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Individuals and NGOs vs Corporations in the Pursuit of Climate Accountability. In the Spotlight: The Italian Oil Major ENI

Dr Stanislava Nedeva¹

Abstract

In May 2023, a lawsuit was filed against ENI by twelve Italian citizens from affected regions, Greenpeace Italy, and ReCommon. The plaintiffs in the lawsuit seek to recover past and potential future damages resulting from ENI's contribution to climate change, of which ENI was allegedly well aware but chose to ignore for decades. This lawsuit is the first of its kind in Italy where climate litigation is commenced against a private business. Yet, it is illustrative of the growing awareness of climate change and engagement not only by NGOs, but also citizens in climate change action firstly, against governments and lately, against business enterprises. While a first hearing is expected in October 2023 by the Court of Rome, the mere filing of this lawsuit demonstrates the growing and pressing demands against carbon emission 'offenders' to take feasible and significant steps towards carbon neutrality. Hence, the potential impacts of the lawsuit could be two-fold: direct – in terms of the court setting a new precedent, encouraging policy-making, and overall developing climate law domestically or even internationally; and indirect, affecting detrimentally ENI's competitive and financial position, bringing greater awareness of dangerous climate change. This paper analyses the motivation and legal foundation behind this lawsuit and the nature of the claims made. It further argues that whilst claims against corporations such as ENI are a welcome step towards signalling that private enterprises have their fair share of responsibility to take in the context of the detrimental effects on the climate, such has to be complemented by legislative measures and clear enforcement mechanisms.

I. Introduction

In response to the pressing need for governments to take urgent action, there has been a feasible increase in the number of climate change litigation proceedings commenced by NGOs and to an extent also by private individuals. However, lately we have seen a change in the use of climate litigation as a strategy not only to increase awareness of the effects of climate change and to put pressure on governments to introduce or amend their national policies to be in line with the Paris Agreement objectives; we observe climate litigation also being directed against private enterprises on the basis that they have allegedly and/or will contribute to dangerous climate change with their actions or omissions. Especially targeted are businesses in the oil and gas and petrochemicals industries, although an increase in lawsuits is noticed in other greenhouse gas-intensive sectors, such as food and agriculture, transport, plastics and finance.²

A very recent example is the lawsuit filed against the Italian major energy company ENI – a lawsuit which is a result of a campaign promoting legal action against ENI. The campaign is known under the name #LaGiustaCausa or #TheJustCause and is the first campaign undertaken against a private company in Italy. The campaign is driven by Greenpeace and ReCommon even though as it transpires below, the lawsuit was initiated also by individuals alongside

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² Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2022 snapshot', 30 June 2022 available at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>.

NGOs. The case therefore belongs to a global climate justice movement, led by affected communities. The plaintiffs demand that the Rome Court rules whether ENI has caused damages through violations of their human rights to life, health, and private and family life. The Plaintiffs demand that the Court holds that ENI revises its industrial strategy to reduce emissions by at least 45 per cent by 2030 compared to 2020 levels, as indicated by the international scientific community to keep the average global temperature increase below 1.5 degrees Celsius according to the Paris Agreement; and that the Italian Ministry of Economy and Finance, as an influential shareholder of ENI (30% share), adopts an ambitious climate policy to guide its participation in the company in line with the Paris Agreement.³ In principle, the plaintiffs ask for the condemnation of the Ministry as well as the public investment bank Cassa Depositi e Prestiti, under the control of the same ministry, which are the two main shareholders in ENI. By virtue of this, the plaintiffs hope to force the Italian state to play a stronger role in ensuring that companies such as ENI comply with the underlying objectives of the Paris Agreement and human rights.

This paper analyses the motivation and legal foundation behind this lawsuit; the nature of the claims made; and the strategic behind climate litigation. It further argues that whilst claims against corporations such as ENI are a welcome step forward towards signalling to private enterprises that they have their fair share of responsibility to take in the context of the detrimental effects on the climate, the most appropriate method to achieve feasible change is through legislation and clear enforcement mechanisms.

II. The Lawsuit and The Plaintiffs' Position

In May 2023, the lawsuit was filed against ENI by twelve Italian citizens from affected regions, Greenpeace Italy, and ReCommon. It seeks past and future damages resulting from ENI's contribution to climate change, of which ENI was allegedly well aware but chose to ignore for decades. The citizens come from Italian regions, such as Veneto, Piedmont, Campania, Marche and Sicily, which are severely affected by the impacts of climate change, such as coastal erosion due to rising sea levels, drought, and melting glaciers.⁴

The lawsuit was initiated for two main reasons. Firstly, the plaintiffs seek to establish a precedent in an Italian court that the commitments of the Paris Agreement apply not only to States but also to large private energy companies, such as ENI directly. They further assert their right to damages for the effects of climate change, for which they assert that ENI bears a heavy responsibility. The result of these damages would be the implication that there have been violations of fundamental human rights, such as the right to life, health and private and family life. The legal basis for this claim is that the rights are enshrined in the Italian Constitution, in the European Convention on Human Rights, and in the International Covenant on Civil and Political Rights. Reference is made to Article 2043 of the Italian Civil Code, regarding liability for non-contractual damages and interpreted, according to previous case-law, as a tool for human rights protection; as well as Article 2050 of the Italian Civil Code, regarding liability for dangerous activities, according to which there is an implied reversed burden of proof, anticipating that the defendant has to prove that every measure was taken to prevent the

³ Greenpeace International, 'Italian citizens and organisations sue fossil fuel company ENI for human rights violations and climate change impacts', 9 May 2023, available at <https://www.greenpeace.org/international/press-release/59686/italian-citizens-and-organisations-sue-fossil-fuel-company-eni-for-human-rights-violations-and-climate-change-impacts/>.

⁴ Ibid.

damaging event.⁵ Furthermore, the plaintiffs argue that ENI is under an obligation to respect the provisions under the Guiding Principles on Business and Human Rights, to which Italy is a signatory, and the OECD Guidelines for multinational enterprises. Greenpeace therefore maintains that by pursuing an industrial policy this violated Italy's international commitments.

The plaintiffs maintain that through the lawsuit they aim to achieve a decision a) that the company has to review its industrial strategy and b) to force the Italian state to play a stronger role in ensuring that companies such as ENI comply with the Paris Agreement and respect human rights.⁶ They want ENI to revise its industrial strategy to reduce emissions by at least 45 per cent by 2030 compared to 2020 levels, as indicated by the international scientific community to keep the average global temperature increase below 1.5 degrees Celsius according to the Paris Agreement; and further insist that the Italian Ministry of Economy and Finance, as an influential shareholder of ENI, should adopt an ambitious climate policy to guide its participation in the company in line with the Paris Agreement.⁷

Additionally, the Plaintiffs further ask that the court condemns '*ENI to pay a monetary sum to be determined by the judge for any violation or non-compliance with or delay in the execution of the obtaining order. No claim for the actual damages suffered by the 12 citizens or others is sought.*'⁸ The lawsuit therefore seeks to obtain both past and future damages as a result of climate change to which Eni '*has significantly contributed by its conduct in recent decades, while being aware of it.*'⁹ ENI is therefore being accused of using greenwashing to push for the use of fossil fuels despite understanding the risks of the build-up of carbon dioxide on the environment following the use and burning of fossil fuel products since the 1970s. It is expected that the first hearing will be held in October 2023, after exchange of written briefs.

