles I-*bis* rappresenta la chiave di volta del diritto processuale europeo, disciplinando la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale tra gli Stati membri dell'UE. In base al regime previsto dal regolamento, fondato sul principio della fiducia reciproca tra gli Stati membri, le decisioni sono riconosciute ed eseguite *ipso iure* negli altri Stati membri¹⁶ senza che sia necessaria alcuna procedura di *exequatur*. In tal modo, le decisioni rese dai giudici degli Stati membri circolano automaticamente all'interno dell'UE, salvo che una delle parti si opponga al riconoscimento e all'esecuzione invocando uno dei motivi di rifiuto tassativamente previsti dall'art. 45 del regolamento Bruxelles I-*bis*¹⁷.

¹³ Regolamento (UE) 2012/1215 del Parlamento europeo e del Consiglio, del 12 dicembre 2012, concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale (rifusione), GU L 2012/351, 1-32; in prosieguo "regolamento Bruxelles I-*bis*".

¹⁴ Menzione speciale meritano, in particolare, la Convenzione concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale conclusa a Lugano il 30 ottobre 2007, GU C 2009/319, 1-56 (in prosieguo "la Convenzione di Lugano") e la Convenzione della conferenza de L'Aja del 2 luglio 2019 sul riconoscimento e l'esecuzione delle decisioni straniere in materia civile e commerciale (in prosieguo "la Convenzione de L'Aja") su cui si soffermerà il presente scritto.

¹⁵ A tal proposito, il presente scritto prenderà come principale riferimento la legge 31 maggio 1995, n. 218.

¹⁶ Con riferimento all'ambito di applicazione territoriale del regolamento Bruxelles I-*bis*, è da rilevarsi che il regolamento non vincola la Danimarca. Il Regno danese ha, tuttavia, recepito la normativa del regolamento Bruxelles I stipulando, il 19 ottobre 2005, un accordo con l'allora Comunità Europea concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale, GU L 2005/299, 62 ss. A seguito della rifusione del regolamento Bruxelles I, la Danimarca ha notificato alla Commissione il 20 dicembre 2012 la propria intenzione di attuare il contenuto delle modifiche apportate dal regolamento Bruxelles I-*bis*; dette modifiche legislative sono entrate in vigore il 1° giugno 2013.

¹⁷ Per ulteriori approfondimenti sul regime previsto dal regolamento Bruxelles I-*bis* si vedano, *ex multis*, M. FARINA, *I procedimenti per il riconoscimento e l'esecuzione delle decisioni straniere nella recente riforma del processo civile in Italia*, in *Riv. dir. internaz. priv. e proc.*, 2023, 65 ss.; M. LUPOI, *Competenza giurisdizionale, riconoscimento ed esecuzione delle decisioni in materia civile e commerciale: il regolamento n. 1215 del 2012*, in P. BIAVATI-M. LUPOI (a cura di), *Regole Europee e Giustizia Civile*, Bologna, 2022, 23 ss.; S.M. CARBONE-C. TUO, *Il*

Qualora la decisione da riconoscere ed eseguire in uno Stato membro dell'UE sia stata emessa dal giudice di uno Stato terzo, il regime normativo applicabile sarà costituito o dal diritto nazionale dello Stato membro interessato o da accordi internazionali in vigore in tale Paese e applicabili nei rapporti con lo Stato di origine della decisione.

Nella prima ipotesi, la disciplina del riconoscimento e dell'esecuzione della decisione straniera divergerà a seconda delle diverse procedure e condizioni fissate dalle norme nazionali dello Stato richiesto.

A titolo di esempio, mi riferirò, per lo più, a quanto stabilisce la legislazione italiana ove il riconoscimento e l'esecuzione nel nostro Paese di decisioni straniere provenienti da uno Stato terzo, non vincolato da alcuna pertinente Convenzione (bilaterale o multilaterale) con l'Italia, sono disciplinati dalla legge n. 218/1995. Ai sensi di tale normativa, una decisione straniera è riconosciuta in Italia quando coesistono le condizioni elencate all'art. 64 della legge n. 218/1995; una volta accertati in positivo tali requisiti verrà data attuazione alla sentenza *de qua*¹⁸.

Nella seconda ipotesi, qualora siano in vigore accordi internazionali tra lo Stato richiesto e il Paese terzo, le norme stabilite da tali accordi si applicheranno al riconoscimento e all'esecuzione della sentenza straniera. Per gli Stati membri dell'UE risultano di particolare rilievo la Convenzione di Lugano del 2007 e la Convenzione de L'Aja del 2019 sul riconoscimento e l'esecuzione delle decisioni straniere in materia civile e commerciale.

La Convenzione di Lugano disciplina i rapporti degli Stati membri dell'UE con Norvegia, Islanda e Svizzera dettando un regime parallelo a quello del

nuovo spazio giudiziario europeo in materia civile e commerciale, Torino, 2016, 1 ss.; M. REQUEJO ISIDRO, *On the abolition of exequatur*, in B. HESS-M. BERGSTRÖM-E. STORSKRUBB (a cura di), *EU civil justice current issues and future outlook*, Londra, 2016, 283 ss.; F. GASCON INCHAUSTI, *La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis*, in E. GUINCHARD (a cura di), *Le nouveau règlement Bruxelles I bis règlement n°1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, Bruxelles, 2014, 205 ss.; O. LOPES PEGNA, *Il regime di circolazione delle decisioni nel regolamento (UE) n. 1215/2012 Bruxelles I-bis*, in *Riv. dir. internaz.*, 2013, 1206 ss.

¹⁸ Sul tema, P. FRANZINA, *Introduzione al diritto internazionale privato*, Torino, 2025, 293 ss.; C. CAMPIGLIO-F. MOSCONI, *Diritto internazionale privato e processuale*, vol. I, *Parte generale e obbligazioni*, Torino, 2024, 395 ss.; O. LOPES PEGNA, *L'accertamento della "competenza internazionale" del giudice straniero ai sensi della legge n. 218/1995*, in *Riv. dir. internaz.*, 2024, 77 ss.; O. VANIN, *L'efficacia delle sentenze straniere civili in Italia. Le condizioni poste dall'art. 64 della legge n. 218/1995*, in *Scuola Superiore della Magistratura*, 2024, 1 ss.; O. LOPES PEGNA, *I procedimenti relativi all'efficacia delle decisioni straniere in materia civile*, Padova, 2009, 7 ss.

regolamento n. 44/2001¹⁹ che si caratterizza per il riconoscimento automatico delle decisioni con necessità di ottenere una dichiarazione di esecutività per procedere all'esecuzione nello Stato richiesto; ai sensi della Convenzione, le parti possono opporsi all'esecuzione invocando i motivi di rifiuto di cui all'art. 34²⁰.

La Convenzione de L'Aja sul riconoscimento e l'esecuzione delle decisioni straniere in materia civile e commerciale stabilisce per gli Stati contraenti un regime uniforme e semplificato per la circolazione delle decisioni civili²¹. La Convenzione elenca, in primo luogo, le condizioni in positivo (c.d. filtri giurisdizionali o giurisdizione indiretta) al ricorrere delle quali uno Stato contraente ha l'obbligo di riconoscere, ed eventualmente dichiarare esecutive, le decisioni provenienti da un altro Stato contraente; indica altresì le cause ostative in presenza delle quali le autorità dello Stato richiesto sono autorizzate a negare il riconoscimento e l'esecuzione di una decisione per la quale, altrimenti, sussisterebbe l'obbligo sopra indicato²².

¹⁹ Regolamento n. 44/2001 del Consiglio del 22 dicembre 2000 concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale, GU L 2001/12, 1-23; in prosieguo, "regolamento Bruxelles I".

²⁰ I motivi di rifiuto previsti all'art. 34 del regolamento Bruxelles I corrispondono, in sostanza, a quelli stabiliti dall'art. 45 del regolamento Bruxelles I-bis. Le considerazioni circa le problematiche esaminate nel quadro del regolamento Bruxelles I-bis possono essere, per quanto qui di interesse, replicate con riferimento al regolamento Bruxelles I e alla Convenzione di Lugano. Il regime previsto dalla Convenzione di Lugano non sarà, pertanto, preso in considerazione nell'ambito del presente scritto; si rinvia in proposito alla disamina relativa al regolamento Bruxelles I-bis.

²¹ La Convenzione è entrata in vigore il 1° settembre 2023 e vincola attualmente l'UE [in tal senso, si veda la Decisione (UE) 2022/1206 del Consiglio del 12 luglio 2022 relativa all'adesione da parte dell'Unione europea alla Convenzione sul riconoscimento e l'esecuzione delle decisioni straniere in materia civile e commerciale GU L 2022/187, 1 ss.]) e gli Stati membri (ad eccezione della Danimarca), l'Ucraina, l'Uruguay, il Regno Unito; entrerà altresì in vigore in Albania e Montenegro a partire dall'1 marzo 2026 e in Andorra dall'1 giugno 2016.

²² Per una disamina più approfondita si rinvia, tra gli altri, a X. KRAMER, *Scope of application: challenges, compromises and chances*, in M. WELLER-J. RIBEIRO-BIDAOUI-B. MORITZ-N. DETHLOFF (a cura di), *The HCCH 2019 judgments Convention: cornerstones, prospects, outlook*, Oxford, 2023, 3 ss.; F. POCAR, *The 2019 Hague judgments Convention*, in J. HARRIS-M. CAMPBELL (a cura di), *Essays in international litigation for Lord Collins*, Oxford, 2022, 71 ss.; R. BRAND, *Jurisdiction and judgments recognition at the Hague conference: choices made, treaties completed, and the path ahead*, in *Netherlands International Law Review*, I, 2020, 3 ss.; H. VAN LOON, *Towards a global Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters*, in *Nederlands Internationaal Privaatrecht*, 2020, I, 4 ss.; F. GARCIMARTÍN-G. SAUMIER, *Explanatory report on the 2019 HCCH judgments Convention*, in

3. I motivi di diniego.

I citati regimi prevedono, pertanto, motivi di diniego che operano come eccezione al *favor executionis* e che permettono allo Stato richiesto di negare il riconoscimento e l'esecuzione di decisioni straniere nel proprio territorio.

Il presente scritto si prefigge, in particolare, lo scopo di analizzare la problematica del diniego al riconoscimento e all'esecuzione di decisioni emesse da un giudice UE o extra UE nei confronti di una o più imprese per violazione della normativa in materia ESG in un Paese dell'UE. Non essendoci ad oggi una casistica generalizzata, si focalizzerà su alcuni casi studio (*Texaco Oil Company e Chevron contro Lago Agrio ed Herrera Rios*)²³ di decisioni in materia ESG il cui riconoscimento e la cui esecuzione nello Stato richiesto hanno formato oggetto di dibattito essendo emerse questioni relative al fatto che dette decisioni contrastassero con il diritto al giusto processo delle parti (ivi incluso il caso di sentenza ottenuta con frode), fossero state adottate da un giudice incompetente (o la cui competenza sia stata determinata in maniera fittizia) ovvero liquidassero danni punitivi sproporzionati²⁴.

È da rilevarsi, infatti, come i casi rispettivamente di violazione del diritto al giusto processo delle parti, di decisione pronunciata da un giudice incompetente e di liquidazione di danni punitivi sproporzionati rientrino generalmente²⁵ tra i motivi ostativi al riconoscimento e all'esecuzione di sentenze straniere nello Stato richiesto. A seconda di quanto previsto dalle diverse legislazioni in esame, tali motivi possono essere classificati quali motivi autonomi di diniego, o rientrare nella clausola generale dell'ordine pubblico.

Hague Conference of private international law, 2020, par. 1 ss.; P. FRANZINA, *La Convenzione de L'Aja del 2 luglio 2019 sul riconoscimento delle sentenze straniere: una prima lettura*, in *Quaderni di Sidiblog*, 2019, 215 ss.; C. MARIOTTINI-A. BONOMI, *A game changer in international litigation? – roadmap to the 2019 Hague judgments Convention*, in *Yearbook of Private International law*, 2018-2019, 537 ss.

²³ Per un'analisi di tali casi si veda *infra*, par. 4.

²⁴ È, peraltro, noto che ulteriori problematiche sorgano con riferimento alla natura collettiva del contenzioso ESG, tuttavia tali questioni non saranno qui analizzate, si rinvia al contributo di E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea: quale spazio per la tutela collettiva?*, in *Riv. dir. internaz. priv. e proc.*, 2023, 848 ss.

²⁵ Ad eccezione di quanto accade nell'ambito del regime instaurato dal regolamento Bruxelles I-bis con riferimento all'incompetenza del giudice *a quo*, si veda *infra*, par. 3.

3.1. *La clausola dell'ordine pubblico.*

L'ordine pubblico rappresenta un limite generale alla circolazione di sentenze straniere che impone ai giudici dello Stato richiesto di rifiutare il riconoscimento e l'esecuzione di una decisione emessa in un altro Stato qualora quest'ultima produca effetti in contrasto con i valori e i principi fondamentali dell'ordinamento giuridico.

L'ordine pubblico si prefigge, infatti, l'obiettivo di proteggere il nucleo dei valori fondamentali dell'ordinamento richiesto, precludendo il riconoscimento di sentenze straniere suscettibili di produrre effetti incompatibili con i principi etici, economici, politici e sociali che connotano tale ordinamento.

È da rilevarsi come la nozione di ordine pubblico sia intrinsecamente connotata da una valenza internazionale che emerge ogni qual volta l'ordine pubblico venga opposto quale limite all'efficacia di provvedimenti stranieri. Ad esempio, nel nostro Paese, l'ordine pubblico internazionale – che va distinto dall'ordine pubblico interno²⁶ – è da identificarsi “nei principi fondamentali della nostra Costituzione, o in quelle altre regole che, pur non trovando in essa collocazione, rispondono all'esigenza di carattere universale di tutelare i diritti fondamentali dell'uomo, o che informano l'intero ordinamento in modo tale che la loro lesione si traduce in uno stravolgimento dei valori fondanti dell'intero assetto ordinamentale”²⁷. Si tratta, in particolare, di un concetto storicamente definito a livello nazionale, il cui contenuto è sempre più influenzato ed arricchito da principi internazionali assolutamente inderogabili²⁸; ad oggi, si sta, peraltro, assistendo ad una “europeizzazione” dell'ordine pubblico nell'ambito dell'UE²⁹.

²⁶ L'ordine pubblico interno si riferisce a quelle norme “che hanno un carattere imperativo semplicemente nei riguardi interni, cioè nel senso che i privati non possono derogarvi con autonome disposizioni”; si veda in tal senso F. SALERNO, *La costituzionalizzazione dell'ordine pubblico internazionale*, in *Riv. dir. internaz. priv. e proc.*, 2018, 262.

²⁷ C. CAMPIGLIO, *Ordine pubblico (dir. int. priv.)*, in *Diritto on line – Treccani*, 2013; G. ARMONE, *L'ordine pubblico internazionale tra identità e condivisione*, in *Questione Giustizia*, 2019, I, 182.

²⁸ Sui recenti sviluppi del concetto di ordine pubblico europeo si vedano, *ex multis*, W. WURMNEST, *Public policy in European private international law*, in O. MEYER, *Public policy and private international law*, Cheltenham, 2022, 25 ss.; I. THOMA, “*Ordre public*”, in J. BASEDOW-G. RÜHL-F. FERRARI-P. DE MIGUEL ASENSIO, *Encyclopedia of private international law*, Cheltenham, 2017, 1458 ss.; O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012, 1 ss.; B. HESS-T. PFEIFFER, *Interpretation of the public policy exception as referred to in EU instruments of private international and procedural law (Study 15 June 2011 on the interpretation of the public policy exception)*, 1 ss.

²⁹ L'europeizzazione della nozione di ordine pubblico è, ad esempio, discussa con riferimento

L'ordine pubblico quale limite al riconoscimento e all'esecuzione di sentenze straniere è costituito, in particolare, da una componente sostanziale e da una processuale: la prima è attivabile qualora la decisione straniera da riconoscere ed eseguire contrasti in modo inaccettabile, per ragioni sostanziali, con norme essenziali dell'ordinamento giuridico dello Stato richiesto; la seconda è opponibile nel caso in cui il procedimento svoltosi all'estero risulti viziato da gravi irregolarità processuali.

Al fine di attivare la clausola dell'ordine pubblico, il giudice dello Stato richiesto deve, sulla base di un'analisi delle circostanze del caso concreto, individuare quale principio fondamentale del proprio ordinamento sarebbe leso nel caso in cui gli effetti della sentenza straniera fossero ivi riconosciuti.

L'ordine pubblico costituisce una clausola di salvaguardia da applicarsi in maniera restrittiva e in circostanze eccezionali³⁰ qualora non sussistano ulteriori specifici motivi di diniego autonomi. Resta salvo, in ogni caso, che, come regola generale, non ci si può avvalere dell'ordine pubblico per riesaminare surrettiziamente il merito di una decisione straniera e per controllare l'esattezza delle valutazioni di diritto o di fatto operate dal giudice straniero.

Con riferimento ai sistemi di riconoscimento ed esecuzione qui in esame, il limite dell'ordine pubblico può essere invocato conformemente all'art. 45, par. 1, lett. a), del regolamento Bruxelles I-bis³¹, all'art. 7, par. 1, lett. c), della Convenzione de L'Aja³² e all'art. 64, lett. g), della legge n. 218/1995³³.

alla materia dei danni punitivi; in tal senso si rinvia a W. WURMNEST, *Public policy in European private international law*, cit., 39-41; O. FERACI, *Towards the Europeanization of public policy regarding punitive damages: an inquiry between theory and practice*, in S. BARIATTI-L. FUMAGALLI-Z. CRESPI REGHIZZI, *Punitive damages and private international law: state of the art and future developments*, Padova, 2019, 287 ss.

