THIRD PARTY INTERVENTION
BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Applications n. 54414/13 and 54264/15

Between

Cordella & Others

and

Ambrogi Melle & Others

Applicants

and

ITALY

Respondent

Written comments by the

***Clinical Program*- Università di Torino**

Pursuant to rule 44 (2) of the Rules of the Court

19 September 2016

Introduction

This memorial is submitted by the *Clinical Program* - Università di Torino pursuant to the leave granted by the Deputy Section Registrar in accordance with Article 36 §2 of the European Convention of Human Rights and Fundamental Freedoms ("ECHR") and Rule 44 §3 of the Rules of the Court.

The *Cordella and others* and the *Ambrogi Melle and others* cases raise several issues related to the right to life and the right to respect for private and family life, enshrined in articles 2 and 8 ECHR. More importantly, these cases are of crucial importance for the future development of the Italian environmental regulation, which, nowadays, is extremely chaotic due to the multiple and uncoordinated governmental interventions. Namely, what this *Clinic* considers a matter of concern is the effect of this regulation on the balance between economic output and the right to health and environmental protection.

This submission will illustrate the European and Italian environmental legal framework, the development of national regulatory interventions on the matter at stake and, finally, the current legislative situation.

Interest of the *Clinical Program*

The *Clinical Program* is a project of legal education established by the University of Turin, Department of Law. Its main goal is to analyse human rights related issues, managing cases involving the effective access to justice in its broadest terms.

This Clinic offers *pro bono* legal services to persons that suffered a violation of their rights and that are unable to have access to the legal market. These services are offered in close cooperation with legal firms, bar associations and other civil society organizations. Over the years the Clinical Program has been cooperating, among others, with the International Training Center of the International Labour Organization (ITC-ILO), the European Network for Clinical Legal Education (ENCLE), Save the Children and the Turin Bar Association (Ordine degli Avvocati di Torino).

One of the activities conducted by this Clinic is strategic litigation. Its work encompasses the preparation of cases to be presented before the European Court of Human Rights.

Last year, the Clinic has been focusing on the environmental regulation in Italy, in particular the impact that the multiple governmental interventions had on the effectiveness of the protection of the environment.

General legal framework

The Italian environmental regulation is extremely **complex**; this intricacy is amplified by the coexistence of two mainly different sources: European Union legislation and national regulations.

As far as the first dimension is concerned, it is primarily necessary to stress that European environmental law is strongly influenced by international law principles enshrined in the 1992 Rio Convention. Indeed, these principles are listed in article 191 of the Treaty on the Functioning of the European Union (TFEU): precautionary principle, preventive action, rectification at source and polluter should pay. More importantly, the above mentioned article states that "*Union policy on the environment shall aim at the high level of protection"*.

The commitment of the European Union to be a world leader in the environmental protection is reflected in its legislation. In relation to the issues at stake, two directives are relevant: Directive 2004/107/CE and Directive 2008/1/CE. The main purpose of the first is to reduce environmental pollution in order to **minimise the harmful effects** that it has on human health. Significantly, this directive recognizes that "*Scientific evidence shows that arsenic, cadmium, nickel and some polycyclic aromatic hydrocarbons are human* ***genotoxic carcinogens*** *and that* ***there is no identifiable threshold below which these substances do not pose a risk to human health****"*. This objective can be easily reached with the application of the best available technologies, which do not entail disproportionate costs.

As for the 2008/1/CE directive, it aims at reducing the emissions into soil. It prescribes that "*Member States should take the necessary steps in order to* ***ensure*** *that the operator of the industrial activities referred to in this Directive is* ***complying with the general***

principles of certain basic obligations. *For that purpose, it would suffice for the competent authorities to* ***take those general principles into account when laying down the authorisation conditions*** *[…] The competent authority or authorities should grant or amend a permit* ***only*** *when integrated environmental protection measures for air, water and land have been laid down […] The authorisation conditions should be periodically reviewed and if necessary updated. Under certain conditions, they should in any event be re-examined"*.

With regard to the national legislation, also the Italian environmental code (d.lgs 152/2006) has been inspired by these broadly recognized principles. It is remarkable the reference made to the concept of **sustainable development** in article 3. This concept – recognized as a norm of customary international law by the International Court of Justice in the Gabčikovo- Nagymaros case – is seen as a development that meets the need of the present without compromising the ability of future generations to meet their own needs. Therefore, the Italian environmental law aims at safeguarding and improving the quality of the environment, having also intergenerational concerns. In order to achieve this ambitious purpose, the d.lgs. 152/2006 requires *inter alia* the release of the **AIA** (Integrated Environmental Authorisation). This act imposes the respect of certain conditions, such as the respect of the environmental code, to industrial entities in order to continue their productions. As a matter of fact, article 29 sexies provides that the AIA should contain the maximum level of emissions per polluting substances and all the provisions able to guarantee the safeguard of the soil and underground waters. Furthermore, the AIA establishes a control system in order to verify the compliance with the prescriptions contained in act.