III. ENI's Position

ENI SpA is an Italian energy company which operates in the oil and gas industry, and petrochemicals. They are amongst the largest European energy companies. Amongst their key objectives is to achieve carbon neutrality by 2050 and reduce its carbon footprint to zero, thus adhering to the objectives of the Paris Agreement to hold the increase in global warming within 1.5 degrees until the end of the century.¹⁰

As part of their business strategy, ENI has confirmed its commitment to the provisions under the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and the ten principles of the UN Global Compact. Consistent with the stated principles, ENI has also expressed it is committed to not violating human rights and

⁵ *Greenpeace Italy, ReCommon, et. al. v ENI, Italian Ministry of Economy and Finance, et. al.*, 9 May 2023, available at <https://climaterightsdatabase.com/2023/05/09/greenpeace-italy-recommon-et-al-v-eni-italian-ministry-of-economy-and-finance-et-al/>.

⁶ Greenpeace International (n 2).

⁷ *Greenpeace Italy et. Al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*, May 2023, <http://climatecasechart.com/non-us-case/greenpeace-italy-et-al-v-eni-spa-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-spa/> ; Greenpeace International (n 1).

⁸ *Greenpeace Italy et. Al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*, May 2023 (n 6).

⁹ Greenpeace International (n 2); EuroNews.green, Greenpeace teams up with Italian citizens people to sue energy giant Eni, May 2023, <https://www.euronews.com/green/2023/05/11/greenpeace-teams-up-with-italian-citizens-people-to-sue-energy-giant-eni>.

¹⁰ ENI's Path Towards Just Transition, available at <https://www.eni.com/en-IT/just-transition/business-model.html>.

to remedying any human rights concerns that may arise from the activities in which it is involved.¹¹

Following a recent shareholders' meeting, ENI reiterated their strategy to work towards achieving climate neutrality and net zero emissions by 2050, in line with the Paris Agreement to keep the maximum temperature increase within 1.5°C. This goal is considered fundamental to Eni's strategic transformation. As part of their decarbonisation strategy, they are in dialogue with stakeholders, including CA100+ coalition shareholders, the government, the civil society and the customers.¹² Similarly, ENI has expressed its support for the Paris Agreement and in order to help limit the global average temperature increase to below 2°C compared to pre-industrial times, ENI's decarbonisation strategy includes a short-term strategy which sets intermediate targets for 2030 and 2040 and a target of achieving net zero emissions by 2050.

With regards to the allegations made against it, ENI rejected these and stated that it was confident it would win the case; and that it is determined to demonstrate the '*groundlessness*' of the lawsuit and the '*correctness*' of its decarbonisation strategy, which was balancing sustainability, energy security and competitiveness.¹³ In response to the lawsuit, ENI has stated that it is also considering legal action on its own against ReCommon for alleged defamation. In July 2023, ENI submitted a request for mediation addressed to both NGOs, as a mandatory prerequisite to a defamation lawsuit under Italian law. The minimum compensation in damages in the mediation request is 100,000 euros.¹⁴

IV. Growing Number of Climate Law Litigations Against Governments and Private Entities

This lawsuit is the first of its kind in Italy as it is filed against a private company. It comes following several already landmark climate judgments upon which the plaintiffs seek to build their case. Climate related lawsuits have been growing exponentially in the recent years, with more individuals and NGOs initiating litigation. The number of climate change-related cases has more than doubled since 2015, bringing the total number of cases to over 2,000. Around one-quarter of these were filed between 2020 and 2022.¹⁵ While the earlier cases were filed against governments, nowadays we see a growing number of cases filed against corporations in the surge towards building climate liability of private parties. Therefore, climate litigation is becoming a very popular way amongst individuals and NGOs as a strategy to raise awareness of climate law 'offenders' and to put pressure on their national governments to take action.

¹¹ Ordinary and Extraordinary Shareholders' Meeting of Eni SpA, 10 May 2023, available at <https://www.eni.com/assets/documents/eng/governance/shareholders-meetings/2023/Questions-and-answers-before-the-Shareholders-Meeting-2023.pdf>.

¹² Ibid.

¹³ Business & Human Rights Resource Centre, 'Italy: NGOs & citizens sue energy giant ENI over human rights & climate change impacts in Italy's first climate lawsuit' 9 May 2023, available at <https://www.business-humanrights.org/en/latest-news/italy-ngos-citizens-sue-energy-giant-eni-over-human-rights-climate-change-impacts-in-italys-first-climate-lawsuit/>; The Local.It, 'Greenpeace sues energy giant Eni in Italy's first climate lawsuit' 9 May 2023, available <https://www.thelocal.it/20230509/greenpeace-sues-energy-giant-eni-in-italys-first-climate-lawsuit>.

¹⁴ Emily Sanders, 'Campaigners Sued an Oil Major for Climate Deception. Now the Company is Preparing to Sue Them Back' Aug 2023, available at <https://www.desmog.com/2023/08/23/climate-accountability-lawsuit-eni-greenpeace-recommon-italy-slapps/>.

¹⁵ Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2022 snapshot', 30 June 2022 available at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>.

Climate litigation could be defined as: *‘interventions before courts, tribunals and complaints bodies where climate change is featured in the evidence or argumentation or was addressed in the reasoning of the decision-making body, whether or not it was a core feature of the litigation.’*¹⁶ Therefore, at the core of climate litigation is climate change and oftentimes associated policies (national or international) or decarbonisation strategies. Climate litigation is often perceived as an accelerator of climate change and governmental actions to bring national strategies in line with international commitments, such as the Paris Agreement.

V. Corporations’ Accountability and Case-Law Developments

With the current climate law pressures and the growing number of climate lawsuits which allege breach of fundamental human rights, there is a growing tendency to see discussions of and pose questions as to corporations’ international responsibilities to preserve individual and communities’ local rights. While there is not yet an international instrument agreed on by States on investors’ conduct, the UN Human Rights Council has been working on the drafting of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The draft is still in the process of amendments and discussions by the participating states. The draft currently provides that individuals and communities who have suffered human rights abuses in the context of business activities shall enjoy all internationally recognised human rights and fundamental freedoms.¹⁷ One should note that indeed the draft is intended to be a ‘legally binding instrument’ that will regulate human rights law and actions of transnational corporations, as the title itself suggests. Article 2.1 of the current draft states that the purpose of this instrument is to *‘clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of transnational character.’*¹⁸ It imposes an obligation on State Parties to regulate the activities of businesses *‘within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character.’*¹⁹ If adopted, the draft would supplement the remarkable resolution which the UN Human Rights Council adopted in October 2021, whereby it recognised that having a clean, healthy and sustainable environment is a human right – a right which States have an obligation to respect and protect.²⁰ The draft will clearly stipulate the human rights responsibility of private entities at international law level. It will also contribute to the enhanced developments of mandatory human rights and climate due diligence for businesses to identify, prevent and mitigate human rights related risks.²¹

¹⁶ Professor Jacqueline Peel, Dr Alice Palmer and Ms Rebekkah Markey-Towler, ‘Review of literature on impacts of climate litigation: Report’ 27 May 2022, available at https://www.unimelb.edu.au/_data/assets/pdf_file/0008/4238450/Impact-lit-review-report_CIFF_Final_27052022.pdf.