³⁰ Ciò è, peraltro, testimoniato dalla dicitura “manifestamente contrario” dell'art. 45, par. 1, lett. a), del regolamento Bruxelles I-bis e dalla lettera “manifestamente incompatibili” dell'art. 7, par. 1, lett. c), della Convenzione de L'Aja.

³¹ Sull'interpretazione dell'art. 45, par. 1, lett. a), rinvia, tra gli altri, a P. MANKOWSKI, *Art. 45* in U. MAGNUS-P. MANKOWSKI (a cura di), *Commentary Brussels I bis Regulation*, Köln, 2023, 842 ss.; J. NOWAK-V. RICHARD, *Art. 45* in M. REQUEJO ISIDRO (a cura di), *Brussels I bis. A commentary on Regulation (EU) No 1215/2012*, Cheltenham, 2022, 665 ss.

³² Per un'analisi dettagliata di tale disposizione, si vedano, *ex multis*, M. DOTTA SALGUEIRO, *Grounds for refusal*, in M. WELLER-J. RIBEIRO-BIDAOU-B. MORITZ-N. DETHLOFF (a cura di), *The HCCH 2019 judgments Convention: cornerstones, prospects, outlook*, Oxford, 2023, 71 ss.; J. JANG, *The public policy exception under the new 2019 HCCH judgments Convention*, in *Netherlands International Law Review*, 2020, I, 97 ss.

³³ Con riferimento a tale norma, si vedano, in particolare, i commenti di P. FRANZINA, *Italy*,

3.2. *Diritto al giusto processo.*

Il riconoscimento e l'esecuzione di una decisione straniera in uno Stato dell'UE può essere rifiutato qualora il giudice dello Stato richiesto rilevi che i procedimenti che hanno portato all'adozione della decisione nel Paese d'origine non si siano svolti nel rispetto del diritto al giusto processo³⁴, così come garantito dall'art. 6 della CEDU, dalle corrispondenti disposizioni nazionali (ad esempio l'art. 111 della Costituzione italiana) e dall'art. 47 della Carta dei diritti fondamentali (da prendere in considerazione, per effetto dell'applicabilità del regolamento Bruxelles I-bis, soltanto ove si tratti di circolazione intra-europea)³⁵.

Il diritto al giusto processo assicura il rispetto del diritto fondamentale di difesa delle parti nel procedimento; una sua violazione può verificarsi ad esempio a causa della mancanza di una notifica effettiva dell'atto di citazione, della brevità del termine per comparire concesso al convenuto, di una presunzione assoluta di colpevolezza nei confronti di una delle parti del procedimento, ovvero dell'impossibilità per una parte di replicare agli argomenti delle altre parti nel corso della fase scritta o orale del giudizio.

È da rilevarsi, peraltro, che anche il divieto di frode processuale rientra fra le garanzie fondamentali delle parti nel procedimento. Invero, è da ritenersi che, qualora una decisione sia stata ottenuta tramite frode in circostanze che abbiano impedito a una parte di esercitare effettivamente le proprie difese nel procedimento, venga violato il diritto al giusto processo: non sarebbero, infatti, garantiti il rispetto dei principi fondamentali di imparzialità e indipendenza dei magistrati. Ove non sia previsto un autonomo motivo di diniego al riguardo, si

in O. MEYER (a cura di), *Public policy and private international law – A comparative guide*, Cheltenham, 2022, 242 ss.; G. PERLINGIERI-G. ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, 1 ss.; V. BARBA, *L'ordine pubblico internazionale*, in *Rassegna di diritto civile*, 2018, II, 403 ss.; G. PERLINGIERI-G. ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, 1 ss.

³⁴ In tal senso, A. LEANDRO, *L'equo processo nel diritto processuale civile internazionale europeo*, in *Riv. dir. internaz. priv. e proc.*, 2016, 22 ss.; R. CAPONI, *Transnational litigation and elements of fair trial*, in P. GOTTFELD-B. HESS (a cura di), *Procedural Justice*, Viterbo, 2014, 507 ss.; F. SALERNO, *L'ordine pubblico processuale internazionale e la tutela dei diritti fondamentali*, in P. PIRRONI (a cura di), *Circolazione dei valori giuridici e tutela dei diritti e delle libertà fondamentali*, Torino, 2011, 121 ss.

³⁵ Per ulteriori indicazioni sull'ambito di applicazione della Carta dei diritti fondamentali, si rinvia all'art. 51 della Carta così come interpretato dalla Corte giust., 19 novembre 2019, causa C-609/17, TSN, ECLI:EU:C:2019:981, punti 51-53; per approfondimenti si rinvia a N. LAZZERINI, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione*, Milano, 2018, 83 ss.

applicherà la generale clausola dell'ordine pubblico per tutelare il divieto di frode processuale.

Ove il giudice dello Stato richiesto constati una violazione del diritto al giusto processo delle parti nel procedimento (in cui può rientrare anche il caso di sentenza ottenuta tramite frode), potrà rifiutare il riconoscimento e l'esecuzione della sentenza straniera. A tal fine, i motivi di diniego variano a seconda della disciplina applicabile.

L'art. 45, par. 1, lett. b), del regolamento Bruxelles I-*bis* prevede un motivo di diniego del riconoscimento e dell'esecuzione di decisioni straniere che mira specificamente a tutelare il diritto di difesa del convenuto, ma esclusivamente con riferimento a provvedimenti resi in procedimenti contumaciali. Trova applicazione ove siano contemporaneamente integrate le seguenti condizioni: "la domanda giudiziale o un atto equivalente non siano stati notificati o comunicati al convenuto in tempo utile e in modo tale da poter presentare le proprie difese eccetto qualora, pur avendone avuto la possibilità, questi non abbia impugnato la decisione" nello Stato membro d'origine³⁶.

L'art. 45, par. 1, lett. b), si riferisce soltanto a decisioni rese *in absentia* senza tutelare il diritto al giusto processo in tutte le sue ulteriori possibili declinazioni; qualora sussistano violazioni del diritto di difesa contrarie al principio del giusto processo che non soddisfino i requisiti di tale disposizione, troverà applicazione la clausola dell'ordine pubblico processuale [art. 45, par. 1, lett. a)]³⁷.

Alla stregua di quanto previsto dal citato art. 45, par. 1, lett. b), del regolamento Bruxelles I-*bis*, anche l'art. 7, par.1, lett. a), (i), della Convenzione de L'Aja tutela il diritto di difesa del convenuto in contumacia stabilendo, in primo luogo, che il riconoscimento e l'esecuzione di una sentenza straniera possono essere rifiutati qualora l'atto introduttivo del procedimento svoltosi nello Stato

³⁶ Per un'ulteriore analisi di tale norma mi sia consentito un rinvio a G. CHIAPPONI, *Una breve riflessione su una possibile riforma dei termini nel diritto processuale europeo*, in *Riv. trim. dir. e proc. civ.*, 2024, IV, 1257 ss.; si rinvia anche, *ex multis*, a J. NOWAK-V. RICHARD, *Art. 45*, cit., 638 ss.; V. RICHARD, *Le jugement par défaut dans l'espace judiciaire européen*, in *Droit Université Panthéon-Sorbonne*, Paris, 2019, 1 ss.

³⁷ In tal senso si rinvia alla giurisprudenza consolidata della Corte di giustizia dell'UE. Si veda, in particolare, Corte giust., 28 marzo 2000, causa C-7/98, *Dieter Krombach contro André Bamberski*, ECLI:EU:C:1999:446; Corte giust., 2 aprile 2009, causa C-394/07, *Marco Gambazzi contro DaimlerChrysler Canada Inc. e CIBC Mellon Trust Company*, ECLI:EU:C:2008:748; Corte giust., 6 settembre 2012, causa C-619/10, *Trade Agency Ltd contro Seramico Investments Ltd*, ECLI:EU:C:2012:247; Corte giust., 23 ottobre 2014, causa C-302/13, *flyLAL-Lithuanian Airlines AS contro Starptautiskā lidosta Rīga VAS e Air Baltic Corporation AS*, ECLI:EU:C:2014:2046.

d'origine non gli sia stato notificato in tempo utile e in modo tale da permettergli di presentare le proprie difese; ciò non vale ovviamente nel caso in cui il convenuto sia comparso e abbia presentato le sue difese senza contestare la notificazione³⁸. La Convenzione prevede altresì che il riconoscimento e l'esecuzione possano essere negati qualora la notifica dell'atto introduttivo sia stata effettuata nello Stato richiesto in modo incompatibile con i principi fondamentali di quello Stato in materia di notificazione degli atti art. 7, par.1, lett. a), (ii)³⁹.

Inoltre, l'art. 7, par. 1, lett. b), della Convenzione de L'Aja specifica che il riconoscimento e l'esecuzione di una sentenza straniera possono essere negati qualora risulti che il *decisum* sia stato ottenuto tramite frode. A differenza di quanto accade nel regolamento Bruxelles I-*bis*, la frode processuale – da intendersi come un comportamento che mira deliberatamente a trarre in inganno per ottenere un guadagno ingiusto o illecito o per privare un altro di un diritto⁴⁰ – viene così considerata alla stregua di un motivo autonomo di rifiuto; con ciò viene sottolineato che la buona fede deve prevalere nei rapporti tra le parti, ribadendosi nella comunità internazionale il principio di accesso alla giustizia e del giusto processo⁴¹.

Ove sussistano violazioni del diritto al giusto processo che non integrino le condizioni degli artt. 7 par. 1, lett. a) e 7 par. 1, lett. b), queste potranno eventualmente trovare protezione nel limite dell'ordine pubblico [art. 7, par. 1, lett. c)]⁴².

A differenza delle disposizioni stabilite dal regolamento di Bruxelles I-*bis* e dalla Convenzione de L'Aja, l'art. 64 della legge n. 218/1995 assoggetta la riconoscibilità e l'attribuzione di forza esecutiva a sentenze straniere a condizioni specificatamente dedicate alla tutela del diritto fondamentale di difesa delle parti nel procedimento in conformità con il principio del giusto processo, così come garantito dall'art. 111 della Costituzione, letto in combinato con l'art. 6 CEDU.

³⁸ Tale ipotesi mira precisamente a proteggere gli interessi del convenuto. In tal senso, F. GARCIMARTÍN-G. SAUMIER, *Explanatory Report on the 2019 HCCH Judgments Convention*, cit., par. 250.

³⁹ Tale ipotesi ha come obiettivo quello di tutelare gli interessi dello Stato richiesto quando la notifica sia stata effettuata in quello Stato; in tal senso, F. GARCIMARTÍN-G. SAUMIER, *Explanatory Report on the 2019 HCCH Judgments Convention*, cit., par. 252.

⁴⁰ F. GARCIMARTÍN-G. SAUMIER, *Explanatory report on the 2019 HCCH judgments Convention*, cit., par. 255 ss.

⁴¹ M. DOTTA SALGUEIRO, *Grounds for refusal*, cit., 80.

⁴² Si veda *supra*, par. 3.1.

L'art. 64 della legge n. 218/1995 stabilisce – tra le altre condizioni – che una sentenza straniera possa essere riconosciuta ed eseguita in Italia quando: “b) l’atto introduttivo del giudizio è stato portato a conoscenza del convenuto in conformità a quanto previsto dalla legge del luogo dove si è svolto il processo e non sono stati violati i diritti essenziali della difesa”; e “c) le parti si sono costituite in giudizio secondo la legge del luogo dove si è svolto il processo o la contumacia è stata dichiarata in conformità a tale legge”.

È da rilevarsi, dunque, che la lett. b), seconda parte, dell'art. 64 svolge la funzione di clausola generale di protezione dei diritti essenziali della difesa nel procedimento in conformità del diritto al giusto processo, senza che sia necessario l'utilizzo del limite dell'ordine pubblico nella sua accezione processuale.

3.3. *Spostamento fraudolento della competenza in frode alla legge.*

Alcune problematiche circa il riconoscimento e l'esecuzione di sentenze straniere nel territorio dell'UE potrebbero, altresì, sorgere nel caso in cui l'autorità giudiziaria dello Stato richiesto rilevi che la competenza giurisdizionale del giudice che ha pronunciato la decisione *de qua* sia stata il frutto di comportamenti fraudolenti di una parte diretti a creare artificiosamente e fittiziamente un collegamento con un giudice diverso da quello che sarebbe stato competente (c.d. frode alla legge)⁴³. Ciò potrebbe avvenire, ad esempio nell'ambito del contenzioso ESG, al fine di evitare l'applicazione della legge di un determinato Paese considerata troppo protettiva.

In tali circostanze, occorre domandarsi, entro quali limiti, il giudice dello Stato richiesto possa addurre il carattere artificioso o simulato del collegamento della fattispecie con un certo ordinamento quale motivo di diniego al riconoscimento e all'esecuzione di una sentenza straniera. La disciplina varia sulla base del regime di circolazione concretamente applicabile al caso di specie.

⁴³ Per approfondimenti sul fenomeno di frode alla legge si rinvia a S. MARINAI, *Frode alla legge e abuso del diritto nel diritto internazionale privato dell'Unione europea*, in *Dir. Un. Eur.*, 2017, III, 485 ss.; O. LOPES PEGNA, *Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo*, in *Riv. dir. internaz.*, 2015, 397 ss.; S. BARIATTI, *Abuso del diritto, conflitti di leggi e diritto del commercio internazionale: spunti di riflessione sul forum shopping*, in S.M. CARBONE (a cura di), *L'Unione europea a vent'anni da Maastricht: verso nuove regole*, XVII Convegno Genova, 31 maggio-1 giugno 2012, Napoli, 2013, 269 ss.; S. CLAVEL, *La place de la fraude en droit international privé contemporain*, in *Travaux du Comité Français de Droit International Privé*, 2013, Parigi, 255 ss.; E. CORNUT, *Forum shopping et abus du choix de for en droit international privé*, in *Journal du Droit International*, 2007, I, 27 ss.

Il sistema istituito dal regolamento Bruxelles I-*bis*, in virtù della fiducia reciproca nell'amministrazione della giustizia e, dunque, nella corretta applicazione dei criteri di riparto di competenza tra gli Stati membri, esclude la sindacabilità della competenza del giudice *a quo* in sede di riconoscimento ed esecuzione di decisioni straniere, non potendo essere utilizzato a tal fine neppure il limite dell'ordine pubblico [(art. 45, par. 3)]⁴⁴. Tuttavia, tale regola generale trova un'eccezione nell'art. 45, par. 1, lett. e), con riferimento a fattispecie in cui sono previste competenze a garanzia del rispetto dei fori di protezione delle parti deboli [art. 45, par. 1, lett. e), (i)], o competenze esclusive [art. 45, par. 1, lett. e), (ii)]. In tutti gli altri casi – tra i quali si può annoverare anche il caso di frode alla legge – è, pertanto, precluso, in sede di riconoscimento ed esecuzione di decisione straniera, qualsiasi controllo sulla corretta applicazione dei criteri di competenza giurisdizionale del giudice dello Stato d'origine⁴⁵.

I criteri di competenza indiretta, stabiliti dalla Convenzione de L'Aja, subordinano la riconoscibilità di una sentenza straniera alla circostanza che questa sia stata resa secondo l'ordinamento di un Paese con cui la fattispecie presenti un collegamento che la stessa Convenzione consideri congruo; il rispetto di uno solo tra i fattori di collegamento tra controversia e ordinamento dello Stato d'origine, così come individuati dagli artt. 5 e 6 della Convenzione, consente, pertanto, alla sentenza di circolare⁴⁶. A tal proposito, è da rilevarsi che la Convenzione non contempla tra i propri filtri giurisdizionali alcuna disposizione relativa all'ipotesi in cui uno dei citati fattori di collegamento con il giudice competente risulti essere il frutto di una creazione artificiosa o simulata; una tale decisione potrebbe conseguentemente essere ammessa a circolare essendo rispettati i filtri giurisdizionali stabiliti dalla Convenzione.

Tuttavia, l'eventuale diniego del riconoscimento e dell'esecuzione di una sentenza straniera resa per effetto di uno spostamento fraudolento della competenza

⁴⁴ Per ulteriori dettagli, S. MARINAI, *Frode alla legge e abuso del diritto nel diritto internazionale privato dell'Unione europea*, cit., 513 ss.; A. ADINOLFI, *La nozione di "abuso di diritto" nell'ordinamento dell'Unione europea*, in *Riv. dir. internaz.*, 2012, 329 ss.; M. GESTRI, *Abuso del diritto e frode alla legge nell'ordinamento comunitario*, Milano, 2003, 183 ss.

⁴⁵ O. LOPES PEGNA, *Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo*, cit., 433 ss.

⁴⁶ Sul tema della c.d. giurisdizione indiretta si rinvia al contributo di P. FRANZINA, *La competenza internazionale quale presupposto per l'efficacia delle decisioni straniere: note sul contenzioso in tema di due diligence*, nel presente volume; si vedano anche P. FRANZINA, *The Jurisdictional Filters*, in M. WELLER-J. RIBEIRO-BIDAOU-B. MORITZ-N. DETHLOFF (a cura di), *The HCCH 2019 judgments Convention: cornerstones, prospects, outlook*, Oxford, 2023, 41 ss.; F. GARCIMARTÍN-G. SAUMIER, *Explanatory report on the 2019 HCCH judgments Convention*, cit., par. 134 ss.

potrebbe eventualmente essere fondato sull'art. 7, par. 1, lett. d), qualora ricorra la specifica ipotesi di diniego ivi contemplata relativa al caso in cui il procedimento dinanzi al giudice di origine sia contrario ad una clausola di scelta del foro secondo cui la controversia in questione doveva essere decisa da un giudice di uno Stato diverso da quello di origine⁴⁷. Qualora la creazione artificiosa di un collegamento con il giudice competente si verifichi in circostanze diverse da quelle di cui all'art. 7, par. 1, lett. d), potrebbe trovare applicazione la clausola dell'ordine pubblico [art. 7, par. 1, lett. c)].

