

**STANDING IN ENVIRONMENTAL LAWSUITS IN ITALY : SOME
SUGGESTIONS FROM THE U.S.**

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1. INTRODUCTION

This article aims to investigating the limits of standing for organizations in environmental lawsuits, engaging in a comparative perspective with U.S. federal system.

The U.S. system offers some interesting areas for examination¹ which recommend to study that model: first, judicial challenges to administrative action affecting the environment have

¹ M. Cappelletti, in *Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi*, in *Le azioni a tutela di interessi collettivi o diffusi, Atti del convegno di studio (Pavia, 11-12 giugno 1974)*, Padova 1976, 191, especially 215, in 1974 enlightened that the U.S. system had a long and developed experience in common interests which must be studied and examined in depth.

been recurring before the Supreme Court; and, second, the focus of jurisprudence on environmental advocacy organizations with particular consideration of their capacity to meet standing requirements. The choice for U.S. legal system lays not only on the important steps of jurisprudence, but moreover on the special value of public participation in the administrative proceeding and on the consequence in organization judicial standing.

The debate over standing for environmental advocacy organizations is quite recent in Italy. A number of judicial decisions in the 1970's² put the focus on the inadequate existing legislative framework, suggesting the opportunity of new solutions in order to guarantee a fair representation to environmental interests, which are not individual positions with judicial access³.

After 40 years since the original debate, this article seeks to consider and reflect on the present framework as created and developed by legislative and judicial power. The European Union has expressed significant interest in this topic and the ongoing debate stresses the need for reconsideration of this themes. The implementation of Aarhus Convention by European Union underlines the need for high standards in the safeguard of environmental interests, including for NGOs standing in judicial proceeding, as recent decisions of the Court of Justice emphasized⁴.

² With the well-known decisions of Consiglio di Stato (the higher Italia administrative judge) 9 June 1970, in *Foro it.* 1970, III, 201; Cons. St., sez.V, 9 March 1973, n. 253, in *Foro amm.* 1973, I, 264, Cons. St., Ad. Plen. 19 October 1979, n. 24 in *Foro amm.* 1979, I, 1442, Cons. St., sez. VI, 14 July 1972, n. 475, in *Giur. it.* 1973, III, 261.

³ As A. Romano observed in the comment to the decision Cons. St., sez. VI 14 July 1972, n. 475, entitled *Interessi "individuali" e tutela giurisdizionale amministrativa*, in *Foro it.* 1972, III, 269.

⁴ In the decisions of the cases C-263/08 and C- 240/09 and in the well known Court of justice 12 May 2011, C-115/09, commented by E. J. Lohse, *Surprise? Surprise! - Case C-115/09 (Kohlekraftwerk Lunen) A Victory of the Environment and a Loss for Procedural Autonomy of the Member States?*, in *Public Law Rev.* 2013, and with tone of approval F. Goisis, *Legittimazione al ricorso delle associazioni ambientali ed obblighi discendenti dalla*

The comparison of standing requirements between different legal systems can undoubtedly offer various solutions and answers to environmental standing issues.

A great Italian scholar⁵ pointed out the value of comparative law both in enlightening the legislator – offering different features and solutions from other Countries – and in corroborating the given solution with the experience offered in a different legal system.

In modern times comparison is a hard work, as comparative law is more than the mere knowledge of a foreign law system. That knowledge is a prerequisite, which the scholar needs in order to understand the features, the peculiarities, the affinities or contrasts in interpreting the examined institution, for the construction of general categories⁶.

Convenzione di Aarhus e dall'ordinamento dell'Unione Europea, in *Dir. proc. amm.* 2012, 91. Critics to Italian law provisions in respect of Aarhus Convention are moved by R. Leonardi, *La legittimazione processuale delle associazioni ambientaliste: alcune questioni ancora giurisprudenziali*, in *Riv. giur. ed.*, 2011, 3 e G. Tulumello, *Access to Justice from the point of view of a judge*, in www.giustizia-amministrativa.it. For a very recent analysis of Aarhus Convention impact in standing see the Conclusions of 18 May 2014 in C- 401/12 P, 402/12P and C-403/12 P.

⁵ A. Amorth, *Introduzione al diritto comparato e al diritto pubblico*, in *Scritti giuridici, 1940-1948*, II, 817. For the importance of a comparative perspective in the study of administrative law M. D'Alberti, *Diritto amministrativo comparato*, Bologna, 1992, spec. 9 and *Manuale di diritto amministrativo*, 2014 and G. Napolitano in the Introduction of the volume, *Diritto amministrativo comparato*, Corso di diritto amministrativo, diretto da S. Cassese, IV, Milano 2007, IX.