¹⁷ UN General Assembly, Human Rights Council, ‘Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions,’ A/HRC/52/41/Add.1, January 2023, Article 4, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/93/PDF/G2300893.pdf?OpenElement> accessed 10.05.2023.

¹⁸ Ibid Article 2.1.

¹⁹ Ibid Article 6.1.

²⁰ UN GA, Human Rights Council, Forty-Eight Session, A/HRC/48/L.23/Rev.1, October 2021, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/270/15/PDF/G2127015.pdf?OpenElement>.

²¹ (n 16) Article 16.

Furthermore, the Philippines Commission on Human Rights has issued a report on the National Inquiry on Climate Change.²² The Inquiry came in response to a petition filed by Greenpeace Southeast Asia and individual petitioners from the Philippines. The petition asked the Commission to examine the impacts of climate change on the human rights of the Filipino people and to consider the role of 47 large fossil fuel producing companies (Carbon Majors) in driving climate change, obstructing climate action and contributing to resulting harmful impacts. Quite remarkably, the report states that climate change is a human right issue. It further recognises that climate change affects vulnerable populations, including women, children, indigenous people, older people, people with disabilities as well as the rights of future generations.²³ It adversely affects individual rights to life, food, water, sanitation and health, and collective rights to food security, development, self-determination, preservation, equality and non-discrimination.²⁴ Potential repercussions of this report might extend to seeing a large number of lawsuits being grounded on human rights breaches. The Philippines Commission's Report further confirmed that Carbon Majors like ENI can be held accountable for human rights violations resulting from climate change anywhere in the world. It concluded that States have a duty to protect human rights, and this duty extends to regulating the conduct of non-State actors and protecting individuals from abuses from such actors.²⁵ Additionally, the duty covers the provision of effective judicial and non-judicial remedies for victims seeking accountability for abuses by businesses. This duty may extend beyond the State's territory, and States have an obligation to act if activities in their territory cause serious human rights violations. The report includes not only a number of recommendations addressed at States, but also recommendations for the Carbon Majors to take a series of actions. For example, the report encourages them to publicly disclose due diligence and climate and human rights impact assessment results, and measures taken to address these; desist from all activities that undermine climate science; cease exploration of new oil fields, leading a just transition to clean energy; contribute to financing the implementation of mitigation and adaptation measures; and cooperate with experts and stakeholders to improve corporate climate responses.²⁶

The report further elaborates on its recommendations by encouraging governments to cooperate on a legally binding instrument to strengthen the implementation of the UN Guiding Principles on Business and Human Rights; for financial institutions and investors to refrain from financing fossil fuel related projects; and for the government of the Philippines to enact laws imposing legal liabilities for corporate or business-related human rights abuses. These findings and recommendations could therefore be illustrative of a systemic shift approach to accountability for climate change and are expected to resonate beyond the Philippines and contribute to more robust climate action and accountability worldwide.²⁷

In addition to the Report, the Brazilian Supreme Court recognised in a decision in August 2022 that the Paris Agreement is a '*human rights treaty*' which takes precedence over other laws.²⁸

²² National Inquiry on Climate Change: Report, Commission on Human Rights of the Philippines 2022, available at <https://www.ciel.org/wp-content/uploads/2023/02/CHRP-NICC-Report-2022.pdf>.

²³ Ibid 33.

²⁴ Ibid 33 *et seq.*

²⁵ Ibid 70.

²⁶ Ibid 130 *et seq.*

²⁷ Setzer and Higham (n 14).

²⁸ *PSB et al. v Brazil (The Climate Fund Case)*, ADPF 708, Decision, 07.01.2022, available at <http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/>;

Eoghan Macdonag, 'Brazilian Supreme Court recognises the Paris Agreement as a "human rights treaty"' Aug 2022, available at <https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/2022/08/brazilian-supreme-court-recognises-the-paris-agreement-as-a-human-rights-treaty.html>.

In this way, in the decision of *PSB et al v Brazil (The Climate Fund Case)*, the Court interpreted the Paris Agreement so as to impose a constitutional obligation on the Government to combat climate change. The Court found that treaties on environmental law, such as the Paris Agreement are a type of human rights treaty and thus, enjoy a 'supranational' or 'supralegal' status and are above 'regular' laws.²⁹ Based on both the separation of powers and the Brazilian constitutional right to a healthy environment, the government has a duty to execute and allocate the funds of the Climate Fund to mitigate climate change; whilst the judiciary must avoid the regression of environmental protection. The implications of this case and the Claimants' success in the *Climate Fund Case* is likely to encourage others to use this case and their domestic courts to challenge governmental action on climate. This pivotal case will likely be used as the foundational case to bring claims against corporations in Brazil and in jurisdictions around the world to seek to establish precedent. In fact, it is one of the cases which Greenpeace refers to in its announcement of the lawsuit against ENI.

Another point worth exploring is the fact that the plaintiffs did not ask the Court to quantify remedies but relied on the decision in *Milieudefensie v Royal Dutch Shell PLC* – a case in which the claimants relied on both human rights and tort law to bring a case before the court. The claimants asked that similarly to that decision, the Court should order ENI to reduce its greenhouse emissions by 45% in 2030 compared to 2020, and to align to the 1.5°C temperature goal. They also asked the Court to impose a monetary sanction in case the order is not fulfilled. The applicants also asked the Court to order the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A. to adopt a policy defining climate goals to foster as relevant shareholder of the corporation.

The significance of *Milieudefensie and others v Royal Dutch Shell PLC* in the context of developing climate change litigation cannot be undermined. In 2019, the applicants - a group of NGOs, as well as more than 17,000 individuals represented by Milieudefensie, claimed that Shell had an obligation to reduce its carbon emissions. This is one of the early and truly remarkable cases for the fact that they raised the issue of business responsibility for human rights violations.³⁰ It is an example of the so-called 'prospective' corporate framework cases, as it focused on what companies should do now and in the future based on the global consensus around the need to rapidly reduce emissions.³¹ At the core of such cases is the requirement that companies align their current and future activities with the goals of the Paris Agreement and comply with their human rights obligations.³²

The decision was considered groundbreaking because the District Court of the Hague ruled that Shell had a corporate duty of care and due diligence obligations under national (Dutch) tort law. The court found that the standard of care applied and required Shell to reduce all global emissions that will harm Dutch citizens.³³ Hence, the court imposed a corporate duty of care on Shell for climate change mitigation. In determining the content of the duty to mitigate

²⁹ *PSB et al. v Brazil (The Climate Fund Case)*, ADPF 708, Decision, 07.01.2022.