Allo stesso modo di quanto previsto dalla Convenzione de L'Aja, l'art. 64, lett. a), della legge n. 218/1995 subordina il riconoscimento e l'esecuzione di una sentenza straniera in Italia alla circostanza che "il giudice che l'ha pronunciata poteva conoscere della causa secondo i principi sulla competenza giurisdizionale propri dell'ordinamento italiano". In particolare, il giudice italiano, in applicazione dei criteri fondanti la propria competenza giurisdizionale, può rifiutarsi di dare effetto nel proprio ordinamento a decisioni straniere emesse in relazione a fattispecie non sufficientemente collegate con l'ordinamento del foro⁴⁸. Qualora il giudice italiano, sulla base dei propri parametri di giurisdizione, rilevi che la competenza del giudice straniero sia stata individuata attraverso una creazione artificiosa o simulata di un criterio di collegamento, potrebbe ritenere la sentenza straniera non riconoscibile in Italia non sussistendo la competenza internazionale del giudice *a quo* [art. 64, lett. a)] ovvero non essendo compatibile con l'ordine pubblico italiano⁴⁹ [art. 64, lett. g)].

3.4. *Danni punitivi.*

Alcune decisioni di condanna, la cui esecuzione sia chiesta in uno Stato membro, potrebbero contenere un risarcimento avente carattere punitivo o esemplare (c.d. *punitive damages*), la cui natura presenta profili di dubbia compatibilità con i principi generali sulla responsabilità previsti da alcuni ordinamenti nazionali che non contemplano l'istituto dei danni punitivi.

⁴⁷ In tal senso, M. DOTTA SALGUEIRO, *Grounds for refusal*, cit., 77; F. GARCIMARTÍN-G. SAUMIER, *Explanatory report on the 2019 HCCH judgments Convention*, cit., par. 267 ss.

⁴⁸ Per approfondimenti sull'argomento si rinvia a O. LOPES PEGNA, *L'accertamento della "competenza internazionale" del giudice straniero ai sensi della legge n. 218/1995*, cit., 77 ss.

⁴⁹ Come rilevato da O. LOPES PEGNA, *L'accertamento della "competenza internazionale" del giudice straniero ai sensi della legge n. 218/1995*, cit., 90 ss., si potrebbe, ad esempio, immaginare il caso in cui la competenza giurisdizionale del giudice estero, accettata espressamente dalle parti, sia in contrasto con la natura inderogabile della giurisdizione italiana.

A tal proposito, la Convenzione de L'Aja contiene una specifica disposizione relativa al diniego del riconoscimento e dell'esecuzione di sentenze che comminano danni punitivi; ove invece nessuna previsione specifica sia contemplata (come ad esempio nell'ambito del regolamento Bruxelles I-*bis* e nell'ordinamento italiano), il rifiuto potrà eventualmente essere dichiarato sulla base della generale clausola di ordine pubblico (da intendersi nella sua componente sostanziale).

Non prevedendo il regolamento Bruxelles I-*bis* alcuna disposizione specifica relativa al diniego del riconoscimento e dell'esecuzione di sentenze contenenti un risarcimento punitivo, un eventuale diniego da parte del giudice dello Stato richiesto si fonderà eventualmente sul limite dell'ordine pubblico sostanziale [art. 45, par. 1, lett. a)]⁵⁰.

L'art. 10 della Convenzione de L'Aja prevede la possibilità per il giudice dello Stato richiesto di negare il riconoscimento e l'esecuzione a una decisione straniera “se e nella misura in cui la decisione concede un risarcimento, anche di carattere esemplare o punitivo, che non indennizza una parte per una perdita o un danno effettivamente subiti”.

Tale norma, riconoscendo in maniera esplicita la differenza tra i sistemi giuridici che accettano solo danni compensativi (il cui scopo è la riparazione della perdita concretamente subita) e quelli che, in aggiunta, contemplano anche danni punitivi o esemplari, garantisce ai primi la possibilità di non riconoscere ed eseguire una decisione di condanna ad un risarcimento punitivo che risulti incompatibile con la propria concezione della responsabilità civile⁵¹.

Con riferimento all'ordinamento italiano, non avendo il legislatore stabilito alcuna disposizione relativa alla compatibilità del risarcimento punitivo con i principi dell'ordinamento italiano, è stata la giurisprudenza ad esprimersi circa la compatibilità dei danni punitivi con l'ordine pubblico italiano [art. 64, lett. g), della legge n. 218/1995].

⁵⁰ A tal proposito, è da rilevarsi come, a seguito della pronuncia della Corte giust., 4 ottobre 2024, causa C-633/22, *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843 l'applicazione della clausola dell'ordine pubblico sia stata estesa al ricorrere di determinate condizioni anche a decisioni di condanna ad un risarcimento compensativo sproporzionato. Tale sentenza ha, infatti, stabilito la possibilità per lo Stato richiesto di rifiutare (parzialmente), per una violazione manifesta del proprio ordine pubblico, l'esecuzione di una decisione straniera di condanna ad un risarcimento compensativo che interferisca con il godimento di una libertà fondamentale ivi garantita, qualora la somma concessa sia sproporzionata rispetto alla lesione verificatasi.

⁵¹ In tal senso, M. DOTTA SALGUEIRO, *Grounds for refusal*, cit., 83 ss.; F. GARCIMARTÍN-G. SAUMIER, *Explanatory report on the 2019 HCCH judgments Convention*, cit., par. 250 ss.

Le Sezioni Unite della Cassazione nel 2017 hanno stabilito che la liquidazione dei danni punitivi non è di per sé incompatibile con l'ordinamento italiano e con la concezione della responsabilità civile ivi prevista⁵².

Più precisamente, il giudice italiano nel decidere del riconoscimento e dell'esecuzione di una sentenza straniera che condanni una parte al pagamento di un risarcimento punitivo dovrà utilizzare i criteri forniti dalla Suprema Corte per verificare in concreto se la pronuncia in oggetto sia stata resa su basi normative che garantiscano la tipicità delle ipotesi di condanna, la prevedibilità della stessa e i limiti quantitativi secondo cui i danni globali liquidati non devono essere manifestamente sproporzionati rispetto alla lesione subita dalle vittime e alla serietà della violazione.

Nell'effettuare tale controllo, la principale difficoltà che il giudice incontrerà discende dall'applicazione del criterio di proporzionalità relativamente alla quantificazione dei danni punitivi. Il giudice, alla luce delle circostanze del caso di specie, dovrà esaminare se vi sia proporzione tra risarcimento riparatorio-compensativo e risarcimento punitivo, nonché tra risarcimento punitivo e condotta censurata. Nel compiere tale valutazione, il giudice può altresì fare riferimento alle somme che sarebbero eventualmente concesse nello Stato richiesto per una lesione comparabile. In ogni caso detta verifica non può implicare un controllo delle valutazioni di merito effettuate dai giudici dello Stato d'origine.

4. *Alcuni casi studio.*

Al fine di esaminare come i motivi di diniego possano essere applicati in concreto nell'ambito del contenzioso ESG e ostacolare il riconoscimento e l'esecuzione di sentenze straniere nello Stato richiesto, ci si riferirà ai casi *Texaco Oil Company e Chevron contro Lago Agrio ed Herrera Rios*.

⁵² Cass., 5 luglio 2017, n. 16601; in commento a tale decisione, *ex multis*, G. PONZANELLI, *Punitive damages and the functions of reparation: some preliminary remarks after the decision of the Italian Supreme Court, Joint Divisions, 5 July 2017, no. 16601*, in S. BARIATTI-L. FUMAGALLI-Z. CRESPI REGHIZZI, *Punitive damages and private international law: state of the art and future developments*, Padova, 2019, 33 ss.; P. FRANZINA, *The purpose and operation of the public policy defence as applied to punitive damages*, *ibid.*, 43 ss.; M. FRANZONI, *Danno punitivo e ordine pubblico*, in *Riv. dir. civ.*, 2018, I, 283 ss.

4.1. *Il caso Herrera Rios.*

Il caso *Herrera Rios* è sorto a seguito delle azioni instaurate, a partire dalla fine degli anni Ottanta, da migliaia di lavoratori di tutto il mondo nei confronti delle società *The Dow Chemical Company*, *Shell Oil Company Corporate e Occidental Chemical Corporation* per i gravi danni alla salute che sono stati loro causati dall'esposizione negli ambienti di lavoro al pesticida DBCP ⁵³.

In un primo momento, le azioni dei lavoratori provenienti da vari Paesi, quali ad esempio il Burkina Faso, la Costa Rica, la Repubblica Dominicana, il Nicaragua, Panama, le Filippine e alcuni Stati caraibici, sono state promosse dinanzi a tribunali americani – luogo di produzione ed esportazione del DBCP – scontrandosi tuttavia con l'applicazione da parte dei giudici aditi della dottrina del *forum non conveniens*; il foro più appropriato è stato ritenuto quello dove i lavoratori prestavano la loro attività ⁵⁴.

Sono così stati instaurati diversi procedimenti in Nicaragua ⁵⁵, Costa Rica ⁵⁶, Ecuador ⁵⁷, Guatemala ⁵⁸ e Panama ⁵⁹; tuttavia, le giurisdizioni di detti Stati si sono dichiarate incompetenti ⁶⁰.

⁵³ Per un'analisi dettagliata di tale caso si veda B. DELMAS, *L'émergence d'actions en exequatur dans le contentieux transnational du travail*, in *Revue Critique du Droit International Privé*, 2023, I, 85 ss.; S. BOHME, *Toxic injustice. A transnational history of exposure and struggle*, 2014, Berkeley, 2014, 1 ss.

⁵⁴ Tra le varie decisioni ci si può riferire a titolo esemplificativo alla decisione della Corte distrettuale del sud del Texas dell'11 luglio 1995, *Delgado v. Shell Oil Co.*, n. 890 F. Supp. 1324.

⁵⁵ Corte suprema del Nicaragua, 2 agosto 1999, *Reynaldo Aguilera Huete e altri Shell Oil Co. e altri*.

⁵⁶ Corte suprema della Costa Rica, prima divisione, 21 febbraio 1996, *Carlos Luis Abarca e altri Shell Oil Company*.

⁵⁷ Diciannovesima Corte civile di prima istanza di Naranajal, 16 marzo 1999, *Elias Espinoza Merelo contro Dole Food Co. Inc e altri*.

⁵⁸ Settima Corte civile di prima istanza, 17 aprile 1995, *Natividad de Jesus Abrego Villeda e altri*.

⁵⁹ Corte suprema del Panama, 10 dicembre 1996, *Santos Abrego Morales e altri contro Shell Oil Co.*

⁶⁰ L'incompetenza è stata dichiarata, in primo luogo, poiché la maggior parte delle costituzioni di tali Stati imponeva il rispetto della libera scelta degli individui di intentare un'azione dinanzi al giudice del luogo del domicilio del convenuto. Ciò si scontrava, tuttavia, con la dottrina del *forum non conveniens* che imponeva alle parti la scelta di un determinato foro. In secondo luogo, la legge di tali Stati si ispirava alla teoria del *forum praeventionis* secondo cui qualora più giurisdizioni siano competenti, la prima dove il convenuto viene citato ha competenza esclusiva, potendo invocarsi la competenza di altri tribunali soltanto in forza di un motivo previsto dalla legge tra cui non rientrava,

A fronte del rifiuto sistematico di tali domande nei suddetti fori, alcuni Stati hanno adottato una legislazione anti *forum non conveniens* che agevolasse le domande proposte dai lavoratori. In particolare, il Nicaragua ha introdotto una legge specifica⁶¹ relativa alle imprese americane che fabbricavano, importavano, distribuivano, commercializzavano il DBCP in forza della quale le suddette società si trovavano dinanzi alla seguente opzione: o accettare la competenza dei giudici del Nicaragua depositando la somma di 100 mila dollari nei 90 giorni seguenti all'introduzione della domanda, ovvero riconoscere la competenza della giurisdizione americana, rifiutando di ricorrere al *forum non conveniens*. Nel caso di procedimenti instaurati in Nicaragua, veniva altresì richiesto alle imprese convenute di versare la somma di 15 milioni di dollari a titolo di misura cautelare in vista dell'esecuzione; a ciò si aggiungeva una presunzione pressoché assoluta di sussistenza del nesso di causalità che garantiva agli attori il pagamento di un'indennità (il cui ammontare era calcolato sulla base dei danni punitivi americani) purché dimostrassero l'esposizione al pesticida e producessero certificati medici attestanti il loro danno alla salute.

Conseguentemente, centinaia di procedimenti furono promossi dinanzi ai tribunali di prima istanza del Nicaragua e furono pronunciate numerose sentenze di condanna al pagamento di centinaia di milioni di dollari nei confronti delle società statunitensi⁶².

Tuttavia, l'esecuzione delle suddette decisioni si rivelò impossibile in Nicaragua, non possedendo le società condannate alcun bene sul territorio di tale Stato.

però l'ipotesi del *forum non conveniens*. Per ulteriori dettagli si veda B. DELMAS, *L'émergence d'actions en exequatur dans le contentieux transnational du travail*, cit., 88.

⁶¹ Legge 17 gennaio 2001, n. 364.

⁶² Tra tali decisioni, si veda la sentenza del Tribunale del primo distretto civile di Chinandega del primo dicembre 2006, n. 000021-0425-2002-CV. In commento a tali decisioni si rinvia a H. SCOTT, *What to do about foreign discriminatory forum non conveniens legislation*, in *Harvard International Law Journal*, 2009, I, 100 ss.; W. HEISER, *Forum non conveniens and retaliatory legislation: the Impact on the available alternative forum inquiry and on the desirability of forum non conveniens as a defense tactic*, in *Kansas Law Review*, 2008, II, 609 ss.; D. FIGUEROA, *Conflicts of jurisdiction between the United States and Latin America in the context of forum non conveniens dismissals*, in *University of Miami Inter-American Law Review*, 2005, I, 119 ss.; P. SANTOYO, *Comment, bananas of wrath: how Nicaragua may have dealt forum non conveniens. A fatal blow removing the doctrine as an obstacle to achieving corporate accountability*, in *Houston Journal of International Law*, 2005, III, 703 ss.; A. GARRO, *Forum non conveniens: "availability" and "adequacy" of Latin American fora from a comparative perspective*, in *University of Miami Inter-American Law Review*, 2004, I, 65 ss.; H. SAINT DAHL, *Forum non conveniens, Latin America and blocking statutes*, in *University of Miami Inter-American Law Review*, I, 2004, 21 ss.

Fu avviata così una battaglia legale – ad oggi ancora senza successo – degli attori per procedere all'esecuzione delle decisioni *de quibus* nel territorio di altri Stati, tra cui Stati Uniti⁶³, Venezuela, Colombia, Ecuador⁶⁴ e Francia⁶⁵.

Le giurisdizioni americane hanno, in sostanza, fondato il rifiuto di riconoscere ed eseguire tali decisioni sulla base di alcuni presupposti. In primo luogo, i giudici statunitensi hanno considerato il difetto di competenza *in rem* e *in personam* materiale e personale dei tribunali del Nicaragua, non avendo le società convenute versato la somma di 100 mila dollari con cui avrebbero dovuto accettare la competenza dei tribunali nicaraguensi⁶⁶. In secondo luogo, hanno rilevato una violazione del diritto al giusto processo delle società convenute in ragione, tanto della mancanza di tribunali terzi e imparziali (con conseguente ottenimento delle decisioni tramite frode e adozione di misure discriminatorie), quanto di una presunzione assoluta e inconfutabile di sussistenza del nesso di causalità delle violazioni di merito commesse addebitata alle società convenute (con impossibilità di fornire una prova contraria). Infine, hanno osservato che erano state liquidate con finalità punitiva somme sproporzionate rispetto ai danni cagionati.

4.2. *Il caso Texaco Oil Company e Chevron contro Lago Agrio.*

La causa *Texaco* riguarda la controversia legale instaurata dai cittadini ecuadoriani di Lago Agrio contro la società *Texaco* – poi fusasi con *Chevron* e divenuta la *Chevron Corporation* – per i danni ambientali gravi e irreversibili causati loro dalle attività di estrazione di petrolio condotte dalla suddetta società in Ecuador⁶⁷.

⁶³ Si vedano a titolo esemplificativo la decisione della Corte distrettuale della California del 21 ottobre 2003, *Franco v. Dow Chemical Co.*, n. CV 03 – 5094 NM (PJWx) e la decisione della Corte distrettuale del sud della Florida del 20 ottobre 2009, *Osorio v. Dole Food Co.*, n. 665 F. Supp. 2d 1307. In commento a tali decisioni, si vedano J. TODD, *Phantom torts and forum non conveniens blocking statutes: irony and metonym in Nicaraguan special law* 364, in *University of Miami Inter-American Law Review*, 2012, II, 291 ss.; A. ROSENCRAZ-S. ROBLIN-N. BALLOFFET, *Doling out environmental justice to Nicaraguan banana workers: the Jose Adolfo Tellez v. Dole Food Company litigation in the U.S. courts*, in *Golden Gate University Environmental Law Journal*, 2009, I, 1 ss.

⁶⁴ Con riferimento alle decisioni rese in Venezuela, Colombia e Ecuador si rinvia a B. DELMAS, *L'émergence d'actions en exequatur dans le contentieux transnational du travail*, 89.

⁶⁵ Tribunale giudiziario di Parigi, 11 maggio 2022, n. RG 19/04112.

⁶⁶ È da rilevarsi come la decisione di rifiuto del Tribunale di Parigi si sia fondata esclusivamente sull'eccezione d'incompetenza senza che fossero presi in considerazione gli altri motivi di diniego esaminati dalle giurisdizioni americane.

⁶⁷ In prosieguo, “il caso *Texaco*”. Per approfondimenti sul caso, si vedano L. PELLEGRINI-M.