The "Salva-Ilva" decrees

The legal framework concerning the Ilva steel plant is extremely chaotic, as the many decrees have been hastily adopted at various points in time.

A. Law 231/2012

The Italian Government firstly intervened with the decree law (d.l.) 207/2012, - converted into law 231/2012. This law authorised the Ilva steel plant, considered a factory of national strategic interest, to continue its production and trades for 36 months as long as it

respected the prescriptions and time limits enshrined in the AIA, released on the 26th October 2012. To this end the Ilva plant reacquired all the assets that had been previously seized. The non-compliance with the AIA dispositions is punished with an administrative pecuniary sanction.

In addition, article 3 paragraph 4 provides for the nominee of a **Guarantor** (Garante) whose main task is to control the application of the provisions of the mentioned decree. The Guarantor should also acquire the information and acts necessary, with the duty to point out the criticalities on the accomplishment. This subject has also to make a biannual report. The Guarantor must promote informative and consultative initiatives in order to guarantee the population with transparency.

B. Law 89/2013

Through the d.l. 61/2013, converted into law 89/2013, the Council of Ministers has approved the **compulsory administration** of the Ilva company, since it employs more than one thousand workers, it runs an industrial plant of national strategic interest and its productive activity objectively entails serious and considerable hazards for the environmental integrity and the health caused by the reiterated non-compliance with the AIA. The compulsory administration lasts for 12 months and it could be extended up to 36 months. The powers and functions of the administrative body are conferred to the commissioner, which avails itself of a sub-commissioner.

According to the law, the Minister of the Environment and of the Land and Maritime Protection appointed a committee composed by three experts, whose task was to prepare the **plan for the measures and activities on the protection of the environment and the health**. The said plan forecasts the necessary actions and timing in order to guarantee the respect of the law and AIA provisions and must conform to the international, European, national and regional regulations.

The law also provides that the commissioner must prepare the **industrial plan** of conformation of the productive activities, which permits the continuation of the productive activity in compliance with the respect of the provisions on the protection of the environment,

health and safety. Until the approval of the said industrial plan, the commissioner must grant the adoption of the measures provided by the AIA and by all authorizations and provisions regarding the protection of the environment and health.

The compulsory administration constitutes a **derogation** from Article 29-*decies*, paragraph 9 of the d.lgs. 152/2006, which provides for the revocation of the AIA and the closure of the plant in case of reiterated violations. The commissioner and the sub-commissioner, in the exercise of their functions, are **responsible** for the violations connected to the enactment of the AIA and of the other rules established for the protection of the environment and the health.

This law **abrogates** Article 3, paragraphs 4, 5 and 6, of the law 231/2012, removing the Guarantor.

C. Law 125/2013

Subsequently, the Italian Government issued the d.l. 101/2013, converted into law 125/2013, which at Article 12 authorized the construction and management of hazardous waste dumps localized on the perimeter of the Ilva plant. The methods of construction and management of the dumps had to be defined, within 30 days from the enter into force of the present law, by a decree of the Minister of the Environment and of the Land and Maritime Protection, who, within three months, must also issue a decree containing the methods of management and disposal of the waste generated by the production cycle of the Ilva.

The commissioner could release Ilva from those contracts in the course of performance if they are incompatible with the preparation and enactment of the plans provided for in the law 89/2013.

D. Law 6/2014

Article 7 paragraph 1 letter d, provides that the adoption of environmental and health measures is considered satisfied if two conditions are fulfilled. Firstly, the air quality in the surrounding area must be **in line with EU requirements and national regulations** with regard to Ilva's emissions. In any case, a worsening must not be recorded with respect to the start date of the compulsory administration. Secondly, the necessary steps to comply with at

least **80%** of the prescriptions contained in the AIA must have been taken before the date of approval of the industrial plan by the commissioner. Such plan allows the continuation of the production in compliance with requisites of environmental protection, health and safety.

Moreover, if the requirements of the plan are met, **criminal and administrative sanctions do not apply** during the period of compulsory administration, for acts or conducts attributable to it. Those sanctions related to acts or conduct attributable to the management period previous to the compulsory administration, are imposed on the company owner or majority shareholder responsible for such acts or behaviours.

After the approval of the industrial plan, the commissioner may require the company owner or the majority shareholder to provide the funds necessary for the implementation of environmental and health protection measures. In case of non-compliance, the commissioner may ask for those sums subject to seizure, even in relation to criminal proceedings against the company owner or majority shareholder, except for those related to environmental crimes or related to the implementation of the AIA.

Article 8 at paragraph 2 establishes the criteria and the procedure to realize not deferrable and urgent interventions required by AIA and by the abovementioned plan.

E. Law 20/2015

Law 20/2015 extended the regulation concerning special administration to in-crisis companies identified as having a national strategic interest. Such special administration is aimed to economic and financial restructuring. This norm also establishes that the commissioner can be nominated as the company's new special commissioner.

This norm establishes the transition of Ilva from compulsory administration into **special administration**, following the request of the commissioner. It also states that the credits arisen before the opening of the special administration, relating to the necessary operations of environmental restoration, security and continuity of the essential productive plants, as well as those related to the implementation of interventions in the field of environmental protection and health, can be deducted.