³⁰ *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, Hague District Court, C/09/571932, Judgment of 26 May 2021, available at 20210526_8918_judgment-1.pdf (climatecasechart.com); <https://climaterightsdatabase.com/2021/05/26/milieudefensie-and-others-v-royal-dutch-shell-plc/>.

³¹ Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2023 snapshot' https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf

³² *Ibid.*

³³ *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, Hague District Court, C/09/571932, Judgment of 26 May 2021, available at 20210526_8918_judgment-1.pdf (climatecasechart.com); <https://climaterightsdatabase.com/2021/05/26/milieudefensie-and-others-v-royal-dutch-shell-plc/>.

climate change, the court referred to ‘widely accepted soft law instruments,’ such as the United Nations Guiding Principles on Business and Human Rights, which set out responsibilities of states and corporations in relation to human rights, as well as.³⁴ The UNGP constitute an authoritative and internationally endorsed ‘soft law’ instrument, which set out the UN Global Compact principles and the OECD Guidelines for Multinational Enterprises.

Despite the non-binding character of the Paris Agreement upon Shell, the corporation still had reduction obligations regarding GHG emissions and the need to take steps to ‘*remove or prevent the serious risks ensuing from the carbon dioxide emissions generated by the company and to limit any lasting consequences as much as possible.*’³⁵ The objectives enshrined in the Paris Agreement were therefore relevant in determining the extent of the reduction obligations. This decision takes things one step further than the earlier decision in *Urgenda*, in which the Dutch Supreme Court held for the first time that governments have a legal duty to prevent dangerous climate change, as it asserted that corporations, not only States, owe a duty of care under Dutch law; have to take steps to mitigate climate change and in this, they should be mindful of the human rights of Dutch residents. The court found that Shell was obliged to reduce its carbon dioxide emissions by net 45% at end 2030, relative to 2019.

Importantly, *Milieudefensie v Royal Dutch Shell plc.* illustrates how domestic courts can help strengthen otherwise non-binding instruments – in this case, soft laws endorsed by Shell, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact and the OECD Guidelines for Multinational Enterprises.³⁶ Specifically, the UN Guiding Principles incorporate provisions on both State and corporate responsibility to protect human rights. In particular, they provide that business enterprises should avoid infringements of human rights and should address adverse human rights impacts with which they are involved.³⁷ In addressing adverse human rights impacts, businesses are required to take adequate measures for their prevention, mitigation and, where appropriate, remediation. The responsibility of business enterprises refers to internationally recognized human rights as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights as set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. The UN Global Compact contains ten principles that require companies to meet responsibilities in the areas of human rights, labour, environment and anti-corruption.³⁸ Similarly, the OECD Guidelines aim to enhance the business contribution to sustainable development and address adverse impacts associated with business activities to ensure they align with internationally agreed goals on climate change.³⁹

While not legally binding, these soft law instruments served as interpretative and persuasive sources, thus potentially encouraging other national courts to endorse otherwise soft law instruments. They can prove to be an influential tool in transnational law development on climate change because if they become widely recognised and referred to by national and/or international courts, this might be evidence that States accept them as a legal obligation, thus

³⁴ Ibid para 4.4.11.

³⁵ Ibid paras 4.4.52 – 4.4.55; also White & Case Case Comment, May 2021, available at <https://www.whitecase.com/insight-alert/milieudefensie-et-al-v-shell-climate-change-claimants-prevail-again-dutch-court-time>.

³⁶ Setzer and Higham (n 14).

³⁷ UN Guiding Principles on Business and Human Rights, June 2011, A.11.

³⁸ UN Global Compact, The Ten Principles of the UN Global Compact, <https://unglobalcompact.org/what-is-gc/mission/principles>.

³⁹ OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 8 June 2023.

transforming soft law norms into hard law norms.⁴⁰ Shell appealed the ruling of the Hague District Court and a Court of Appeal decision is expected in 2024.

Overall, the decision serves to demonstrate the pivotal role of national courts in driving climate change forward and in ensuring that private entities comply with national climate law standards, as implemented under their international and EU law standards. Specifically, in this case, the District Court also asserted that the duty of care was based on the international and EU Law obligations. Therefore, cases such as this one could a) create precedent (nationally) as to the companies climate change obligations by virtue of the need to protect the local environment, public health and human rights; but also b) to drive energy policy-making forward, by sending loud and clear signals to their governments that they need to exercise enhanced control over private entities and ensure that their national legislation is thus abided by. This might in turn create the need to create a specialised national body with the authority to monitor companies' strategies to mitigate negative effects on the climate by virtue of their business operations as well as to monitor that their green strategies are realistic and correspond to reality, i.e., that they are not an example of greenwashing. While some have welcomed the decision,⁴¹ others have expressed limitations. For example, Mayer has questioned whether mitigation action directly inferred from global objectives and climate science could be applied to an individual company and suggests that such a ruling would need to discuss the development of transnational initiatives aimed at reducing carbon dioxide emissions in oil and gas production and to identify good practice from other companies.⁴² Overall, this decision demonstrates the key role of litigation in incentivising better decarbonisation strategies, in particular and better corporate social responsibility, in general. It integrates a corporate due diligence duty based on both human rights law and climate law standards, but under national tort law; and even more, it shows that climate law litigation can serve to force companies (and governments) into compliance with such obligations. It appears that one of the main goals behind the litigation against ENI is exactly that ENI reviews its industrial strategy to ensure decarbonisation at a faster pace, whilst also force the Italian state to play a more prominent role in ensuring that other companies comply with the Paris Agreement and respects human rights. Therefore, it is not surprising that *Milieudefensie v Royal Dutch Shell plc* is one of the cases upon which the plaintiffs draw.

In consequence, transnational law is moving towards a direction of strengthened recognition of the importance to protect human rights and ensure environmental protection on a global scale, whilst also signalling to private corporations that they have a pivotal role to play therein and that soon there might be obligations imposed them on an EU/international level, not only domestically. In the context of the lawsuit against ENI, it is possible that these recent and ongoing developments might influence the Court of Rome in its decision-making. However, even if they do not have a direct impact on the outcome, they will certainly contribute to a wider social recognition and reaction.

⁴⁰ BIICL, Corporate Climate Litigation: Lessons Learned, Comparative Perspectives and Future Pathways Event Report, May 2023, available at https://www.biicl.org/documents/165_corporate_climate_litigation_lessons_learned_comparative_perspectives_and_future_pathways.pdf.

⁴¹ E.g., see Andreas Hösli, 'Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?' (2021) *Climate Law*, 11(2), 195-209; Chiara Macchi, Josephine van Zeben, 'Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell' (2021) 30(3) *RECIEL* 409-415.

⁴² Setzer and Higham (n 14); Benoit Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: Milieudefensie v. Royal Dutch Shell District Court of The Hague (The Netherlands)' (2022) 11(2) *Transnational Environmental Law*, 407-418.