Il procedimento è stato inizialmente instaurato dinanzi a giudici statunitensi⁶⁸ – *Texaco* aveva infatti la sua sede centrale negli USA – che si sono tuttavia dichiarati incompetenti applicando la dottrina del *forum non conveniens* e riconoscendo la competenza in capo ai tribunali ecuadoriani, costituendo questi ultimi il foro più appropriato.

Il procedimento, viziato secondo *Chevron* dalla mancata indipendenza e imparzialità della magistratura ecuadoriana, si è così svolto dinanzi al Tribunale superiore di Nueva Loja. Ne è seguita la condanna di *Chevron* al pagamento di 9 milioni di dollari per i danni ambientali causati dalle operazioni di estrazione condotte in Ecuador⁶⁹. Tuttavia, non possedendo *Chevron* alcun bene in Ecuador, la suddetta decisione non poté essere eseguita in tale territorio.

I giudici ecuadoriani hanno adottato tale decisione sulla base del c.d. principio *piercing the corporate veil*, rendendo così la decisione invocabile nei confronti di tutte le sussidiarie di *Chevron* nel mondo.

I cittadini ecuadoriani hanno così cercato di ottenere, senza successo, l'esecuzione della decisione del tribunale ecuadoriano in Argentina⁷⁰ e

ARSEL-M. ORTA-MARTINEZ-C.F. MENA, *International investment agreements, human rights, and environmental justice: the Texaco/Chevron case from the Ecuadorian Amazon*, in *Journal of International Economic Law*, 2020, II, 455 ss.; M. MORETA-B.LIU, *The challenge of bringing transnational. Bringing corporations to justice for environmental damage: a case study of Texaco Oil Company and Chevron vs Lago Agrio Plaintiffs*, in C. VOIGT-Z. MAKUCH (a cura di), *Courts and the environment*, Cheltenham, 2018, 271 ss.; D. KHATAM, *Chevron and Ecuador proceedings: a primer on transnational litigation strategies*, in *Stanford Journal of International Law*, 2017, II, 249 ss.; S. BUCCINA-D. CHENE-J. GRAMLICH, *Accounting for the environmental impacts of Texaco's operations in Ecuador: Chevron's contingent environmental liability disclosures*, in *Accounting Forum*, 2013, 1 ss.; S. JOSEPH, *Protracted lawfare: the tale of Chevron Texaco in the Amazon*, in *Journal of Human Rights and the Environment*, 2012, I, 70 ss.; J. KIMERLING, *Indigenous peoples and the oil frontier in Amazonia: the case of Ecuador, Chevron Texaco, and Aguinda v. Texaco*, in *New York University Journal of International Law and Politics*, 2006, III, 413 ss.

⁶⁸ In tal senso, si vedano le seguenti sentenze: sentenza del Giudice distrettuale del sud di New York, 12 novembre 1996, *Aguinda vs Texaco Inc* (1996), n. 945 F Supp 625; sentenza della Corte d'appello del secondo circuito, 23 febbraio 2001, 241 F.3d 194 (2d Cir, 2001); sentenza del Giudice distrettuale del sud di New York, 30 maggio 2001, *Aguinda vs Texaco Inc* (2001), n. 142 F.Supp.2d 534.

⁶⁹ Corte superiore di giustizia di Nueva Loja, 14 febbraio 2011, *Aguinda v. ChevronTexaco*, n. 2003-0002.

⁷⁰ In Argentina, l'esecuzione della sentenza ecuadoriana è stata negata, in sostanza, poiché i giudici della Corte Suprema argentina hanno considerato che *Chevron Argentina* aveva una personalità giuridica distinta da *Chevron Corporation*; in tal senso Corte suprema di giustizia dell'Argentina, 4 giugno 2013, *Aguinda Salazar Maria vs Chevron Corporation*, n. A.253.XLIX A.238.XLIX.

Canada⁷¹, aggredendo i beni posseduti dalle sussidiarie di *Chevron* in tali Stati (*Chevron Argentina* e *Chevron Canada*).

Al fine di impedire l'esecuzione della sentenza ecuadoriana in giurisdizioni straniere, *Chevron Corporation* e *Texaco* hanno instaurato un procedimento arbitrale nell'ambito della Corte permanente di arbitrato de L'Aja conformemente alle regole di arbitrato Uncitral; l'azione è stata proposta sulla base dell'art. VI, par. 3, lett. a), del Trattato bilaterale d'investimento tra gli USA e l'Ecuador. Le ricorrenti hanno, in particolare, sostenuto che l'Ecuador avesse violato e reso nulli i precedenti accordi che esoneravano *Texaco* da qualsiasi responsabilità in materia di impatto ambientale su terreni pubblici, fatte salve eventuali richieste promosse da singoli individui circa presunte lesioni personali o danni a proprietà private. Inoltre, le ricorrenti rilevavano che il giudizio dinanzi al Tribunale di Lago Agrio si era svolto in violazione delle garanzie fondamentali d'indipendenza ed imparzialità dei giudici, avendo i magistrati ecuadoriani deliberatamente favorito i cittadini del posto nel corso del procedimento; ciò determinava la violazione del loro diritto fondamentale al giusto processo.

In forza di tali argomenti, il tribunale arbitrale ha ordinato all'Ecuador di adottare ogni misura necessaria atta ad impedire il riconoscimento e l'esecuzione della sentenza del Tribunale di Lago Agrio in Ecuador e in altri Stati; in caso di violazione di detto obbligo tutte le perdite derivanti dall'esecuzione di tale sentenza dovranno essere sostenute dai convenuti ecuadoriani⁷².

⁷¹ Nonostante la Corte Suprema del Canada (sentenza del 4 settembre 2015, *Chevron Corp. v. Yaiguaje*, n. 42) abbia riconosciuto la giurisdizione delle corti canadesi a riconoscere ed eseguire la sentenza ecuadoriana, non è stata affrontata la questione chiave se *Chevron Canada*, essendo una sussidiaria di *Chevron Corporation* ed avendo una personalità giuridica distinta da quest'ultima, potesse essere ritenuta responsabile per le azioni della società madre. In ogni caso, è da rilevarsi che, se anche la sentenza ecuadoriana fosse riconosciuta ed eseguita in Canada, difficilmente ci sarebbero fondi sufficienti in quel Paese per soddisfare i creditori ecuadoriani. In proposito, M. MORETA-B. LIU, *The challenge of bringing transnational. Bringing corporations to justice for environmental damage: a case study of Texaco Oil Company and Chevron vs Lago Agrio Plaintiffs*, cit., 280, 281.

⁷² In tal senso, si vedano le seguenti decisioni arbitrali sul caso n. 2009-23: primo lodo provvisorio sulle misure provvisore, 25 gennaio 2012; secondo lodo provvisorio sulle misure provvisore, 18 febbraio 2012; terzo lodo provvisorio sulle misure provvisore, 27 febbraio 2012; quarto lodo provvisorio sulle misure provvisore 7 febbraio 2013; primo lodo parziale sulla prima parte, 17 settembre 2013; secondo lodo parziale sulla seconda parte, 30 agosto 2018. È da rilevarsi che l'Ecuador ha domandato l'annullamento di tali decisioni dinanzi alle giurisdizioni olandesi senza però che la sua domanda fosse accolta; si rinvia in particolare alle seguenti decisioni: sentenza della Corte distrettuale de L'Aja, 20 gennaio 2016, caso n. C/09/477457 /

I lodi arbitrali a tutt'oggi emessi⁷³ hanno così stabilito un diniego “universale” di riconoscimento e di esecuzione della sentenza ecuadoriana poiché adottata, *inter alia*, in violazione del diritto al giusto processo delle società *Chevron* e *Texaco*.

5. Osservazioni conclusive.

Tali casi studio, senza alcuna pretesa di esaustività, mostrano talune delle difficoltà che si possono presentare anche nel riconoscere ed eseguire in uno Stato dell'UE decisioni ESG provenienti da Stati terzi⁷⁴ ove risulti controverso il rispetto degli standard di protezione del diritto di difesa delle parti nel procedimento svoltosi nello Stato d'origine.

Il procedimento nello Stato d'origine – come esemplificato dai citati casi *Herrera Rios* e *Chevron* con riferimento ai procedimenti svoltisi in Nicaragua e Ecuador⁷⁵ – potrebbe essere viziato a causa dell'incompetenza del giudice *a quo*

HA ZA 14-1291; sentenza della Corte d'appello de L'Aja, 18 luglio 2017, caso n. 200. 193.4 18/0 I; sentenza della Corte suprema olandese, 12 aprile 2019, caso n. 17/04926; sentenza della Corte distrettuale de L'Aja, 16 settembre 2020, caso n. C/09/570029/HA ZA 19-268; sentenza della Corte suprema olandese, 17 novembre 2023, caso n. 22/03577.

⁷³ È da notare che il lodo arbitrale definitivo deve ancora essere pronunciato.

⁷⁴ Relativamente alla circolazione intra-europea non sembrano attualmente emergere nella casistica generale difficoltà specifiche, diverse da quelle che emergono in relazione a decisioni rese in altre materie, riguardanti il riconoscimento e l'esecuzione di decisioni ESG.

⁷⁵ In tali casi, l'applicazione della dottrina del *forum non conveniens* da parte dei tribunali statunitensi ha determinato la giurisdizione in capo ai giudici nicaraguensi ed ecuadoriani davanti ai quali si sono svolti procedimenti in cui è stato contestato il rispetto dei diritti fondamentali di difesa delle parti con il conseguente rischio per queste ultime di non ottenere giustizia sostanziale con le decisioni ivi rese. In proposito, si segnalano recenti dibattiti accademici sull'applicazione della dottrina del *forum non conveniens* nell'ambito del contenzioso ESG; si vedano, in particolare, M. POESEN, *A Scots perspective on forum non conveniens in business and human rights litigation: Hugh Campbell KC v James Finlay (Kenya) Ltd*, in *Journal of Private International Law*, 2025, I, 135 ss.; U. GRUSIC, *Limbu v Dyson: The death of forum non conveniens in business and human rights and environmental litigation in England?*, in *Eapil Blog*, 10 febbraio 2025; E. ARISTOVA, *Tort litigation against transnational corporations*, Oxford, 2024, 1 ss.; A. MILLS, *Sustainability and jurisdiction in the international civil litigation market*, in *Journal of Private International Law*, 2024, I, 1 ss.; D. PALOMBO, *Who is benefiting from the 'neutrality' of private international law?*, in *Eapil Blog*, 11 dicembre 2024; G. VAN CALSTER, *Jurisdiction of English courts in foreign direct liability claims*, in *Eapil Blog*, 10 dicembre 2024; M. AHMED, *A different forum (non) conveniens test for tort litigation against transnational corporations?*, in *Eapil*

(determinatasi a seguito della mancanza di un fattore di collegamento o dell'esistenza di criteri di collegamento fittizi creati *ad hoc* per evitare l'applicazione di legislazioni protettive), dell'inadeguatezza della legislazione del luogo in relazione a procedimenti ESG⁷⁶, dell'inesperienza dei giudici locali a trattare cause complesse come quelle relative al contenzioso ESG, della parzialità delle giurisdizioni del luogo con rischio di favoritismi a vantaggio dei cittadini locali, della liquidazione di un risarcimento punitivo sproporzionato rispetto alle violazioni poste in essere e al pregiudizio subito.

Il riconoscimento e l'esecuzione di una sentenza pronunciata in tali condizioni potrebbero, pertanto, essere negati in uno Stato membro qualora i giudici di tale Stato rilevino, alla luce delle circostanze del caso concreto, che il procedimento nel Paese d'origine sia stato condotto senza conformarsi ai principi del giusto processo previsti nello Stato in cui la decisione straniera deve essere riconosciuta ed eseguita. Più precisamente, ciò potrebbe condurre i giudici dello Stato richiesto, sulla base della specifica situazione considerata e della normativa applicabile, a ritenere come motivi di diniego quelli relativi al mancato rispetto delle garanzie del giusto processo e all'ottenimento di sentenza tramite frode (ad esempio, l'art. 7, par. 1, lett. b), e art. 7, par. 1, lett. c), della Convenzione de L'Aja o l'art. 64, lett. b), e lett. c), della legge n. 218/1995), all'incompetenza del giudice *a quo* (ad esempio, l'art. 7, par. 1, lett. c), e lett. d), della Convenzione de L'Aja o l'art. 64, lett. a), e lett. g), della legge n. 218/1995), e alla liquidazione di danni punitivi sproporzionati (ad esempio, l'art. 10 della Convenzione de L'Aja o l'art. 64, lett. g), della legge n. 218/1995).

Le considerazioni svolte mostrano, pertanto, come il riconoscimento e l'esecuzione in uno Stato dell'UE di sentenze in materia ESG provenienti da Paesi terzi possano essere negati quando il giudice dello Stato richiesto ritenga che la sentenza straniera violi il diritto al giusto processo delle parti (ivi incluso il caso di sentenza ottenuta con frode), sia stata pronunciata da un giudice incompetente

Blog, 10 dicembre 2024; E. ARISTOVA, *Tort litigation against transnational corporations and the challenge of jurisdiction: an introduction*, in *Eapil Blog*, 9 dicembre 2024; P. MUCHLINSKI, *Tort litigation against transnational corporations in the business and human rights framework*, in *Eapil Blog*, 9 dicembre 2024; U. GRUSIC, *Dyson collects a "brexit dividend" in a business and human rights case in England*, in *Eapil Blog*, 30 ottobre 2023; B. HESS-M. MANTOVANI, *Current developments in forum access: comments on jurisdiction and forum non conveniens – European perspectives on human rights litigation*, in *Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, 2019, 1 ss.

⁷⁶ Ad esempio, l'impossibilità per i ricorrenti che abbiano limitate risorse economiche di ottenere accesso al gratuito patrocinio o la necessità di ricorrere ad azioni individuali piuttosto che ad azioni di classe non previste dalla legislazione nazionale di riferimento.

o la cui competenza risulti da criteri di collegamento fittizi o fraudolenti ovvero liquidi danni punitivi sproporzionati. In particolare, il diniego potrà essere fondato sull'applicazione di motivi di rifiuto previsti *ad hoc* ovvero, in mancanza di disposizioni specifiche, sulla generale clausola dell'ordine pubblico.

Un'altra questione rilevante – esemplificata dal caso *Chevron* – che potrebbe porsi nell'ambito del riconoscimento e dell'esecuzione di sentenze ESG – è, peraltro, da riferirsi alle c.d. *worldwide anti enforcement injunctions*, la cui *ratio* si scontra con la c.d. *comity* internazionale e presenta profili di dubbia compatibilità con i principi fondamentali degli ordinamenti giuridici degli Stati dell'UE.

Le *worldwide anti enforcement injunctions* costituiscono, in particolare, provvedimenti giudiziari, diffusi principalmente nell'ordinamento americano, che vietano ad una parte di procedere universalmente all'esecuzione di una sentenza o di un lodo arbitrale stranieri e che rappresentano una forma straordinaria di equa riparazione avverso decisioni ritenute inique⁷⁷.

Tali provvedimenti hanno efficacia *in personam* e la loro durata varia da caso a caso⁷⁸.

I principali motivi che possono giustificare, al ricorrere di circostanze eccezionali, la loro adozione riguardano decisioni straniere (incluse, *inter alia*, le sentenze in materia ESG) che siano state ottenute con frode, che abbiano violato una clausola di scelta del foro, ovvero che risultino da una condotta vessatoria od oppressiva posta in essere da una parte⁷⁹.

È da rilevarsi, tuttavia, che la natura delle *worldwide anti enforcement injunctions* si scontra con l'autorità di cosa giudicata di una decisione e interferisce significativamente con i sistemi giuridici stranieri, impedendo ad altri Stati di considerare il carattere esecutivo della decisione oggetto dell'*anti enforcement injunction*⁸⁰.

A tal proposito, talune problematiche potrebbero sorgere in un giudizio in cui l'attore miri ad ottenere il riconoscimento e l'esecuzione di una decisione

⁷⁷ A titolo esemplificativo, si rinvia alla *worldwide anti enforcement injunctions* adottata dalla Corte distrettuale del nord della California il 10 aprile 2005 nella causa *Sundaram v. Freshworks Inc.*, n. 22-cv-06750-CRB, 2025 WL 1083168; per ulteriori approfondimenti su tale tipologia di provvedimenti, si veda H. BUXBAUM-R. MICHAELS, *Anti-enforcement injunctions*, in *New York University Journal of International Law and Politics*, 2023, I, 101 ss.

⁷⁸ H. BUXBAUM-R. MICHAELS, *Anti-enforcement injunctions*, cit., 105.

⁷⁹ H. BUXBAUM-R. MICHAELS, *Anti-enforcement injunctions*, cit., 110 ss.

⁸⁰ H. BUXBAUM, *U.S. Court Issues Worldwide Anti-Enforcement Injunction*, in *ConflictLaws.net. Views and news in private international law*, 29 aprile 2025.

contro cui sia stata resa una *worldwide anti enforcement injunction* in un Paese dell'UE aggredendo i beni posseduti dalle filiali del debitore in quel Paese. Vi è da chiedersi, in particolare, se le filiali del debitore possano invocare in tale giudizio l'efficacia delle *anti enforcement injunctions* per impedire allo Stato richiesto di procedere al riconoscimento e all'esecuzione della decisione *de qua*.

Avendo questa tipologia di provvedimenti efficacia *in personam*, difficilmente la loro autorità potrà essere invocata dal debitore in uno Stato membro per impedire che si proceda contro una sua filiale; lo Stato richiesto potrebbe così valutare autonomamente, in conformità ai motivi di diniego previsti dalla propria legislazione, se riconoscere ed eseguire la decisione *de qua*. In ogni caso, anche qualora si aggredissero beni posseduti dal debitore in uno Stato dell'UE e l'esecutato opponesse l'efficacia di una *worldwide anti-enforcement injunction*, ciò non dovrebbe impedire allo Stato richiesto di valutare in modo autonomo le condizioni per riconoscere ed eseguire la decisione *de qua*, scontrandosi l'*anti enforcement injunction* con l'autorità di *res judicata* di detta decisione e mettendo a rischio il rispetto della *comity* internazionale.