As regards the timing of fulfilment of the above mentioned plan, this law states that it is considered implemented "*if by 31 July 2015, has been realized, at least to the extent of* ***80%,*** *the number of requirements which expired on that date*".

Moreover, the special commissioner and his delegates are **exempt from criminal and administrative** liability with regard to those activities carried out while implementing the environmental plan and fulfilling the best preventive rules on environment, protection of health and public safety and safety at work. This exemption concerns crimes of bankruptcy for loans to the company, as well as for payments and transactions authorized by the commissioner.

Furthermore, the special commissioner is authorized to sign a conventional act of liquidation with FINTECNA S.p.A., the assignee of Ilva. It obliges FINTECNA **to safeguard Ilva from losses resulting from violations of the environmental laws** occurred during the management period previous to the transfer.

F. <u>Law 13/2016</u>

The law 13/2016 provides for urgent regulations concerning the **sale** of Ilva to private investors.

Firstly, it establishes a short time limit - June 2016 - for the sale of the Ilva companies. The anticipation of the deadline was necessary due to the economic difficulties Ilva had to face after the Swiss judiciary refused to allow the re-entry of 1 billion and 200 million euros seized from the Riva family in 2013. This sum was destined to the environmental reclamation of the Taranto plant.

Secondly, a sum of 1, 1 billion has been allocated to the Ilva complex: **300** million as a loan, in order to face the transitional phase, and **800** million for environmental reclamation. The 300 million will be repaid by the new purchaser of the company, while the 800 million will be repaid in 2016 and 2017 by whoever will be held responsible for the crime of environmental disaster at the end of the criminal trial currently in process in Taranto. Furthermore, 35 million are made available through the "Fondo centrale di garanzia" (the

Central Guarantee Fund) for those ancillary activities able to demonstrate that at least the 50% of their income was made with Ilva for two years since 2010.

Finally, the deadline for the completion of the provisions on reclamation will be postponed from August 2016 to June 2017. The postponement is due to the introduction by the law of the possibility to **modify the Environmental Plan** ("Piano ambientale") issued by the Council of Ministers when required for the realization of the Industrial and monetary plan of the purchaser.

G. Law 151/2016

The law 151/2016 provides for urgent regulations concerning the completion of the special administration procedure of the Ilva companies.

First of all, the law renews the procedure for the modification and implementation of the Environmental Plan: a Panel of experts is constituted and all the offers presented before the 30th June 2016 that imply the modification or implementation of the Plan, or any other required authorization, must be reviewed and evaluated by the Panel. The law also allows for the **postponement** up to 18 months of the deadline for the **enactment** of the Plan and the related request must be evaluated by the Panel as well. Moreover, the Minister of the Environment gives an opinion and can propose changes to the proposals of the tenderers. During the next 15 days, the tenderers must propose their final offers adapting to the Minister's opinion, otherwise they are excluded from the awarding process.

As for the monetary measures adopted, the law **exempts** the purchaser or renter chosen at the end of the transfer procedure **from repaying the 300 million euros** granted by the Italian State in the previous decree-law, and shifts this burden to the special administration. Moreover, the law **postpones** until 2018 the deadline for the repayment of the 800 million euros granted for the fulfilment of the Environmental and Health plan ("Piano di tutela ambientale e sanitaria").

Finally, the **immunity** from any judicial prosecution, granted to the special commissioner in matters related to the realization of the Environmental plan, is **extended to**

the new purchaser or renter until 30th June 2017 (or 18 months more in case a postponement is required).

Current legal situation

Considering the abovementioned development brought by the Salva-Ilva decrees into Italian legislation, the resulting regulation is peculiar in several aspects.

Firstly, Ilva is still under **special administration** and it is managed by a special commissioner. One of this figure's duties is to control the respect of the applicable regulations. In doing so, he enjoys an **immunity** from jurisdiction.

With regard to the present applicable regulation, of the utmost importance is the environmental plan, which recalls the dispositions enshrined in the AIA, even if it **postpones** the fulfilment of environmental obligations. Indeed, the deadline for the completion of the provisions on reclamation has been deferred to **2019** by the last law 151/2016.

Secondly, Ilva's special commissioner is currently attempting to sell or rent it to private companies whose owner, according to the law, will be exempted from repaying the 300 million euros previously granted by the Italian Government. Moreover, such owner or renter will enjoy immunity from any judicial prosecution.

Conclusion

This multi-layered legal framework should be considered in the light of Article 8 of the European Convention of Human Rights, which bind States to strike a fair balance between the competing interests of the individuals- such as health and life (Article 2 ECHR) – and the community as a whole – for example the protection of a plant of national strategic interest.

For all the above reasons, the *Clinical program* is interested in hearing the position of the Court on this matter. It would be important to set some general principles that can possibly shed light on the chaotic Italian legal framework and, thus, offer greater certainty to individuals seeking redress for human rights violations.