VI. Potential Repercussions: Direct and Indirect Impacts

While the lawsuit is in its preliminary stages, it is by far not the first case on climate law breaches. It is an example of a case that seeks to merge corporate liability cases which seeks financial damages for historic responsibility, with cases which aim to align companies' activities with the Paris Agreement and other human rights and international obligations commonly addressed to states.⁴³ Therefore, it signifies a changing strategy amongst NGOs and individuals in initiating climate change litigation. In general, it appears that the lawsuit seeks to disincentivise ENI from continuing with its high emitting activities by requiring changes in corporate governance and decision-making. It focuses on ENI's policies and strategies and draws on human rights and environmental due diligence standards.⁴⁴

However, the most significant and distinguishing element here is that the plaintiffs are bringing a claim against a private party for international law breaches under the Paris Agreement. It must be noted that the Paris Agreement is an international agreement directed at addressing climate change and the devastating consequences of global temperature rise. It is a legally binding treaty on all State Parties, but does not bind private parties (i.e., companies or individuals). It was adopted at the UN Climate Change Conference in Paris, France (2015) by 196 Parties; and entered into force in November 2016.⁴⁵ The treaty was adopted in recognition that climate change is a global emergency. Its overarching goal is to keep the increase in the global average temperature to well below 2°C above pre-industrial levels, and to limit the temperature increase to 1.5°C above pre-industrial levels. Since 2020, countries have been submitting their nationally determined contributions to reflect their commitments on mitigation, in particular (e.g., cutting greenhouse gas emissions), as well as on adaptation and climate finance.

Therefore, while the State parties are expected to communicate their NDCs to the international community, their effectiveness depends on domestic implementation. The European Union is also a Party to the Paris Agreement as a result of which it has had to change its EU law climate mitigation targets in recent years in order to keep up with its tightening external Paris Agreement commitments. The EU's commitments have been incorporated into EU Law by the 2021 'European Climate Law' (Regulation 2021/1119), which sets a binding objective of climate neutrality in the Union by 2050. Therefore, EU climate related regulations and directives apply to the government of Italy in the pursuit of achieving the Paris Agreement objectives, but do not bind ENI. Thus, ENI is not bound by the obligations under the Paris Agreement directly, though it would be bound by relevant national legislation which Italy might have enforced in order to implement its international obligations under the Paris Agreement. Therefore, if the Rome Court rules in favour of the plaintiff the repercussions of this decision will be arguably revolutionary for climate law protection. Such a decision will not only affect ENI's operations, but it will also put huge amounts of pressure on all national and foreign companies, especially those in industries with high carbon emissions, such as the fossil fuels industry, to review and amend their policies so as to ensure compliance with a) national climate law regulations and b) the Paris Agreement which is an obligation within the realm of public international law. Such a decision might be one step closer to materialising given the recognition of the Paris Agreement as 'a human rights treaty' and climate change as a 'global emergency.'

⁴³ Setzer and Higham (n 33).

⁴⁴ Ibid.

⁴⁵ United Nations Climate Change, 'The Paris Agreement' <https://unfccc.int/process-and-meetings/the-paris-agreement>.

However, at the moment, the author finds it unlikely that the Rome Court will be prepared to take such an ambitious step forward and set what would be a groundbreaking precedent by recognising that private enterprises have direct legal obligations under the Paris Agreement. Instead, it is more plausible that the court finds convincing the decision in *Milieudefensie v Royal Dutch Shell plc* and orders ENI to reduce its greenhouse gas emissions on a similar basis – i.e., without the need to set precedent in the context of horizontal actions between individuals and companies, but also acknowledging the indirect role human rights and environmental protection play in these cases. One obvious reason is that this is outside the scope of the Paris Agreement, which as an international agreement binds only the States that have signed and ratified it. Establishing a precedent that a private company is bound by the Paris Agreement may encourage other local movements and NGOs to pursue similar lawsuits and allege the international responsibility of otherwise private parties. While change is often driven by such actions, the author believes that there needs to be a differentiation between claiming damages against a company in a national court for breaches of national law and for breaches of general international law. Thus, similarly to the approach in *Milieudefensie v Royal Dutch Shell plc*, the provisions in the Paris Agreement, human rights and environmental protection could be used indirectly to progress private law, relying on similar arguments to that adopted by the Hague District Court that there is broad international consensus on the actions required to prevent dangerous climate change and, on the guarantees, found under the European Convention of Human Rights, in addition to other international soft law instruments. In private claims before national courts, through the interpretation of general clauses and tort law, new duties of care towards third parties that protect the climate could be developed.⁴⁶

Nevertheless, even if the claimants are unsuccessful in some or all their claims, the lawsuit can still have, and arguably already does have, an impact on ENI and on the Italian government. For example, the litigation can, and most certainly will, have a detrimental effect on the reputation of ENI as the company and the litigation will be subjected to enhanced social-/media attention which will put under greater pressure and criticism the accuracy and truthfulness of the company's decarbonisation strategy. Furthermore, ENI will likely be required to submit documents in evidence that might shed light on its alleged breaches of human rights by means of not achieving its decarbonisation goals as quickly as it has suggested in its business strategy, or even illustrate a case of greenwashing. For example, ENI might be asked to disclose climate related financial risks, concrete emissions' reductions, or accountability of corporations for their human rights obligations.⁴⁷ In fact, the Italian Competition and Market Authority has already fined ENI in December 2019 for using misleading advertising messages in its sales promotion campaign for 'Eni Diesel+' fuel – a decision which was later appealed but upheld by the Administrative Court of Lazio in November 2021.⁴⁸ Therefore, the revelation of potentially confidential information may also put ENI at a competitive disadvantage against other fossil fuel companies.

In addition to any associated legal costs and any potential payment of damages, the lawsuit might even have indirect detrimental effects on the company's market value. While it proves difficult and beyond this paper's scope to evaluate ENI's market value prior and post the initiation of the lawsuit, a recent study has shown evidence that climate litigation may cause

⁴⁶ M.P. Weller and M.L. Tran, 'Climate Litigation against companies' (2022) *Climate Action*, Springer, 1-17.

⁴⁷ Peel, Palmer and Markey-Towler (n 16); IPCC, *Climate Change 2022: Mitigation of Climate Change*, 2022 IPCC_AR6_WGIII_SPM.pdf.

⁴⁸ Italian Competition Authority Ruling Eni's Diesel+ Advertising Campaign, available at <http://climatecasechart.com/non-us-case/italian-competition-authority-ruling-enis-diesel-advertising-campaign/>.

defendant corporations' stock prices to fall.⁴⁹ The research finds that a filing or an unfavourable court decision in a climate related case reduces the company's value by -0.41% on average, relative to expected values. The largest stock market responses are found for cases filed against Carbon Majors, reducing firm value by -0.57% following case filings and by -1.50% following unfavourable judgments. The study concludes that lenders, financial regulators, and governments should consider climate litigation risk as a material financial risk, since the observed decline in firm value suggests that the market is already responding to litigation risk. Therefore, even the mere filing of the lawsuit against ENI could have negative impact on the company's value.