In tale contesto occorre, tuttavia, rilevare che la casistica generale sulla circolazione delle decisioni in materia ESG non è molto ricca e ciò rende non esaustivo lo studio delle cause ostative al riconoscimento e all'esecuzione delle sentenze così pronunciate. Il contenzioso ESG è, però, in continua crescita e ciò sembra andare nella direzione di una sempre maggiore "globalizzazione dell'esecuzione" che determinerà un incremento di casi di riconoscimento ed esecuzione di decisioni in materia ESG con la possibilità di individuare ulteriori peculiarità in merito ai possibili ostacoli alla circolazione di tali decisioni.

L'EFFICACIA TRANSFRONTALIERA DEGLI ACCORDI DI COMPOSIZIONE DELLA LITE NEL CONTENZIOSO IN MATERIA DI PRINCIPI ESG

Olivia Lopes Pegna

SOMMARIO: 1. Premessa. – 2. Il *favor* dell'Unione europea per la mediazione delle controversie civili transfrontaliere: la direttiva 2008/52/CE. – 3. Esecutività degli accordi di mediazione: l'attuazione della direttiva in Italia. – 4. La circolazione degli accordi transattivi ai sensi del regolamento (UE) n. 1215/2012 (Bruxelles I-bis). – 5. Uno sguardo fuori dall'Unione: opportunità e limiti della Convenzione di Singapore sull'efficacia degli accordi di mediazione. – 6. Conclusioni.

1. *Premessa.*

Il contenzioso (orizzontale)¹ in materia di principi ESG (Environment Social Governance), cui è dedicato questo volume, ha spesso e per sua natura carattere transfrontaliero. Ciò in quanto coinvolge entità (società multinazionali) che operano attraverso sussidiarie dislocate in tutto il mondo, o attraverso rapporti contrattuali con fornitori e terzisti anch'essi potenzialmente dislocati in luoghi diversi. La costituzione di società sussidiarie della società madre in Stati terzi, e/o la catena di contratti di fornitura, la c.d. "catena di valore" (*global value chain*), crea dunque spesso collegamenti (di tipo "soggettivo" e/o "oggettivo")² della fattispecie con due o più Stati.

Il contenzioso sulla *corporate accountability* concerne solitamente violazioni di diritti umani, in particolare dei lavoratori, o danni provocati all'ambiente, causati nel c.d. "host State", che tuttavia potrebbe dare minori garanzie di tutela

¹ Escludiamo dal campo d'indagine il contenzioso verticale sul cambiamento climatico. In argomento, per tutti, cfr. A. JOUBIN-BRET, *International mediation, An appropriate tool for climate change related dispute Resolution*, in *Law Gazette*, 2024.

² Per questa distinzione, cfr. O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione europea*, Torino, 2025, 90 ss.

rispetto a quello di costituzione o della sede legale della società: vuoi per normative meno avanzate in tema di tutela dei diritti dei lavoratori, vuoi per *standards* meno rigorosi in materia di tutela dell'ambiente. Ciò porta spesso gli attori a preferire di avviare i giudizi negli Stati dove ha sede legale la società "madre", leader del gruppo ("home State")³. In modo ancor più evidente il carattere transfrontaliero della fattispecie si manifesta nel contenzioso climatico "orizzontale", in cui gli effetti dei comportamenti climalteranti si producono in modo talmente diffuso da assumere una dimensione "intrinsecamente globale"⁴.

A differenza di altre tipologie di contenzioso, in questo ambito l'obiettivo perseguito non è, o non è soltanto, di tipo risarcitorio: come, ad esempio, quando sono proposte azioni inibitorie volte ad imporre all'impresa convenuta una riduzione delle emissioni di CO₂ nell'atmosfera. Inoltre, molto spesso si tratta di violazioni diffuse, che comportano l'esigenza di tutelare identiche posizioni di una pluralità di soggetti. Ciò comporta che le discipline internazionali-privatistiche nate e concepite prevalentemente per soddisfare tipologie di contenzioso tra due o più privati possono non sempre rivelarsi adeguate⁵.

In sintesi, quello preso in esame costituisce spesso un contenzioso avente ad oggetto interessi collettivi, con finalità prevalentemente, anche se non esclusivamente, strategiche (c.d. *strategic litigation*)⁶ e con carattere "strutturalmente" internazionale⁷.

Da un lato, quindi, la molteplicità di interessi e soggetti coinvolti, potrebbe comportare, più che in altri settori, la volontà di perseguire accordi transattivi

³ Cfr. G. CARELLA, *Art. 19 della Risoluzione dell'Institut de droit international su Human Rights and Private International Law: attuazione della responsabilità sociale d'impresa e diritto internazionale privato*, in *Dir. umani e dir. int.*, 2023, 169 ss., 175-176; O. FERACI, *Sfide e specificità del contenzioso transfrontaliero in tema di cambiamento climatico ed efficacia delle decisioni straniere*, in questo volume.

⁴ O. FERACI, *Contenzioso climatico*, cit., 39.

⁵ Per critiche analoghe, con riferimento ai "mass settlements", cfr. X.E. KRAMER, *Enforcing mass settlements in the European Judicial Area: EU Policy and the strange case of the Dutch collective Settlements (WCAM)*, in C. HODGES-A. STADLER (eds.), *Resolving Mass Disputes. ADR and Settlement of Mass Claims*, 2013, 63 ss., 82. Alcuni casi di prassi hanno anche messo in evidenza come spesso le corti non prendano in considerazione questioni legate al diritto applicabile nell'approvare transazioni di contenziosi di massa aventi carattere transfrontaliero: cfr. C. HODGES-A. STADLER, *Introduction*, in *Id.*, *Resolving Mass Disputes*, cit., 20 ss.

⁶ L. LUPORINI, *Strategic Litigation at the Domestic and International Levels as a Tool to Advance Climate Change Adaptation? Challenges and Prospects*, in *Yearb. Int. Disaster Law*, 2023, 202 ss.; O. FERACI, *Contenzioso climatico*, cit., 41 ss. (e la dottrina ivi richiamata).

⁷ Cfr. per tutti, P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *Riv. dir. int. priv. proc.*, 2022.

in corso di causa o anche del tutto stragiudiziali. Dall'altro, tuttavia, quando il contenzioso – si pensi in particolare a quello climatico – viene avviato con chiare finalità strategiche, potrebbe diminuire l'interesse, per le parti attrici, a raggiungere un accordo, considerato che l'attenzione mediatica è certamente maggiore con riferimento ad un procedimento giudiziale.

Il presente contributo è volto ad esaminare le criticità che possono emergere quando sia necessario far valere accordi “di composizione della lite”⁸ in uno Stato diverso da quello nel quale sono stati conclusi⁹. L'esigenza può sorgere sia per ottenere l'esecuzione (forzata) degli obblighi ivi assunti, sia per contrastare una eventuale domanda giudiziale avente ad oggetto la stessa lite già oggetto di accordo transattivo.

2. Il favor dell'Unione europea per la mediazione delle controversie civili transfrontaliere: la direttiva 2008/52/CE.

Fin dal Consiglio europeo di Tampere del 1999 era emersa l'esigenza di favorire in seno all'Unione l'istituzione di procedure extragiudiziali e alternative, tese ad agevolare un migliore accesso alla giustizia. A tal fine, è stata adottata la direttiva 2008/52/CE del Parlamento e del Consiglio del 21 maggio 2008, relativa a determinati aspetti della mediazione in materia civile e commerciale¹⁰, che ha lo scopo di facilitare l'accesso ai metodi alternativi di soluzione delle controversie e di promuoverne la composizione amichevole (art. 1)¹¹.

La direttiva circoscrive il proprio ambito di applicazione alle sole controversie *transfrontaliere* (art. 1, par. 2), che vengono definite come quelle controversie in cui almeno una delle parti è domiciliata o risiede abitualmente in uno Stato membro diverso da quello di qualsiasi altra parte (art. 2, par. 1)¹². Come

⁸ La terminologia utilizzata è volutamente ampia, per comprendere qualsiasi tipologia di accordo volto a comporre la lite, indipendentemente dalla procedura seguita per raggiungere tale accordo.

⁹ L'a. ringrazia la Prof.ssa Elena D'Alessandro per i preziosi spunti sul tema emersi dalla sua relazione tenuta nel corso nel Convegno che si è svolto a Firenze il 20 giugno 2025 dal titolo “La dimensione transfrontaliera dei principi ESG: la circolazione delle decisioni”.

¹⁰ GUUE L 136 del 24 maggio 2008, 3.

¹¹ Cfr. N. TROCKER, *La Direttiva CE 2008/52 in materia di mediazione: una scelta per il rinnovamento della giustizia civile in Europa*, in N. TROCKER-A. DE LUCA (a cura di), *La mediazione civile alla luce della Direttiva 2008/52/CE*, Firenze, 2011, 159 ss.

¹² Altre normative dell'Unione si sono dotate di definizioni di controversie transfrontaliere

momenti rilevanti per la verifica di questo presupposto, ai sensi del medesimo articolo, vengono indicati la data in cui: a) le parti concordano di ricorrere alla mediazione dopo il sorgere della controversia; b) il ricorso alla mediazione è ordinato da un organo giurisdizionale; c) l'obbligo di ricorrere alla mediazione sorge a norma del diritto nazionale; o, d) un invito alla mediazione è rivolto alle parti dal giudice (ai sensi dell'art. 5).

Per la determinazione del domicilio la direttiva rinvia(va) agli artt. 59 e 60 del regolamento n. 44/2001, allora in vigore, rinvio che oggi deve essere letto come riferito agli artt. 62 e 63 del regolamento (UE) n. 1215/2012 (c.d. *Bruxelles I-bis*)¹³. Conformemente alla prassi oramai consolidata nella normativa dell'Unione nel settore della cooperazione giudiziaria civile, non si introduce invece alcuna definizione di residenza abituale. A tale riguardo si potrà tuttavia fare riferimento alla giurisprudenza consolidata della Corte di giustizia, che – come noto – valorizza a tal fine il luogo in cui l'interessato ha fissato, con voluto carattere di stabilità, il centro permanente o abituale dei propri interessi¹⁴.

3. Esecutività degli accordi di mediazione: l'attuazione della direttiva in Italia.

La possibilità di conferire forza esecutiva all'accordo transattivo è da considerarsi una componente essenziale della garanzia di accesso alla giustizia, alla stregua di quanto accade con riferimento alle decisioni giudiziali.

Il considerando n. 19 della direttiva valorizza questa esigenza stabilendo che “[l]a mediazione non dovrebbe essere ritenuta un'alternativa deteriore al procedimento giudiziario nel senso che il rispetto degli accordi derivanti dalla mediazione dipenda dalla buona volontà delle parti. Gli Stati membri dovrebbero pertanto garantire che le parti di un accordo scritto risultante dalla mediazione possano chiedere che il contenuto dell'accordo sia reso esecutivo”. A tal

utili ai fini dello specifico strumento, non sempre in modo coerente. Cfr. in argomento O. LOPES PEGNA, *La nozione di controversia “transfrontaliera” nel processo di armonizzazione delle norme di procedura civile degli Stati membri dell'Unione europea*, in *Riv. dir. int. priv. proc.*, 2018, 922 ss.

¹³ Regolamento (UE) n. 1215/2012 del Parlamento europeo e del Consiglio del 12 dicembre 2012 concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale (*Bruxelles I-bis*).

¹⁴ Si osservi che, sebbene i Regolamenti Roma I e Roma II abbiano introdotto una definizione di residenza abituale per le persone giuridiche e per le persone fisiche che agiscono nell'ambito della propria attività professionale, queste definizioni sono volte alla individuazione della legge applicabile, quindi non necessariamente sono da seguire anche ad altri fini i fini, come in questo caso.

fine, la direttiva introduce un obbligo per gli Stati membri di assicurare che le parti, o una di esse con l'esplicito consenso delle altre, abbiano la possibilità di chiedere che il contenuto di un accordo scritto risultante da una mediazione sia reso esecutivo (art. 6, par. 1), con esclusione del caso in cui il contenuto dell'accordo risulti contrario alla legge dello Stato membro in cui viene presentata la richiesta, o di quello in cui la legge di detto Stato membro non ne prevede l'esecutività. Il contenuto dell'accordo potrà essere reso esecutivo in una sentenza, in una decisione, o in un atto autentico da un organo giurisdizionale o da un'altra autorità competente in conformità al diritto dello Stato membro in cui è presentata la richiesta (art. 6, par. 2).

In Italia si è provveduto a dare attuazione alla direttiva con il d.lgs. 4 marzo 2010, n. 28¹⁵, che – all'art. 12 – stabilisce che ove tutte le parti aderenti alla mediazione siano assistite da avvocati, l'accordo costituisce titolo esecutivo per l'espropriazione forzata, l'esecuzione per consegna e rilascio, l'esecuzione degli obblighi di fare e non fare, nonché per l'iscrizione di ipoteca giudiziale. Sono gli avvocati delle parti che ne attestano la conformità rispetto alle norme imperative e all'ordine pubblico.

Quando invece le parti *non* siano assistite da avvocati, l'accordo allegato al verbale è omologato, su istanza di parte, con decreto del Presidente del tribunale del luogo dove ha sede l'organismo di mediazione avanti al quale l'accordo è stato raggiunto, previo accertamento della regolarità formale e del rispetto delle norme imperative e dell'ordine pubblico (art. 12, comma 1-*bis*). Nel testo modificato dal correttivo¹⁶, ai sensi dell'art. 12, comma 1-*ter*, nelle controversie transfrontaliere di cui all'art. 2 della direttiva, l'accordo allegato al verbale è omologato su istanza di parte con le stesse modalità. Con l'omologazione l'accordo costituisce titolo esecutivo (art. 12, comma 2, d.lgs. 4 marzo 2010, n. 28).

Nel considerando n. 20 della direttiva si legge poi che un tale accordo, una volta reso esecutivo in uno Stato membro, dovrebbe essere “riconosciuto e dichiarato esecutivo” negli altri Stati membri “in conformità alla normativa comunitaria o nazionale applicabile”. In particolare, per la materia civile e commerciale, si richiama il regolamento n. 44/2001, oggi sostituito dal regolamento (UE) n. 1215/2012¹⁷.

¹⁵ D.lgs. 4 marzo 2010, n. 28, Attuazione dell'art. 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali.

¹⁶ Cfr. d.lgs. n. 28/2010, nel testo integrato con le Disposizioni integrative e correttive al d.lgs. 10 ottobre 2022, n. 149, in materia di mediazione civile e commerciale e negoziazione assistita, pubblicate in *GU* 10 gennaio 2025, n. 7, 1 ss.

¹⁷ Vedi *infra*, par. 4.

4. *La circolazione degli accordi transattivi ai sensi del regolamento (UE) n. 1215/2012 (Bruxelles I-bis).*

L'esigenza di far valere un accordo transattivo in uno Stato diverso può emergere non soltanto quando la controversia si presenta fin dall'inizio come transfrontaliera, ma anche rispetto ad accordi relativi a liti che risultano puramente interne ad uno Stato. Per la circolazione degli accordi tra Stati membri, nella materia civile e commerciale la disciplina di riferimento è fornita dal regolamento (UE) n. 1215/2012 (Bruxelles I-*bis*).

Ai sensi dell'art. 2, lett. b), del regolamento, deve intendersi per "transazione giudiziaria" quella "*approvata dall'autorità giurisdizionale di uno Stato membro o conclusa davanti all'autorità giurisdizionale di uno Stato membro nel corso di un procedimento*".

Questa formulazione elimina i dubbi interpretativi sorti con riferimento all'art. 58 del regolamento n. 44/2001, che si riferiva alle "transazioni *concluse davanti al giudice nel corso del processo*". Sebbene anche il confronto con altre versioni linguistiche lasciasse aperti dubbi interpretativi¹⁸, era stata prospettata in dottrina una lettura che – andando oltre il dato testuale – comprendesse anche le transazioni concluse in via stragiudiziale e solo successivamente approvate dal giudice¹⁹.

Le transazioni aventi efficacia esecutiva nello Stato membro d'origine sono eseguite negli altri Stati membri, alle stesse condizioni previste per gli atti pubblici (art. 59 del regolamento Bruxelles I-*bis*)²⁰. Non è più previsto a tal fine alcun procedimento intermedio di dichiarazione di esecutività²¹, e la

¹⁸ "A settlement which has been approved by a court in the course of proceedings", in inglese; "Les transactions conclues devant le juge au cours d'un procès" nella versione francese; "Las transacciones celebradas ante el tribunal durante un proceso", nella versione spagnola; "Vergleiche, die vor einem Gericht im Laufe eines Verfahrens geschlossen", nella versione tedesca.

¹⁹ Cfr. D'ALESSANDRO, *Il conferimento dell'esecutività al verbale di conciliazione stragiudiziale e la sua circolazione all'interno dello spazio giudiziario europeo*, in *Riv. trim. dir. proc. civ.*, 2011, 1157 ss., 1171; ID., *Results of mediation and cross-border enforcement of mediation agreements*, in *ERA Forum*, 2013, 418. In senso adesivo, M. BOVE, *Circolazione europea della conciliazione-titolo esecutivo*, in *Le Società*, 2012, 703 ss., 705.

²⁰ Risulta più raro che accordi transattivi possano rivestire la forma dell'atto pubblico. In tal caso, sarà applicabile direttamente la disciplina dell'art. 58 del regolamento, che ne regola l'esecutività negli altri Stati membri.