Regardless of the outcome, this lawsuit might incentivise ENI and other companies to review their decarbonisation strategies and consider accelerating the pace with which they drive change internally. Furthermore, and again, independently of the outcome of the litigation, it is highly likely that the publicity associated with the lawsuit will raise further awareness of climate change targets even more so because of the wide public interest involved in environmental protection, health and the protection of human rights. The implications of the publicity and the litigation campaign overall could have extensive impact by, for instance, prompting national legislators to revisit their national targets and adjust these to be in line with the Paris Agreement. For example, following *Milieudéfensie et al. v Royal Dutch Shell plc.* and one of the claimants' lobbying for the inclusion of specific climate due diligence obligations in a forthcoming Dutch mandatory due diligence law, there has been a proposal of the Dutch mandatory due diligence law to include climate-related obligations, including developing a plan to reduce climate risks.⁵⁰ Furthermore, while the decision in *R (Plan B Earth and Others) v The Secretary of State for Business, Energy, and Industrial Strategy* was not in the claimants' favour, the litigation was well publicised, leading the then Prime Minister to promise to revisit the targets, which were finally adjusted to 'net zero' by a subsequent government.⁵¹ Arguably, this might be one of the undisclosed, yet anticipated, outcomes of the lawsuit by the claimants, independent of a potential court victory. Looking at the facts and allegations made by the plaintiffs, it does appear that this might be a strategic type of climate litigation against a Carbon Major which aims to reshape the way one perceives energy production and to advocate a shift from fossil fuels to renewables, by drawing attention to the vulnerability of communities and infrastructure to extreme weather and sea level rise.⁵² From a legal point of view, it appears difficult to see how the desired outcome, i.e., that the court will pronounce that the Paris Agreement is also binding upon private enterprises, will be attained. Therefore, the lawsuit might make a meaningful contribution to the wider climate change and requisite action debate; it might instigate behavioural change, but most of all, it is believed that the lawsuit will help shape narratives. In this regard, the role of national judges is pivotal not only in the context of interpreting and applying the law, and perhaps setting precedent and legal thresholds, but also driving forward legislative changes. These may encompass governmental action to adjust its

⁴⁹ Misato Sato, Glen Gostlow, Catherine Higham, Joana Setzer and Frank Venmans, 'Impacts on Climate Litigation on Firm Value,' Working Paper, May 2023, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf.

⁵⁰ Mikko Rajavouri, Annalisa Savaresi, and Harro van Asselt, 'Mandatory due diligence laws and climate change litigation: Bridging the corporate climate accountability gap?' (2023) Regulation & Governance.

⁵¹ *R (Plan B Earth and Others) v The Secretary of State for Business, Energy, and Industrial Strategy* (2017) Claim No. CO/16/2018; see discussion in Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (2020) The British Academy, London.

⁵² See Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (2020) The British Academy, London.

climate change targets, or even the introduction of corporate obligations to incorporate mandatory due diligence.

On the other hand, ENI's response to the lawsuit with a request for mediation can also change the direction of initial lawsuit and thus of any potential repercussions overall. While ENI has expressed that it seeks to protect its reputation, some argue that such moves are rather legal tactics to dissuade campaigners from public action.⁵³ They are considered a well-thought legal tactic to silence climate activities and critics of oil majors, also known as SLAPPs (strategic lawsuits against public participation).⁵⁴ Especially if the lawsuit is directed at individuals who may not be able to pay legal fees and any prospective damages, such actions might be interpreted as aiming to intimidate the claimants and encourage them to withdraw any claims. Nevertheless, ENI denies any such motivation and had filed the mediation request against both NGOs. The motive behind such lawsuits might indeed be to protect its reputation from defamatory statements, but it may be, and it is often perceived as, a way for enterprises to avoid negative media attention, public participation, and scrutiny into their business strategies, which might expose them to the public as well as to their competitors. In that regards, strategic lawsuits of this kind aim to dissuade the campaigners from pursuing their claims further out of fear of retaliation, convincing them to settle the dispute outside of the court, thus seizing access to further scrutiny and public and media attention. As ENI is by no means the only oil major to bring action against those who have called out their responsibility in a lawsuit and in response to the increase in the number of SLAPPs, the European Union has been negotiating a directive to set out a minimum standard of protection to safeguard journalists, media groups and human rights defenders from strategic and unfounded lawsuits against public participation.⁵⁵ It is intended to apply to matters of '*a civil or commercial nature with cross-border implications, whatever the nature of the court or tribunal.*'⁵⁶ It might prove whether a claim would amount to a SLAPP, at least without knowing the motivations to commence the lawsuit, which would prove difficult given that companies would attempt to evade having their actions qualified as such and would rather prefer to define them as protection their reputation. The Directive therefore focuses on the ability to define individuals' actions as acts of 'public participation' and concerning 'matters of public interest,'⁵⁷ which might be less challenging to establish. However, it might be less straightforward to bring evidence that the lawsuit amounts to 'abusive court proceeding against public participation', thus triggering the possibility that those individuals are awarded remedies.⁵⁸ The intention behind the claim would therefore be more challenging to identify, but helpful factors would be the proportionality of the claim and damages sought, multiple proceedings initiated by the claimant in relation to similar matters, and behaviour which intimidates, harasses or threatens.⁵⁹ While the Directive is still under discussion, it has been considered a welcome step in the right direction, although criticisms

⁵³ Emily Sanders, 'Campaigners Sued an Oil Major for Climate Deception. Now the Company is Preparing to Sue Them Back' 23 Aug, available at <https://www.desmog.com/2023/08/23/climate-accountability-lawsuit-eni-greenpeace-recommon-italy-slapps/>; Also Dr Peter Coe, 'Strategic Lawsuits against Public Participation: a few thoughts' Oct 2022, Inform, available at <https://inform.org/2022/06/17/strategic-lawsuits-against-public-participation-a-few-thoughts-peter-coe/>.

⁵⁴ Ibid.

⁵⁵ Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), COM/2022/177 final, Article 1.

⁵⁶ Ibid Article 2.

⁵⁷ Ibid Article 3(1) and (2).

⁵⁸ Ibid Article 3(3) and Articles 14-16.

⁵⁹ Ibid Article 3.

have also been raised for weakening of the originally envisaged scope of protection through certain limitations.⁶⁰

Overall, on the one hand we have the prospect of direct and indirect effects upon the parties from the original lawsuit initiated by the Italian individuals and NGOs against ENI. On the other hand, it remains to be seen what the request for mediation will bring and whether the parties will settle out of court, thus turning obsolete any discussion as to the direct impact of litigation upon ENI. This second perspective shows that climate litigation can be used as a strategic tool by both NGOs in shedding greater light to the problem and raising publicity, and at the same time as a strategy employed by enterprises to silence campaigners and divert attention away from their business and any potential deviations between climate change commitments and actions. From a third and final perspective, these back-and-forth actions and reactions among NGOs/campaigners and alleged offenders have grown so exponentially as to initiate legislative action, which seeks to balance competing rights: for example, the right of freedom of expression of human rights activists, affected individuals and NGOs against the right to a fair hearing of business enterprises. In between these stands the public interest to receive access to information and be aware of any false statements a company might be making about its actions to help in the fight against the negative impacts of climate change, which is undoubtedly a matter of public and indeed global interest.