²¹ Ciò rende oggi meno rilevante la possibilità di impiegare il procedimento stabilito dal

transazione potrà circolare negli altri Stati membri munita di un attestato, che l'attuale regolamento disciplina più in dettaglio nei contenuti (pur continuando a rinviare al modello *standard* allegato): l'attestato conterrà infatti "una sintesi di quanto concordato tra le parti e registrato nella transazione giudiziaria" (art. 60) ²².

Quanto alle condizioni per l'efficacia, il rinvio alle condizioni stabilite per l'efficacia degli atti pubblici comporta che l'esecuzione possa essere negata "soltanto se è manifestamente contraria all'ordine pubblico nello Stato membro richiesto" (art. 58). L'ipotesi di contrasto con l'ordine pubblico appare in linea di massima poco probabile con riferimento a questi accordi, tenuto conto che per lo più esso tenderà ad operare – in riferimento alle decisioni – in relazione ad aspetti procedurali o in relazione ad eventuali condanne a danni punitivi ²³: ipotesi che si possono tendenzialmente escludere con riferimento ad accordi transattivi. Tuttavia, un profilo di possibile rilievo per la materia oggetto di esame risulta l'eventualità che tale limite possa entrare in gioco con riferimento ad accordi transattivi raggiunti a seguito di modelli di *class action* che non prevedano sufficienti garanzie di tutela dei diritti fondamentali dei membri della "classe" ²⁴. Occorre tuttavia ricordare che il limite opera, nel contesto dell'Unione, solo se il riconoscimento sia "manifestamente"

regolamento (CE) n. 805/2004 del Parlamento europeo e del Consiglio del 2 aprile 2004 che istituisce un titolo esecutivo europeo per i crediti non contestati, che in precedenza poteva avere una utilità in particolare per gli accordi aventi ad oggetto il pagamento di somme di denaro. Cfr. D'ALESSANDRO, *Il conferimento dell'esecutività*, cit., 1168 ss.; in senso parzialmente adesivo M. BOVE, *Circolazione europea*, cit., 705 ss.

²² Cfr. il comma 7 dell'art. 30-*bis* del d.lgs. n. 149/2022 (riforma Cartabia) che rende applicabili i procedimenti di riconoscimento ed esecuzione disciplinati ai commi precedenti dello stesso articolo anche agli atti pubblici, alle transazioni giudiziarie e agli accordi stragiudiziali. In argomento si rinvia a M.C. BARUFFI, *Il riconoscimento delle decisioni straniere dopo la riforma Cartabia*, in *Nuove leggi civili commentate*, 2023, 1230 ss., 1239.

²³ Con riferimento all'incidenza del limite dell'ordine pubblico nella materia in esame, in relazione all'efficacia di decisioni, si rinvia a G. CHIAPPONI, *Giusto processo, danni punitivi e frode alla legge: il ruolo del limite dell'ordine pubblico*, nel presente volume.

²⁴ Per questo come per altri profili problematici, in particolare con riferimento all'esperienza dei "settlements" collettivi olandesi, cfr. M. DANOV, *The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments*, in *Journ. Priv. Int. Law*, 2010, 359 ss., spec. 388 ss.; S. BARIATTI, *Recognition and Enforcement in the EU of Judicial Decisions Rendered upon Class Actions: the Case of U.S. and Dutch Judgments and Settlements*, in F. POCAR-I. VIERIENGO-F. VILLATA (eds.), *Recasting Brussels I*, Padova, 2012, 319 ss.; X.E. KRAMER, *Enforcing Mass Settlements*, cit., 83 ss.

contrario all'ordine pubblico, e che mere differenze procedurali non sono sufficienti ad integrare il limite²⁵.

Mentre il mancato richiamo al motivo di rifiuto legato alle garanzie procedurali del convenuto in procedimenti contumaciali risulta pienamente giustificato, stante la natura non giudiziale degli accordi in esame, può invece sollevare qualche perplessità l'omesso richiamo del motivo di rifiuto legato all'incompatibilità con decisioni emesse nello Stato richiesto o ivi riconosciute²⁶. Appare difficile immaginare che uno Stato possa tener conto di un accordo transattivo raggiunto all'estero, e, *a fortiori*, darvi esecuzione, se questo dovesse risultare incompatibile con una decisione già produttiva di effetti nell'ordinamento²⁷. Una soluzione potrebbe essere quella di considerare il valore della *res iudicata* salvaguardato dal limite dell'ordine pubblico ("processuale")²⁸. Anche se questa soluzione si scontrerebbe con una precisa scelta operata fin dalla Convenzione di Bruxelles²⁹ di distinguere le ipotesi di inconciliabilità fra decisioni dal limite dell'ordine pubblico (cfr. art. 45 del regolamento). In alternativa, non resterebbe che immaginare che questa eccezione possa essere fatta valere a titolo di motivo di diniego dell'esecuzione previsto dalla legge dello Stato richiesto (ai sensi dell'art. 41, par. 2, del regolamento, oggetto di richiamo nell'art. 58). Così come potranno operare altri motivi di diniego (o sospensione) dell'esecuzione previsti dalla legge dello Stato membro richiesto, sempre per effetto di tale

²⁵ E. BENVENUTI, *Climate change litigation e diritto internazionale privato dell'Unione europea: quale spazio per la tutela collettiva?*, in *Riv. dir. int. priv. proc.*, 2023, 848 ss., 905.

²⁶ Nell'ipotesi inversa a quella considerata, la presenza di una transazione non può fondare il motivo di rifiuto relativo al contrasto fra decisioni, non potendo essere qualificato alla stregua di una decisione ai sensi dell'art. 27 della Convenzione (oggi art. 45 regolamento). Cfr. Corte giust., 2 giugno 1994, C-141/92, *Solo Kleinmotoren*, par. 18. Cfr. D'ALESSANDRO, *Results of mediation*, cit., 419.

²⁷ Non ricorrerebbe incompatibilità nell'ipotesi in cui l'accordo (successivo alla decisione) tenesse in considerazione quanto stabilito nella decisione o avesse ad oggetto proprio quanto stabilito nella decisione stessa. Si pensi ad un accordo che verta sul *quantum* da risarcire, sulle modalità e/o tempi di esecuzione, etc.

²⁸ Così G. RAITI, *Il giudicato civile nazionale quale persistente presidio di ordine pubblico processuale anche nella più recente giurisprudenza pregiudiziale della Corte di giustizia*, in P. PIRRONE (a cura di), *Circolazione di valori giuridici e tutela dei diritti e delle libertà fondamentali*, Torino, 2011, 189 ss., 191.

²⁹ La presa in esame delle ipotesi di inconciliabilità fra decisioni in disposizioni distinte da quella sul limite dell'ordine pubblico fu una precisa scelta confermata nella Relazione di Paul Jenard. Cfr. P. JENARD, *Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters*, GUCE C59/1 del 5 marzo 1979, 45.

disposizione: ad esempio, potrebbe assumere rilevanza l'avvenuto adempimento delle obbligazioni assunte con l'accordo³⁰.

Si consideri che il regolamento (UE) 2019/1111 prende invece espressamente in considerazione come causa di rifiuto del riconoscimento e dell'esecuzione di un atto pubblico o di un accordo in materia di responsabilità genitoriale l'incompatibilità con una decisione, un atto pubblico o un accordo successivo³¹ in materia di responsabilità genitoriale emesso nello Stato richiesto (art. 68, par. 2, lett. c)). E, analogamente, per l'ipotesi in cui ci sia incompatibilità con una decisione, un atto pubblico o un accordo successivo emesso in altro Stato membro o in Stato terzo nel quale risiede abitualmente il minore se riconosciuti nello Stato membro richiesto (art. 68, par. 2, lett. d)).

Può sembrare assolutamente scontato che nella disciplina del *Bruxelles I-bis* sia del tutto irrilevante la questione della competenza giurisdizionale dell'autorità giurisdizionale che omologa o davanti alla quale si conclude la transazione. Del resto, la verifica della competenza (c.d. indiretta) del giudice *a quo* è esclusa, come è noto, anche per le decisioni, eccetto per alcune regole di competenza cui si è voluto attribuire una garanzia rafforzata, anche in sede di riconoscimento (art. 45, par. 3). Dato che la disciplina in esame concerne anche accordi raggiunti in via stragiudiziale, che vengono poi solo "approvati" dall'autorità giudiziaria, non è richiesto, ai fini dell'esecuzione *crossborder*, che la procedura di "approvazione" avvenga davanti all'autorità "che sarebbe stata competente" per il merito. Questa preoccupazione emerge invece nei Principi ELI sull'amministrazione stragiudiziale della giustizia in materia di famiglia e successioni³²: nel documento si propone al legislatore europeo di dare rilevanza ai profili della giurisdizione (Principio 4, parr. 47 ss.), in particolare

³⁰ In questo senso M. BROSCHE, *Article 58*, in M. REQUEJO ISIDRO (ed.), *Brussels I bis. A commentary on Regulation (EU) No 1215/2012*, Cheltenham, 2012, 763 ss., 767. Nella Convenzione di Singapore – che verrà trattata nel paragrafo successivo – l'avvenuto adempimento delle obbligazioni previste dall'accordo figura tra i motivi di rifiuto ai sensi dell'art. 5, lett. c), (i).

³¹ Come ho avuto già occasione di osservare in altra sede, si conferma in questa disposizione il diverso approccio in relazione ai provvedimenti sui minori, dove è sempre la decisione (o l'accordo) successivo a prevalere, stante la modificabilità e adattabilità di quanto deciso a nuove circostanze nell'interesse della miglior tutela del minore, Cfr. O. LOPES PEGNA, *Prospettive e limiti per un "completamento" della disciplina della circolazione delle decisioni civili nello spazio giudiziario europeo*, in P. IVALDI et al. (a cura di), *Verso il completamento dello spazio giudiziario europeo in materia civile e commerciale*, Alphen aan den Rijn, 2024, 167 ss., 169.

³² *ELI Principles on the Extra-Judicial Administration of Justice in Cross Border Family and Succession Matters, Final Draft*, pubblicato il 16 settembre 2025.

anche con riferimento al profilo della giurisdizione “indiretta” per l’efficacia extraterritoriale degli accordi stragiudiziali (“acts in family and succession matters”). Nella materia familiare e delle successioni, quindi, è emersa l’esigenza di garantire che la fase giudiziale di omologazione avvenga davanti ad una autorità competente sulla base delle norme comuni, ai fini della circolazione dell’accordo transattivo. A tal riguardo, possiamo anche ricordare che, ai sensi dell’art. 64 del regolamento Bruxelles II-ter su separazione e divorzio³³, la sezione 4 relativa ad atti pubblici e accordi si applica solo agli atti pubblici redatti o registrati e agli accordi che sono stati registrati “in uno Stato membro che assume la competenza ai sensi del capo II” (ovvero quello relativo alle competenze)³⁴. Altrettanto non è previsto al momento, invece, con riferimento alle successioni.

Appare infine utile osservare che la disciplina stabilita nel regolamento Bruxelles I-bis si preoccupa esclusivamente di garantire l’*esecutività* transfrontaliera delle transazioni, con riferimento – chiaramente – alle sole obbligazioni che abbiano un carattere tale da poter essere soggette a forme di *esecuzione*³⁵. Nulla è previsto invece in merito al “riconoscimento” di effetti che possa comportare, in particolare, un effetto preclusivo davanti ad un’autorità adita sulla medesima controversia: gli accordi da questo punto di vista mantengono quindi una mera valenza di tipo “contrattuale”, come affermato dalla Corte di giustizia nel caso *Solo Kleinmotoren*³⁶. Sarà dunque la legge applicabile all’accordo – determinata

³³ Regolamento (UE) 2019/1111 del Consiglio del 25 giugno 2019, relativo alla competenza, al riconoscimento e all’esecuzione delle decisioni in materia matrimoniale e in materia di responsabilità genitoriale, e alla sottrazione internazionale di minori (rifusione).

³⁴ Cfr. C. GONZÁLES BEILFUSS, Art. 64, in ID. et al., *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham, 2023, 485 ss.

³⁵ Analogo approccio è seguito dalla Convenzione de L’Aja del 2019 sul riconoscimento e l’esecuzione delle decisioni straniere in materia civile e commerciale (*Judgments Convention*), dove, all’art. 11, si prevede che le transazioni approvate dal giudice di uno Stato parte o concluse davanti ad un giudice di uno Stato parte, se esecutive in tale Stato, siano eseguibili negli altri Stati parte alla stregua della disciplina dettata per le decisioni. Sulla Convenzione, più ampiamente, cfr. P. FRANZINA, *La competenza internazionale quale presupposto per l’efficacia delle decisioni straniere: note sul contenzioso in tema di due diligence*, nel presente volume.

³⁶ Cfr. P. JENARD, *Report on the Convention*, cit., 56. Cfr. Corte giust., 2 giugno 1994, C-141/92, *Solo Kleinmotoren*, par. 18. Cfr. X.E. KRAMER, *Article 59*, in U. MAGNUS et al., *Brussels I bis Commentary*, Berlino, 2016, 982 ss., 988; M. BROSCHE, *Article 59*, in M. REQUEJO ISIDRO (ed.), *Brussels I bis. A commentary on Regulation (EU) No 1215/2012*, Cheltenham, 2012, 769-770.

sulla base delle norme di conflitto dello Stato richiesto – che determinerà gli effetti che l'accordo potrà produrre nello Stato in cui esso viene fatto valere³⁷. Questa soluzione espone tuttavia al rischio di una eterogeneità di soluzioni negli Stati membri³⁸.

Da questo punto di vista, si differenziano alcuni regolamenti settoriali che estendono negli Stati membri l'efficacia *probatoria* degli atti pubblici, che tuttavia esulano – *ratione materiae* – dal nostro ambito di indagine. Ad esempio, nel regolamento (UE) n. 650/2012 in materia di successioni³⁹, l'art. 59 stabilisce che gli atti pubblici redatti in uno Stato membro hanno negli altri Stati membri la “stessa efficacia probatoria” che hanno nello Stato d'origine, o producono gli effetti “più comparabili”. Tale efficacia probatoria non sarà dunque più determinata sulla base della legge applicabile nello Stato membro in cui l'accordo è fatto valere, ma in forza della legge dello Stato membro d'origine (considerando n. 61): risulta così sottratta alle variabili e conseguentemente alle incertezze che derivano invece dal “sistema Bruxelles” in assenza di una soluzione uniforme. Una soluzione analoga è stata adottata anche nei regolamenti sui regimi patrimoniali tra coniugi (art. 58)⁴⁰ e sugli effetti patrimoniali delle unioni registrate (art. 58)⁴¹. I Principi ELI sopra richiamati raccomandano effetti più ampi della mera efficacia probatoria: nel Principio n. 5 si legge: “The European Union should ensure that the effects of an act in family and succession matters according to the law of a Member State whose authorities other than courts participated in the act are extended to all Member States as far as the law of the European Union harmonises the law applicable to, and the jurisdiction for, the family and succession matter”.

³⁷ M. BROSCHE, *Article 59*, cit., 770.

³⁸ Come già visto sopra, la direttiva in materia di mediazione si riferisce espressamente anche al riconoscimento, oltre che all'esecuzione degli accordi nel richiamare la normativa unionale o nazionale applicabile (cfr. considerando n. 20 della direttiva sopra richiamato).

³⁹ Regolamento (UE) n. 650/2012 del Parlamento europeo e del Consiglio del 4 luglio 2012, relativo alla competenza, alla legge applicabile, al riconoscimento e all'accettazione e all'esecuzione degli atti pubblici in materia di successioni e alla creazione di un certificato successorio europeo.

⁴⁰ Regolamento (UE) 2016/1103 del Consiglio del 24 giugno 2016, che attua la cooperazione rafforzata nel settore della competenza, della legge applicabile, del riconoscimento e dell'esecuzione delle decisioni in materia di regimi patrimoniali tra coniugi.

⁴¹ Regolamento (UE) 2016/1104 del Consiglio del 24 giugno 2016, che attua la cooperazione rafforzata nel settore della competenza, della legge applicabile, del riconoscimento e dell'esecuzione delle decisioni in materia di effetti patrimoniali delle unioni registrate.

Nel regolamento in materia matrimoniale (regolamento (UE) 2019/1111) si è scelto invece di disciplinare anche il “riconoscimento”, oltre che l’esecutività, degli atti pubblici e degli accordi in materia di separazione e divorzio aventi effetti giuridici vincolanti (art. 65) ⁴².

Se prendiamo in considerazione in particolare le controversie in materia ESG, che coinvolgono interessi diffusi, l’effetto “preclusivo” assume particolare rilevanza, soprattutto nei casi di azioni collettive ⁴³. Rafforzerebbe quindi la certezza del diritto una disciplina uniforme anche rispetto alla possibilità di invocare l’accordo transattivo in giudizio, rendendoli in tal modo anche più “attrattive” le soluzioni di composizione della lite alternative a quelle giudiziali.

In questa direzione si muove la Convenzione di Singapore, che – come vedremo – si preoccupa anche di garantire una efficacia preclusiva degli accordi di mediazione fatti valere in un successivo giudizio ⁴⁴.

5. *Uno sguardo fuori dall’Unione: opportunità e limiti della Convenzione di Singapore sull’efficacia degli accordi di mediazione.*

L’esigenza che gli accordi di composizione stragiudiziale della lite, in particolare quelli raggiunti con un percorso di mediazione, possano avere una efficacia *crossborder* si è posta all’attenzione anche delle Nazioni Unite ed in particolare in seno all’UNCITRAL. All’esito di lavori durati alcuni anni, il 7 agosto 2019 è stata aperta alla firma la Convenzione delle Nazioni Unite sugli accordi di mediazione internazionali (“Convention on International settlement agreements resulting from mediation”), elaborata dall’UNCITRAL (di seguito Convenzione di Singapore) ⁴⁵. La Convenzione conta ad oggi 19 Stati parti, tra i quali non figurano (neanche come firmatari) né l’Unione europea né alcuno Stato dell’Unione ⁴⁶.