VII. The Way Forward

It is certain this lawsuit will be one of many that corporations will be faced up against. This reflects not only the wider social awareness and interest in the negative impacts of climate change as a result of corporates' actions or inactions, but also the need to undertake bigger steps that will create feasible impact. Hence, this paper argues that the way forward, amongst others, is through legislative reform. While lawsuits initiated by individuals and/or NGOs could have some isolated effects on the respondent company; while they may gather a lot of media attention and cause reputational damage to the company; while they may or may not initiate collective behavioural change; they will likely fall short of achieving overarching positive effects on climate change without the help of national governments and international organisations with legislative powers, such as the European Union. Hence, in the context of the effectiveness litigation to hold carbon-intensive corporations legally accountable for climate change harms, Gunderson and Fyock contend that bringing claims against corporations for civil wrongs will remain ineffective as a mitigation strategy because many carbon-intensive corporations can absorb substantial lawsuit-related costs and, even if legal costs push fossil fuel companies out of business, their competitors will step in to extract open reserves.⁶¹

Therefore, some might contend that legislative measures are a better step forward as opposed to setting judicial precedents, especially of the kind sought by the Italian individuals, Greenpeace and ReCommon. Truthfully, legislative measures will prevent questions of democratic legitimacy. Nevertheless, this paper argues that legislative measures need to go

⁶⁰ E.g., International Press Institute, 'EU Anti-SLAPP directive: A landmark step in the right direction' April 2022, available at <https://ipi.media/eu-anti-slapp-directive-a-landmark-step-in-the-right-direction/>; and then, European Federation of Journalists, 'EU Council adopts watered-down position on anti-SLAPP directive' June 2023, available at <https://europeanjournalists.org/blog/2023/06/09/eu-council-adopts-watered-down-position-on-anti-slapp-directive/>.

⁶¹ Ryan Gunderson and Claiton Fyock, 'The Political Economy of Climate Change Litigation: Is There a Point to Suing Fossil Fuel Companies?' (2022) <https://doi.org/10.1080/13563467.2021.1967911> pp 441-454; also Peel, Palmer and Markey-Towler (n 16).

hand in hand with litigation as each has a separate yet essential role to play in the general systemic shift towards minimising the negative impacts of climate change and taking responsibility and adequate measures to address these. More specifically, even if the Italian court does not set a precedent with its decision, the European Union legislators are at an exceptional position to develop EU climate change law further as part of the Green Deal objectives. The EU has already taken some steps in order to align its policies with the Paris Agreement objectives. Amongst others, it has introduced the EU taxonomy as a cornerstone of its sustainable finance framework and market transparency. The EU taxonomy classifies criteria for economic activities that are aligned with a net zero target by 2050. Specifically, the Taxonomy Regulation outlines the four conditions that an economic activity has to meet in order to qualify as environmentally sustainable. This is accompanied by the existence of other climate-related initiatives, such as the EU Energy Trading Scheme, the Effort Sharing Regulation, the Renewables Directive and Energy Efficiency Directive, to name a few. Furthermore, the EU Commission has initiated a proposal for a Directive on corporate sustainability due diligence as a positive step towards the Union's transition to a climate-neutral economy, in line with the European Green Deal and the UN Sustainable Development Goals.⁶² The proposed will complement other existing measures by imposing obligations on companies to provide data and information on risks within their value chains that are linked to the respect of human rights or environmental impact.⁶³ It has the potential to create wide impact across Europe. It will be the first to introduce common rules on corporate sustainability due diligence on companies operating within the EU, thus helping prevent fragmentation of laws between Member States.

In terms of scope, the directive applies to companies of significant size and economic strength and those operating in high impact sectors, such as textiles, agriculture and extraction of minerals, including those extracted from crude petroleum and natural gas.⁶⁴ From data available with regards to ENI's size (in the context of revenue and number of employees as per the directive), if/once adopted, the directive will apply to EU-based companies, such as ENI, and will oblige them to undertake due diligence on their activities. In order to comply with the corporate due diligence duty, companies need to take several steps. They need to: integrate due diligence policies, identify actual or potential adverse human rights and environmental impacts, prevent or mitigate potential impacts and bring to an end or minimise actual impacts, establish a companies' procedure, and monitor the effectiveness of due diligence.⁶⁵ Therefore, if and once adopted private enterprises, including ENI, will be under an obligation to establish a procedure through which they can monitor the progress and effectiveness of their due diligence

⁶² European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, February 2022, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> (hereafter Draft Directive on Corporate Sustainable Due Diligence).

⁶³ E.g., Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance; Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; also see European Parliament Briefing, 'Corporate sustainability due diligence: How to integrate human rights and environmental concerns in value chains', available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI\(2022\)729424_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf).

⁶⁴ Draft Directive on Corporate Sustainable Due Diligence Article 2.

⁶⁵ Ibid; European Commission Press Release, February 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1145.

and address the extent to which their activities affect negatively human rights and environmental protection.

Under the Directive, companies will have to adopt a transition plan aimed at restricting global warming to 1.5°C in accordance with the Paris Agreement. In this way, the legislation rightfully acknowledges that the responsibility to mitigate the negative impacts of climate change are not only in the hands of States and national governments. This legislative initiative correctly recognises the need for a collective action and the need for private businesses to face accountability for agreements such as the Paris Agreement to have a better chance at achieving otherwise ambitious goals. In terms of enforcement, the directive requires Member States to appoint a supervisory authority and grant it supervisory and enforcement powers.⁶⁶ The authority will be able to impose administrative sanctions, including fines and compliance orders. The directive also allows for private enforcement to allow victims access to compensation for damages resulting from the companies' failure to comply with their due diligence obligations.⁶⁷ However, one must note that the proposal places the onus on the victims, making it more challenging to bring a case before the EU courts as the information they need may often be with the company against which they seek to make claims.⁶⁸ Further, the draft considers the imposition of a duty of care on company directors to act in the best interest of their companies, including the context of human rights, climate change and environmental consequences.⁶⁹ The draft also considers the establishment of a link between directors' remuneration and their contribution to the company's business strategy in the long-term interests and sustainability. However, the issue with this is the lack of clarity as to the nature of their duties, which could make companies more risk averse. This concern has also been expressed by stakeholders.⁷⁰

Of course, the directive is not without its controversies and weaknesses. An amendment proposed by Parliament JURI Committee Report is the incorporation of a single market clause to require Member States to coordinate their efforts when transposing the directive, with a view to full harmonisation, in order to ensure a level playing field and to prevent the fragmentation of the single market.⁷¹ Nevertheless, the fact that the Commission has opted for a directive as opposed to a regulation leaves open the question of uniform and effective implementation, interpretation and application of the directive domestically. That is because directives leave it to national governments to give effect to the objectives of a directive through national legislation, as opposed to regulations which are directly applicable. Furthermore, the text of the directive refers on a number of occasions that companies need to '*appropriate measure*' and that Member States have to ensure companies are doing so. This wording appears more general and unspecific as it does not provide further guidance as to what actions will be considered 'appropriate.' The burden will fall on the national supervisory authorities to conduct investigations and determine whether there have been any breaches. But without much further guidance, the content of 'appropriate measures' will be left to Member States to fill up; whilst

⁶⁶ Draft Directive on Corporate Sustainable Due Diligence, Articles 17-21.