⁴² Per un analitico esame della disciplina si rinvia a C. HONORATI-E. DI NAPOLI, *Guida alla mediazione familiare internazionale*, Pisa, 2025, 77 ss.

⁴³ X.E. KRAMER, *Enforcing mass settlements*, cit., 86.

⁴⁴ *Infra*, par. 5.

⁴⁵ La Convenzione è stata aperta alla firma con risoluzione dell’Assemblea Generale n. 73/198 del 20 dicembre 2018. Cfr. T. SCHNABEL, *The Singapore Convention on Mediation: a Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, in *Pepperdine Dispute Resolution Law Journal*, 2019, 1 ss.

⁴⁶ Ai sensi dell’art. 12 anche le organizzazioni di integrazione economica regionali possono diventare parte della Convenzione.

L'obiettivo della Convenzione è quello di favorire il ricorso alla mediazione, garantendo efficacia agli accordi di mediazione delle liti internazionali, superando la mera natura "contrattuale" degli stessi ⁴⁷.

Ai sensi della Convenzione, per "mediazione" si deve intendere "a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute" (art. 2, par. 3).

L'ambito di applicazione è limitato ai soli accordi "stragiudiziali": ai sensi dell'art. 1, par. 3, infatti, sono esclusi dall'ambito di applicazione gli accordi approvati da un giudice o conclusi nel corso di un giudizio davanti ad un giudice, e che siano eseguibili come una sentenza nello Stato di quel giudice.

La natura "internazionale" della lite, ai sensi della Convenzione, si verifica quando le parti, al momento dell'accordo, hanno il loro "place of business" in Stati diversi, o lo Stato in cui le parti hanno il "place of business" è diverso dallo Stato in cui una parte sostanziale delle obbligazioni in base all'accordo è eseguito ⁴⁸, o dallo Stato con il quale il merito dell'accordo presenta il collegamento più stretto ⁴⁹. Dato che la mediazione non ha tipicamente una "sede" ("seat"), la definizione non può che essere ricondotta alla natura del rapporto, prescindendo dal luogo in cui la mediazione avviene ⁵⁰.

La Convenzione stabilisce un obbligo per gli Stati parte di dare esecuzione all'accordo di mediazione alle condizioni stabilite dalla Convenzione stessa (art. 3, par. 1), e di consentire alla parte dell'accordo di mediazione di poter invocare in giudizio l'accordo per provare che la questione è stata già risolta (art. 3, par. 2) ⁵¹. Come è stato osservato, stabilendo l'esecutività dell'accordo, seppur disciplinata poi dalla legge processuale dello Stato parte richiesto, la Convenzione va dunque

⁴⁷ Cfr. T. SCHNABEL, *The Singapore Convention*, cit., 11; S.Y. CHONG-F. STEFEK, *Enforcement of International settlement agreements resulting from mediation under the Singapore Convention – Private international law issue perspective*, in *Singapore Academy of Law Journal*, 2019, 448 ss.

⁴⁸ "The State in which a substantial part of the obligations under the settlement agreement is performed".

⁴⁹ "The State with which the subject matter of the settlement agreement is most closely connected".

⁵⁰ Cfr. S.Y. CHONG-F. STEFEK, *Enforcement of International settlement agreements*, cit., 456.

⁵¹ G. PALAO, *Article 3 General Principles*, in ID. (ed.), *The Singapore Convention on Mediation. A Commentary on the United Nations Convention on International Settlement Agreements resulting from Mediation*, Cheltenham, 2022, 107 ss.

oltre quanto stabilito dalla direttiva (UE) 2008/52, tenuto conto che con il rinvio alla disciplina stabilita dal regime “Bruxelles I” l’esecuzione è subordinata ad una forma di “omologazione” giudiziale non richiesta invece dalla Convenzione⁵².

Le condizioni per poter invocare l’accordo sono stabilite all’art. 4, mentre l’art. 5 prevede motivi uniformi di rifiuto della possibilità di invocare l’accordo davanti all’autorità competente dello Stato parte.

L’aspetto che rende dubbia la concreta possibilità che la Convenzione possa contribuire effettivamente al rafforzamento della possibilità di invocare un accordo di mediazione con riferimento alle controversie oggetto del presente volume risiede nel suo ambito di applicazione “materiale”.

Da un lato, la Convenzione espressamente esclude dal suo ambito di applicazione gli accordi relativi all’impiego (“settlement agreements relating to (...) employment law”, art. 1, par. 2, lett. b). Più in generale, poi, e con riferimento alle tipologie di controversie riconducibili alla “materia ESG”, il dubbio principale concerne la natura “commerciale” delle controversie assoggettate alla Convenzione (art. 1, par. 1)⁵³.

La Convenzione non contiene una definizione di controversia commerciale (“commercial dispute”), ma la disciplina sembra riferita prevalentemente (se non esclusivamente) ai rapporti BtoB⁵⁴. A tal fine, un utile punto di riferimento per interpretare la Convenzione potrebbe essere costituito dalla *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* del 2018⁵⁵, dove si legge in nota:

“The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture

⁵² G. PALAO, *Article 3 General Principles*, cit., 124. Cfr. anche ID., *La Convención de Singapur sobre Mediación desde la Perspectiva de la Unión Europea: Algunas Reflexiones*, in *Revista VOX*, 2012, 40.

⁵³ T. SCHNABEL, *The Singapore Convention*, cit., 22 ss.

⁵⁴ In questo senso P. CORTÉS, *Article 1. Scope of Application*, in G. PALAO (ed.), *The Singapore Convention on Mediation*, cit., 63 ss., 73. Si osservi che ai sensi dell’art. 1, par. 2, sono esclusi anche gli accordi conclusi per risolvere una controversia relativa ad una transazione nella quale una delle parti assume la veste di consumatore.

⁵⁵ Adottata con Risoluzione dell’Assemblea Generale n. 73/199 del 20 dicembre 2018.

and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road”.

Tuttavia, mentre la *Model Law*, per sua natura, lascia aperta la possibilità per gli Stati di prendere la disciplina come modello anche per materie non commerciali⁵⁶, la Convenzione, in quanto fonte di obblighi, richiederebbe ad avviso di chi scrive una maggiore precisione sul suo ambito di applicazione, ciò che avrebbe reso opportuno l’inserimento di una specifica definizione.

Nonostante queste incertezze, dunque, anche nell’eventualità in cui la Convenzione ampliasse il suo raggio d’azione con una maggiore partecipazione statale, il rilievo appena evidenziato costituirebbe – a parere di chi scrive – il principale ostacolo ai fini dell’applicabilità dello strumento alle controversie in esame nel presente volume.

L’aspetto di maggiore interesse, e anche più innovativo, della Convenzione risiede nella circostanza che essa si preoccupa di disciplinare anche l’efficacia dell’accordo transattivo fatto valere in corso di causa (art. 3, par. 2)⁵⁷. Pur evitando (volutamente) di utilizzare il termine “recognition”⁵⁸, contestato da molti Stati in quanto generalmente impiegato per sentenze e lodi arbitrali⁵⁹, la disposizione consente l’utilizzo dell’accordo in giudizio come vera e propria “difesa”, conferendo una efficacia maggiore rispetto a quella meramente “probatoria” dell’avvenuta transazione della lite⁶⁰. Nella efficace metafora di Schnabel: l’accordo può essere usato sia come “spada” che come “scudo”⁶¹. Sembra invece fuorviante l’impiego del concetto di *res iudicata*, talvolta utilizzato in dottrina⁶², con riferimento a questi accordi.

⁵⁶ Cfr. la *Guide to Enactment and Use*, par. 30 e 31.

⁵⁷ G. PALAO, *Article 3 General Principles*, 125 ss.

⁵⁸ In questo senso, con riferimento alla *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* del 2018, cfr. la *Guide to Enactment and Use*, par. 126. Cfr. S.Y. CHONG-F. STEFEK, *Enforcement of International settlement agreements*, cit., 465, che dà conto anche di una netta contrarietà dell’Unione europea all’utilizzo del termine “recognition”.

⁵⁹ Per un’ampia disamina delle posizioni prese dai vari Stati e dell’Unione europea sul punto, si rinvia a T. SCHNABEL, *The Singapore Convention*, 34 ss.

⁶⁰ Cfr. la *Guide to Enactment and Use*, cit., par. 126-127. T. SCHNABEL, *The Singapore Convention*, 40.

⁶¹ T. SCHNABEL, *The Singapore Convention*, cit., 36.

⁶² Cfr. ad esempio G. PALAO, *Article 3 General Principles*, 126. In senso contrario alla possibilità di assimilare questa efficacia a quella di riconoscimento “internazionale-privatistico”, S.Y. CHONG-F. STEFEK, *Enforcement of International settlement agreements*, cit., 465.

Come abbiamo visto, questa efficacia non è allo stesso modo garantita in modo esplicito dagli strumenti precedentemente esaminati applicabili nella materia civile e commerciale, che si limitano a disciplinare l'efficacia esecutiva, e continuano dunque a basarsi su una valenza esclusivamente "contrattuale" dell'accordo per il suo impiego quale "scudo" contro nuove azioni aventi ad oggetto la stessa controversia. Circostanza che può portare anche a soluzioni difformi negli ordinamenti, data l'incidenza che su tale efficacia può avere la legge applicabile⁶³.

Per favorire la soluzione stragiudiziale delle controversie, questo aspetto pare invece non meno importante di quello legato alla esecuzione dell'accordo, e dovrebbe quindi costituire oggetto di attenzione anche in seno all'UE.

6. Conclusioni.

La possibilità di far valere gli accordi di composizione della lite anche *cross-border* appare un'esigenza di cui tener conto, e alla quale le normative attualmente applicabili non paiono pienamente soddisfacenti.

Da un lato, la disciplina dell'Unione si concentra esclusivamente sugli effetti "esecutivi" degli accordi conclusi o approvati da una autorità giudiziaria, lasciando impregiudicata la loro valenza "contrattuale", che resta soggetta a possibili soluzioni difformi, legati alla legge applicabile all'accordo. L'estensione di questa disciplina agli accordi di mediazione ai sensi della direttiva UE sopra esaminata comporta che gli stessi limiti siano estesi anche in questo contesto. Questo pare l'aspetto in cui sarebbe auspicabile una evoluzione, che può essere favorita – nel contesto dell'Unione – da norme uniformi applicabili alla efficacia "privatistica", "contrattuale", dell'accordo⁶⁴.

Sul piano dei motivi che possono giustificare il rifiuto dell'esecuzione, il richiamo come unico limite all'ordine pubblico può non essere pienamente soddisfacente: ad esempio, questa soluzione non sembra tenere nella dovuta considerazione il possibile rischio di inconciliabilità tra l'accordo transattivo con una precedente decisione produttiva di effetti nell'ordinamento richiesto.

La Convenzione di Singapore sull'efficacia degli accordi di mediazione, anche nell'eventualità di una adesione dell'Unione europea o dei singoli Stati membri, allo stato attuale non pare soddisfare le esigenze di circolazione degli

⁶³ S.Y. CHONG-F. STEFEK, *Enforcement of International settlement agreements*, cit., 452-453.

⁶⁴ X.E. KRAMER, *Enforcing mass settlements*, cit., 86.

accordi di mediazione nelle materie in esame: vuoi per l'esclusione delle controversie in materia di lavoro, vuoi, più in generale, per l'incertezza legata alla definizione di materia "commerciale", che lascia ampi dubbi sulla possibilità di poter ricondurre nel suo ambito di applicazione le controversie sui Principi ESG che non abbiano carattere BtoB.

RICONOSCIMENTO DI SENTENZE STRANIERE IN MATERIA DI PRINCIPI ESG: CONCLUSIONI

Francesco Salerno

SOMMARIO: 1. “Globalizzazione” delle imprese, standard internazionali o sovranazionali e assetto statocentrico del diritto internazionale privato. – 2. La circolazione di decisioni straniere nel “filtro” nell’ordinamento statale: a) la competenza internazionale del giudice d’origine. – 3. b) la compatibilità con decisioni pregresse nel foro richiesto. – 4. c) il limite dell’ordine pubblico (internazionale).

1. *“Globalizzazione” delle imprese, standard internazionali o sovranazionali e assetto statocentrico del diritto internazionale privato.*

L’incontro fiorentino del 20 giugno 2025 ha rappresentato un’opportuna occasione di riflessione sugli sviluppi significativi che, specie in ambito europeo, ha registrato la definizione di regole vincolanti tese a rendere le imprese “socialmente responsabili”. Il punto focale è rappresentato dalle Direttive dell’UE riguardanti la rendicontazione societaria di sostenibilità (2022/2464) e la *due diligence* ai fini della sostenibilità (2024/1760). Nell’ordinamento italiano la prima è stata già attuata con il decreto legislativo 6 settembre 2024, n. 125; per la seconda si è invece procrastinata di un anno la scadenza al 26 luglio 2027 e comunque vi sarà una notevole gradualità che, a seconda delle dimensioni e della natura delle imprese, si dovrebbe esaurire il 26 luglio 2029.

Queste cautele sono connaturate alle difficoltà che gli operatori economici incontrano nel programmare e attuare una *policy* aziendale coerente con i principi ESG, per quanto non poche imprese multinazionali abbiano da tempo volontariamente avviato – soprattutto sulla spinta dei codici di condotta OCSE e ILO nonché del *Global Compact* delle Nazioni Unite – una prassi coerente tanto da registrare un *rating* mirato di sostenibilità sociale (ISO/SA 8000) ¹. Va da sé

¹ Opportunamente, M. CASTELLANETA, *La responsabilità sociale di impresa nel contesto*

che la standardizzazione e la trasparenza della condotta di imprese favorisce la concorrenza ma crea anche aspettative definite di gruppi di interessi intorno a quello che una volta veniva chiamato il “ciclo” multinazionale e che oggi riguarda la più articolata “catena di valore” dell’impresa, poiché investe non solo la produzione ma anche la fornitura e la commercializzazione ad essa collegata.

Il confronto tra i portatori di interessi diffusi e il *management* è in effetti particolarmente complesso quando investe una impresa multinazionale (cui si può assimilare una piattaforma digitale transnazionale). In questa circostanza esso può essere variamente allocato: al vertice della casa-madre, nelle direzioni “regionali” di una impresa multinazionale, ovvero nelle sue varie filiali nazionali. In ogni caso, un confronto del genere, per la qualità degli attori e le dimensioni dell’impresa, non può che essere *naturaliter* transfrontaliero.

È comprensibile che, di fronte ad un quadro assai innovativo, gli interventi della giornata fiorentina si siano diversamente distribuiti evidenziando ora le criticità normative *de lege lata* ora le necessità che si impongono *de lege ferenda*. Restando il più possibile sul terreno del diritto positivo vigente, ci si deve necessariamente calare nel contesto statocentrico, che costituisce tuttora il solo contenitore ordinamentale nel quale le controversie tra privati possono trovare composizione in considerazione del diritto di accesso alla giustizia che vi viene garantito.

Rispetto ad un contenzioso collegabile a più ordinamenti statali, si aprano in genere possibilità diverse di strategia processuale circa il sistema statale preferito nel quale radicare la lite. Questa scelta per l’attore dipende da vari fattori quali l’opportunità di beneficiare del gratuito patrocinio, la predisposizione di una *class action*, le migliori prospettive di successo con riferimento al diritto applicabile e soprattutto – in assenza di una proroga volontaria della giurisdizione – l’esistenza di un titolo giurisdizionale oggettivamente precostituito o che sia comunque sufficientemente plausibile nella prospettiva della futura circolazione della decisione che dovesse essere emessa al termine del processo.

internazionale: il programma Global Compact delle Nazioni Unite, in M. CASTELLANETA-F. VESSIA (a cura di), *La responsabilità sociale d’impresa tra diritto societario e diritto internazionale*, Napoli, 2019, 271, ricorda che l’adesione delle imprese al *Global Compact* “comporta l’impossibilità di stipulare contratti con fornitori e altri soggetti ... che svolgono la propria attività in modo contrario ai dieci principi del *Global Compact*”.

2. *La circolazione di decisioni straniere nel “filtro” nell’ordinamento statale:*
a) *la competenza internazionale del giudice d’origine.*

Come è noto, una delle più frequenti condizioni ostative al riconoscimento di sentenze straniere attiene per l'appunto alla competenza giurisdizionale dell'ordinamento di origine da cui quelle provengono. Il modo in cui il foro richiama provvede a determinare tale parametro dipende dalla normativa applicabile. La relazione di Pietro Franzina indica le varie tecniche che vengono utilizzate nella disciplina internazionale uniforme in materia civile e commerciale nella quale si collocano le controversie sul rispetto dei principi ESG. In genere gli strumenti internazionali o sovranazionali provvedono ad indicare una lista di legami oggettivamente predefiniti o concordati tra le parti, idonei a legittimare – almeno sotto questo profilo – la circolazione extra-territoriale della decisione. Nel “sistema Bruxelles I” abbiamo una disciplina relativamente ibrida poiché nei rapporti tra Stati membri dell'UE e destinatari dell'attuale regolamento (UE) 2012/1215 i parametri sono costituiti non solo dai titoli uniformi di giurisdizione che provvedono a ripartire la competenza giurisdizionale tra Stati membri ma anche dai c.d. titoli nazionali di giurisdizione esorbitante quali contemplati dall'art. 6 del regolamento. Nella Convenzione de L'Aja del 2019 sul riconoscimento di sentenze straniere, su cui maggiormente si è soffermata l'attenzione di Franzina, si indicano (art. 5) i soli criteri di giurisdizione che, in modo uniforme, giustificano la competenza dell'ordinamento di origine; l'art. 15 della Convenzione comunque non esclude il riconoscimento di sentenze straniere secondo la legge nazionale quando manchino i requisiti stabiliti dalla disciplina uniforme.

Resta il fatto che nella disciplina comune italiana, per quanto residualmente applicabile, vige il criterio del c.d. “effetto specchio” nel senso che i criteri posti alla base della competenza del giudice italiano consentono di stabilire la legittimità del titolo di giurisdizione utilizzato o utilizzabile nell'ordinamento di origine della sentenza straniera. In altri termini, quanto più ampia è la sfera di competenza del giudice italiano tanto più ampia risulterà la sfera di competenza internazionale del giudice straniero. L'assetto ibrido delle norme comuni sulla giurisdizione quale definito dalla legge n. 218/1995 – determinato dalla combinazione tra titoli direttamente formulati e altri ricavabili tramite rinvio o al “sistema Bruxelles I” o alle norme di competenza territoriale (art. 3, comma 2) – obbliga naturalmente l'interprete a considerare una gamma articolata di opportunità di accesso alla giustizia utilizzabili nell'ordinamento di origine della sentenza straniera.

Raccordata una prospettiva del genere alle controversie in tema di rispetto della *due diligence* delle imprese multinazionali, non pare molto utile delimitare

la giurisdizione al solo foro generale del convenuto, vale a dire al suo domicilio. La tesi è stata ben sostenuta e argomentata in Italia ad opera di Ornella Feraci con riferimento alle liti che attengono al cambiamento climatico², puntando sulla circostanza che, per essere veramente effettivo, un contenzioso del genere deve necessariamente radicare la lite nell'ordinamento nel quale sia possibile incidere meglio sulla *policy* del gruppo multinazionale e quindi farne discendere gli effetti sulla "catena di valore" che dipende dallo stesso. Un ragionamento del genere riflette una concezione neo-istituzionalista dell'impresa³, che induce a canalizzare nella direzione della casa-madre ogni sorta di controversia che abbia una obiettiva rilevanza "globale". Questo approccio "verticale" bene si attaglia ad una visione "globalizzata" nella quale sembrerebbe del tutto esaurita la dimensione statocentrica, tanto da considerare irrilevante il luogo dell'evento dannoso.

Chi scrive ritiene che l'elemento della territorialità, tanto più quando racchiuda una dimensione "sovrana", mantenga tuttora la sua importanza e vitalità anche in presenza di attori che assurgono a dimensioni globali. In primo luogo, perché le imprese multinazionali, pur essendo agenti rilevanti del processo di globalizzazione, sono anche idonee – e a volte desiderose – di "territorializzarsi" in rapporto anche a singoli segmenti della propria catena di valore⁴. A fronte di questo scenario – insieme dinamico e differenziato – emergono nuove tipologie di danno, di vittime o di responsabilità – come messo in evidenza anche nella relazione di Henke – che esprimono esigenze di garanzie alle quali lo Stato territoriale dovrebbe pur dare una risposta se non vuole negare la sua stessa funzione di protezione. Perciò sarebbe preferibile lasciare aperte tutte le possibilità che il diritto vigente di uno Stato offre in tema di accesso alla giustizia. Del resto, gli interessi rilevanti ai fini dei principi ESG che scaturiscono dalla "catena di valore" di una impresa multinazionale riguardano anche "portatori" di interessi non necessariamente globali che possono avere una loro giustificata aspettativa di giustizia nella dimensione nazionale.

L'esigenza di assicurare la prevedibilità del foro vale tanto per la pretesa vittima che per l'impresa, ma la natura della prima e della seconda determinano

² O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, spec. 111 ss.

³ Cfr. F. FAVOTTO-G. MICHELON, *Responsabilità sociale dell'impresa come efficace e lungimirante strategia aziendale*, in G. CONTE (a cura di), *La responsabilità sociale dell'impresa*, Bari, 2008, 222.

⁴ E. MAULIN, *L'Etat dans la mondialisation. Perspectives géo-juridiques sue les évolutions de la territorialité*, in P. BONIN-P. BRUNET-S. KERNEIS (a cura di), *Formes et doctrines de l'Etat. Dialogue entre histoire du droit et théorie du droit*, Paris, 2017, 252.

esiti differenti: l'accesso alla giustizia va perciò commisurato alle circostanze del caso concreto. La prospettiva (ma non il vincolo) di concentrare le liti in un unico foro è probabilmente meglio pertinente se sussistono almeno due condizioni: per un verso, la tipologia di controversie assume valenza strategica rispetto all'intero gruppo e, per un altro, la casa-madre è in grado di assumere un controllo completo sull'attività delle succursali presenti all'estero. È una soluzione che funziona bene, ad esempio, per le *Big Data* ma non è detto che si attagli sempre – e allo stesso modo – a tutto il complesso e variegato mondo delle imprese multinazionali ed in relazione ai vari portatori di interessi che ne fanno parte o accompagnano la sua catena di valore. Si pensi, in particolare, alle controversie di lavoro (parte qualificante dei principi ESG), che raramente assurgono a livello di gruppo multinazionale mentre è più facile che si aggancino alle singole realtà nazionali in cui operano le succursali dell'impresa multinazionale.

Inoltre, nei paesi destinatari della disciplina uniforme europea, la “concentrazione” del contenzioso ESG nel foro del domicilio della casa-madre di una impresa multinazionale non è di per sé risolutiva rispetto alla possibile proliferazione dei giudizi. In base all'art. 63 del regolamento (UE) 2012/1215, vi sono tre possibili – e tutte legittime – accezioni di foro domiciliare per le persone giuridiche ed in particolare per le società: la sede legale, l'amministrazione centrale e il centro dell'attività principale. Ognuna di queste si presterebbe all'avvio di liti “strategiche” mirate al medesimo oggetto⁵. Se non composte attraverso la regola sulla litispendenza, il risultato dei relativi giudizi paralleli troverebbe efficacia nel foro richiesto secondo criteri di anteriorità temporale (art. 45, lett. c) e d)), dal momento che i tre criteri sono tra loro equiordinati. Infine, la concentrazione della lite “globale” nel foro del domicilio (quale che esso sia) deve fare i conti – come opportunamente evidenziato nella relazione di Chiapponi a proposito dell'ordinamento statunitense – con la possibile “ostilità” del foro richiesto a rimuovere il “velo” dell'autonomia societaria, per cui la chiamata in giudizio della casa-madre è preclusa per fatti riconducibili alla condotta di una sua succursale all'estero. Questo “unilateralismo” del foro richiesto diverrebbe ancora più marcato qualora dovesse trovare accoglienza l'ipotesi ricorrente di introdurre nella disciplina uniforme o in quella comune il c.d. “foro di necessità”⁶, vale a dire l'accesso alla giustizia giustificato da un legame solo

⁵ L'art. 3, par. 2, della Convenzione de L'Aja del 2019 ne aggiunge un quarto: il luogo di incorporazione della persona giuridica.

⁶ O. LOPES PEGNA, *Accesso alla giustizia e giurisdizione nel contenzioso transfrontaliero*, Bari, 2022, spec. 117 ss.

“sufficiente” ma motivato dalla natura dei diritti in giuoco in base ai “valori” propri di quel foro. In condizioni del genere il riconoscimento della sentenza straniera nel foro richiesto dovrebbe richiedere una preliminare considerazione della coincidenza valoriale tra i due ordinamenti posti a raffronto.

Perciò, anche in considerazione delle varie ragioni di strategia processuale che guidano la condotta degli attori impegnati in un contenzioso su temi di *due diligence*, forse è preferibile lasciare aperte le varie possibilità che, oltre al foro domiciliare, la disciplina uniforme e quella comune prefigurano, vale a dire il foro della responsabilità extra-contrattuale, il foro della succursale e quindi la concentrazione delle liti attraverso la connessione attributiva (sia pure con i limiti indicati da Franzina a proposito della Convenzione de L’Aja).

3. b) *la compatibilità con decisioni pregresse nel foro richiesto.*

Poiché il foro competente assorbe ogni genere di azione (mero accertamento, condanna, ingiunzione positiva o negativa detta anche inibitoria) e non si può escludere la possibilità di liti parallele o connesse, è utile soffermarsi su un aspetto non sufficientemente focalizzato nel corso di questo incontro, vale a dire la determinazione della sfera oggettiva e soggettiva degli effetti del giudicato straniero. Questo aspetto diventa tanto più rilevante se nel foro richiesto si ponga una questione di compatibilità tra quel giudicato ed una pregressa decisione emanata nel medesimo foro. In un caso del genere sovengono esigenze di certezza del diritto che investono l’intero ordinamento richiesto e quindi opportunamente sia la disciplina comune che quella uniforme ne fanno un aspetto irrinunciabile di verifica in relazione alla possibile circolazione di decisioni straniere.

Nel diritto uniforme europeo si è da tempo consolidato il convincimento, per opera soprattutto della giurisprudenza della Corte di giustizia, di correlare l’efficacia delle sentenze straniere emanate in uno Stato membro agli effetti che sono propri nel suo ordinamento di origine. Tale principio comporta che la sfera oggettiva e soggettiva del giudicato si commisura sulla base di quanto prefigura in proposito l’ordinamento di origine della decisione ed è rispetto a quella sfera che va valutata una eventuale questione di incompatibilità con una pregressa decisione del foro richiesto. Questa “cessione” di sovranità giurisdizionale sembra invero giustificata dal principio di reciproca fiducia che accompagna il regime uniforme europeo. Tuttavia, anche la disciplina comune – accogliendo il principio del riconoscimento automatico – sembra strutturata per accogliere in linea di massima il medesimo principio della estensione degli effetti.

Naturalmente la correlazione va modulata in base anche alla natura dell'atto pubblico straniero idoneo a circolare nello spazio (ciò su cui si sofferma il contributo di Lopes Pegna). Così, se la sfera del giudicato di condanna reca con sé anche l'accertamento dei fatti che ne è all'origine, non altrettanto può dirsi qualora si concluda un accordo transattivo sulla lite. Per quanto il ricorso alla mediazione non sia particolarmente frequente (come messo in evidenza da D'Alessandro)⁷, merita comunque ricordare che il contenuto vincolante dell'accordo e quindi i suoi effetti (a prescindere dalla circostanza se questo sia omologato dal giudice o abbia natura assolutamente extra-giudiziale) è delimitato ai punti specificamente concordati tra le parti: per sua natura un atto del genere non può avere contenuti "impliciti" quali quelli che sovente l'ordinamento d'origine assegna alla sentenza con valore di giudicato.

Va poi considerato che rispetto a talune specifiche forme di giudizi riguardanti la condotta delle imprese multinazionali in relazione al mancato rispetto di regole ESG non sembra agevole replicare il principio della estensione degli effetti. Si vuole fare riferimento alla eventualità che la decisione straniera sia stata emessa a seguito di una *class action*. Non esiste una disciplina uniforme europea in proposito. Negli Stati in cui questo istituto processuale è prefigurato, esso viene regolato in base a norme speciali che definiscono anche i contorni specifici della sfera di giudicato oggettivo e soggettivo. Nell'ordinamento italiano, a seguito dell'ultima novellazione operata dalla legge n. 31/2019, essa trova un'organica disciplina negli artt. da 840-*bis* a 840-*sexiesdecies* c.p.c. La procedura, suscettibile di determinare una sentenza di condanna o di inibitoria, è speciale e di natura sommaria (in forma largamente telematica). Essa si regge sull'esistenza di "diritti individuali omogenei degli aderenti" all'azione collettiva nei confronti dell'impresa, azione che deve essere necessariamente unica e gestita da associazioni qualificate secondo i requisiti posti dalla stessa legge⁸. La peculiarità di tale disciplina dipende quindi in larga misura dal diritto nazionale che la consente e che non si presta ad accogliere agevolmente il prodotto giudiziario di un modello "estraneo" di *class action* se non nei termini in cui quello sia *grosso modo* equivalente al modello del foro richiesto e soprattutto non si presenti alternativo ad esso.

⁷Altra ipotesi, non affrontata nell'incontro fiorentino, ma oggetto di un precedente incontro specifico sul tema, è che le controversie in materia di ESG vengano portate dinanzi ad arbitri.

⁸Ciò non esclude che anche una lite collettiva di questo genere possa concludersi con un accordo transattivo: art. 840-*quaterdecies* c.p.c.

4. c) *il limite dell'ordine pubblico (internazionale).*

Ovviamente anche le sentenze straniere relative alla condotta delle imprese multinazionali nel rispetto dei principi ESG sono soggette al “filtro” dell’ordine pubblico (internazionale). La questione è stata evidenziata dalla relazione di Chiapponi incentrata su vari profili della decisione straniera che possono essere oggetto di verifica nella prospettiva del limite dell’ordine pubblico. In questo ambito è stata prestata attenzione anche alla possibilità di invocare l’ordine pubblico per escludere il riconoscimento di una sentenza straniera pronunciata in un ordinamento sulla base di un titolo di giurisdizione artificiosamente creato con modalità fraudolente. Per quanto la frode alla legge sia – quando non esplicitamente ed autonomamente prefigurata – parte integrante dell’ordine pubblico, la sua utilizzazione rispetto ai criteri di competenza internazionale deve fronteggiare due ordini di obiezioni.

La prima attiene all’autonomia che la disciplina positiva, sia essa uniforme o comune, riconosce alla rilevanza obiettiva di determinate circostanze – come, ad esempio, la cittadinanza (o la nazionalità delle società) e la residenza – la cui sussistenza è rimessa in tutto o in parte alla legge dell’ordinamento di origine sia pure in relazione a determinazioni individuali a ciò finalizzate.

Il secondo ostacolo riguarda l’espressa preclusione disposta specificamente dal diritto uniforme europeo (art. 45, par. 2, del regolamento (UE) 2012/1215) circa un eventuale “riesame” del foro richiesto sulle circostanze di collegamento giurisdizionale (di carattere non esclusivo) su cui si è fondata la competenza giurisdizionale dell’ordinamento di origine della sentenza, dal momento che in queste ipotesi “l’autorità giurisdizionale cui sia stata presentata l’istanza è vincolata dall’accertamento dei fatti sul quale l’autorità giurisdizionale d’origine ha fondato la propria competenza”.

È invece possibile che il limite dell’ordine pubblico osti al riconoscimento di una sentenza straniera per gli “effetti” sostanziali che essa determina nel foro richiesto. La prospettiva è piuttosto remota se prevale l’idea che la consistente e continua normazione internazionale e sovranazionale relativa ai principi ESG escluda una radicale divergenza tra Stato di origine e Stato richiesto. Tuttavia, non si deve dimenticare che i principi ESG sono generali e di portata talora promozionale o premiale⁹, tanto più se rapportati ad un parametro di *due diligence* che è mutevole non solo in relazione al caso concreto ma anche agli

⁹ P. ACCONCI, *La promozione della responsabilità sociale d’impresa nel diritto internazionale*, in P. ACCONCI (a cura di), *La responsabilità sociale di impresa in Europa*, Napoli, 2009, 23.

indicatori che ogni ordinamento nazionale utilizza per definire il criterio di correttezza aziendale.

Perciò gli standard nazionali dei vari paesi non sono del tutto identici, evidenziando soprattutto a livello globale notevoli differenze. Lo confermano in modo indiretto i diversi criteri che guidano le agenzie di *rating* nel definire il *ranking* delle imprese alla luce del loro rispetto dei principi ESG¹⁰. *A fortiori*, vi possono essere differenti percezioni del medesimo valore tra i singoli ordinamenti nazionali, specie là dove il parametro dell'ordine pubblico dello Stato richiesto si impregni di valori sociali o ambientali che riflettono direttamente principi costituzionali. In questo senso è significativa la novella (legge costituzionale 11 febbraio 2022, n. 1) che ha modificato la Costituzione italiana negli artt. 9 e 41 introducendo specifici riferimenti alla tutela dell'ambiente anche nella prospettiva intergenerazionale, con una significativa "intrusione" sulla sfera di autonomia gestionale delle imprese. Oltre che fornire gli opportuni stimoli legislativi¹¹, questi nuovi principi rafforzano notevolmente il valore degli standard materiali dell'ordinamento italiano quale foro richiesto.

La circostanza che negli ultimi anni la Cassazione abbia rimosso il limite dell'ordine pubblico nel riconoscimento di sentenze straniere che contenevano condanne implicanti il risarcimento dei c.d. danni punitivi (Chiapponi)¹² non deve – in ultima analisi – indurre a ritenere che ormai il controllo dell'ordine pubblico sia divenuto marginale nella verifica del diritto applicabile (così invece Franzina). Invero quella apertura giurisprudenziale bene si adatta pure a mitigare talune rigidità che affiorano nella nostra giurisprudenza specie a proposito della determinazione del danno non patrimoniale, ma non può elidere le divergenze significative che, specie in tema di tutela dei diritti fondamentali, si delineano tuttora tra i diversi ordinamenti nazionali.

¹⁰ Cfr. R. ANGIUS-C. ELIA, *Due società che valutano gli indici ESG ignorano gli abusi a Gaza*, in *Il Sole/24 ore*, 9 maggio 2025, 16. Di riflesso, ciò può tradursi in differenti percezioni della correttezza delle imprese da parte dei giudici nazionali: F. PERNAZZA, *Il rating del debito sovrano: profili giuridici*, in M.R. MAURO-F. PERNAZZA (a cura di), *Il debito sovrano tra tutela del credito e salvaguardia della funzione dello Stato*, 2014, 122 s.

¹¹ Cfr. l'art. 4 della legge n. 167/2025 rubricato "valutazione di impatto generazionale".

¹² V. anche Cass., 5 luglio 2017, n. 16601. Peraltro, come ricordato dallo stesso Chiapponi, anche l'art. 10 della Convenzione de L'Aja del 2019 menziona esplicitamente la sentenza sui danni punitivi come suscettibile di riconoscimento.

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