⁶⁷ Ibid Articles 22, 23, 27.

⁶⁸ Johannes Blankenbach and Saskia Wilks, 'Due-diligence directive—key issues for final negotiations' (2023) Social Europe, available at <https://www.socialeurope.eu/due-diligence-directive-key-issues-for-final-negotiations>.

⁶⁹ Draft Directive on Corporate Sustainable Due Diligence, Articles 25-26.

⁷⁰ European Parliament Briefing, 'Corporate sustainability due diligence: How to integrate human rights and environmental concerns in value chains' [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI\(2022\)729424_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf).

⁷¹ European Parliament Report - A9-0184/2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

the role of the supervisory authorities becomes challenging as the directive seems to suggest that wide expertise is necessary in order to conduct inspections – expertise that encompasses both environmental protection and human rights across industries. This might bring to light divergent levels of knowledge and expertise across Member States and potentially lead to ‘skills gaps.’⁷² Moreover, the amount of administrative sanctions would be determined by each Member State (and enforced by the supervisory authorities) – hence, providing more scope for fragmentation between the Member States and potentially, imposing divergent sanctions on companies, thus placing different financial burdens on them across jurisdictions. In that context, a concern has also been expressed that by requiring companies to obtain ‘contractual assurances’ from a direct partner, i.e., from their suppliers about their own compliance with their company's code of conduct, this might create a loophole for companies to evade liability.⁷³ Another obvious limitation of the proposed directive is that it excludes small and medium enterprises – which creates a gap in accountability of businesses for their impact on the environment and human rights. Nevertheless, SMEs may be affected by directive in their capacity as contractors or subcontractors to companies that are within its scope. At the same time, the directive is a very welcome initiatives even though it has decided to focus on high-impact sectors and larger companies, as these are usually the corporations that lead the carbon emissions ranking lists, and therefore the proportionality justification to exclude SMEs appears reasonable.

Overall, there are still questions left to be determined at the interinstitutional negotiations between the EU Commission, Parliament and Council. Nevertheless, the Directive is a welcome legislative initiative by the EU institutions and even if imperfect, it still has the unique opportunity to serve as a legal recognition of companies’ due diligence obligations and impose anticipated actions and results from them. Finally, the directive also offers one particular benefit to the companies affected by the directive – that is the fact that there will be common and equal rules on corporate sustainability due diligence, which will help create uniformity across Member States and prevent fragmentation. Some EU countries, such as France and Germany, already have national rules regarding the risk of corporate violations of human and environmental rights, but their scope and effect differ, thus leading to inconsistency of the obligations from one Member State to another.

VIII. Conclusions

The lawsuit initiated by Italian individuals in cooperation with Greenpeace and ReCommon against ENI is an example of the growing number of cases which serve to illustrate the nexus between corporate conduct, climate change and human rights. Climate change has the potential to push not only the Oil Majors but also other corporations to reduce their greenhouse gas emissions, especially if they feel threatened by litigation. However, given the initial stages of the lawsuit and of climate litigation more broadly, it is challenging to assess the extent to which litigation can have a positive and overarching effect on climate change, or whether such change will be limited to the parties involved in litigation. As Setzer and Byrnes suggest *‘[w]hile direct and indirect regulatory impacts can be observed among all types of climate litigation, questions about whether the outcomes of these cases actually help to address climate change in a*

⁷² Watson Farley and Williams, ‘Ten Areas of Continued Uncertainty in the EU Commission Proposal for a Corporate Sustainability Due Diligence Directive’ (2022), available at <https://www.wfw.com/articles/ten-areas-of-continued-uncertainty-in-the-eu-commission-proposal-for-a-corporate-sustainability-due-diligence-directive/>.

⁷³ European Parliament Briefing (n 61).

*meaningful way remain unanswered.*⁷⁴ Furthermore, there is always the possibility that such disputes are settled outside of court, which will reduce the scope of their wider impact.

Climate litigation puts national judges at the forefront of climate law development. Lawsuits such as this one against ENI demonstrate the pivotal role of the judiciary not only in terms of legal interpretation, but also in driving policy making forward. Indeed, it will be a very revolutionary change if the Court of Rome decides to accord ENI responsibility under the Paris Agreement. The increasing number of cases against private parties illustrates the growing interest in the area and especially, the growing concerns of climate change expressed by individuals, not only NGOs. While previously cases were brought against governments, now a more prevalent trend is to bring cases against private parties for their responsibility for both past and current polluting action. It is too early to evaluate the impact of climate lawsuits in general, and the lawsuit against ENI, in particular, but it is anticipated that climate litigation will incentivise State action in the direction of implementing national monitoring and sanctioning measures of climate polluters. In that sense, there might be strengthened governmental control; but simultaneously, there could be a positive behavioural change in private corporations as well. Whether this has a direct and feasible impact on climate change itself could only be assessed in the future. But given that climate-related cases are on the rise, the collective action by NGOs and individuals has a true potential to drive change forward and contribute to the mitigation of the negative impacts on climate change and reduction of GHG emissions by corporations. What we might expect to see in the future is a legislative reform to recognise corporate responsibility nationally and/or internationally. We might even witness the development of individual (criminal) responsibility of shareholders and directors. The past, current, and future lawsuits as well as consideration for legislative initiatives are all a reflection of the growing recognition that responsibility should be accorded not only to State Parties but also the private entities for the actions or omissions with regards to environmental pollution. Such a significant systemic shift approach has the potential to create better symmetry between the duties and responsibilities of States in terms of affording fair treatment of national and international corporations, and the accountability of such private corporations. Climate litigation might prove a suitable tool in pursuit of this balance, whilst ultimately seeking to safeguard the wider public interests and welfare. In response to the climate lawsuits commenced against them, companies might pursue litigation in order to defend their reputation on the basis of defamatory statements, and this is their undeniable right to do so. However, such a response is now more prevalently scrutinised by legislators, practitioners and scholars so as to determine whether it might be a form of strategic legal action against public participation aimed to scare and silence, against which campaigners, activists and journalists might need legal protection.

Nevertheless, this paper argues that the way forward is a combination between litigation and legislative measures which will concretize the human rights and climate-related responsibility of companies into legally binding obligations. This could be achieved through domestic legislation, but collective action by the Member States of the European Union expressed in initiatives such as the Corporate Responsibility Directive might be a better solution in terms of ensuring uniformity and effectiveness of the law across all 27 Member States. Simultaneously, this paper acknowledged that the draft directive is not without its flaws, and that both stakeholders and lawyers have expressed concerns, but to achieve some, even if marginal,

⁷⁴ J Setzer and R Byrnes, 'Global trends in climate change litigation: 2020 snapshot' Policy Report (2020) Grantham Research Institute on Climate Change and the Environment, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf.

positive impact on the climate, piecemeal solutions are better than no solutions at all. The importance is to find the right balance between imposing legal obligations on companies with a view to achieving the overarching aim of reducing carbon emissions, against avoiding legislation that will strain financially businesses by requiring them to invest exponentially in infrastructure that will help them become carbon neutral and/or by imposing arbitrary and inconsistent sanctions across the Union.