⁶ The debate on the necessary rethinking of the traditional categories in comparative administrative law is enlightened in F. Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 *American Journ. Comparative Law* 859 (2011) and Bruce Ackerman, in *Good-bye Montesquieu*, in *Comparative Administrative Law*, edited by Susan Rose-Ackerman e Peter L. Lindseth, 2010, 128, where the Author underlined the need for “a new framework for analysis”. For a consonant approach J.L. Mashow, in *Explaining administrative law: reflections on federal administrative law in nineteenth century America*, in *Comparative Administrative Law*, ult. cit., 37. The book *Methods of comparative law*, edited by P.G. Monateri, Edward Elgar 2012, contains numerous articles on the subject and particularly G. Monateri, (*Methods of comparative law: an intellectual overview*, 1) focuses on comparative law, “as the best intellectual device we can

Comparison is useful when the objects are comparable such as *legittimazione* in Italy and standing in the U.S., which both refer to a pre condition for the judicial examination of the lawsuit⁷. Examining the threshold for standing in environmental interests lawsuits means analyzing the nature and scope of judicial review in environmental interest lawsuits.

The rules for standing affect and influence the construction of judicial review of Public Authorities decisions: Narrow standing rules that require the applicant to have a personal interest in or be personally affected by the decision under review identify judicial review as a mechanism for ensuring that individual interests are properly taken into account by administrative decisionmakers. By contrast, broad standing rules that allow representatives of groups or of the public to challenge administrative decisions by making application for judicial review identify judicial review not only as a mechanism for protecting the interest of individuals but also as a way of contesting the social interests promoted by the decision under review, as Peter Cane explained regarding Administrative tribunals⁸. Similarly in the U.S. the rules of standing play an important role in the balance and separation of powers, with respect to limits on judicial authority over administrative powers⁹.

use to depict the figurality of Law and to construct a theory of representational understanding of a normative world”.

⁷ An Italian scholar, V. Molaschi, has already reflected on this topic, a few years ago, in *Standing to Sue of Environmental Groups in Italy and in the United States of America*, in *Jeelp*, 2006, 52. Even in a wider perspective analyses the U.S. system framework in environment safeguard, F. Fracchia, *Amministrazione, ambiente e dovere: Stati Uniti e Italia a confronto*, in *Ambiente, attività amministrativa e codificazione*, a cura di De Carolis-Ferrari-Police, Milano, 2005, 120.

⁸ P. Cane, *Administrative Tribunals and Adjudication*, Hart Publishing, 2010, 229.

⁹ As enlightened by Richard Pierce Jr., *Is standing law or politics?*, 77 N.C.L. Rev. 1741(1999) e J. H. Adler, *God, gaia, the taxpayer, and the Lorax: standing, justiciability, and separation of powers after Massachusetts and Hein*, 20 Regentes U.L. Rev. 175 (2007-2008).

This must keep in mind the difference between the two legal systems. In the U.S. judicial review is an extreme remedy, after an administrative proceeding similar to a trial¹⁰; instead in Italy judicial review is very common even though, particularly for environmental interests, it is more often practical, moved from political interests, such as delaying the construction of the building or the beginning of the commercial activities, instead of a real request of rights protection.

In sum, this paper will argue on the proper role of organizations in environmental safeguard. After examining the actual landscape in Italy and in the U.S., attention will focus on jurisprudence in order to find the reasons the judges had differently chosen for admitting or excluding standing in environmental cases. The study of legislative prescriptions, as construed in cases, will prove that environmental associations are not entitled of a general power of control in whatever activities interesting nature, but organizations must prove they have a reasonable interest in the favorable outcome of the case. The protection of natural resources is a public interest conferred to administrative authorities and Courts have to intervene just in the pathological contest as the administrative proceeding is the proper contest where to contemplate all the interest at stake.

2. INDIVIDUAL STANDING ANE ENVIRONMENTAL INTERESTS: AN ODD COUPLE.

The Italian legal system contemplates a peculiar category for environmental interests: They are both different from individual interests - which can be equal but with distinct objects – as well as from the common interest, not yet qualified as relevant by law. The

¹⁰ As underlined by D. de Pretis, *La giustizia amministrativa*, in *Corso di diritto amministrativo*, directed by S. Cassese, IV, *Diritto amministrativo comparato*, cit. e B. Marchetti, *Pubblica amministrazione e corti negli Stati Uniti. Il judicial review sulle amministrative agencies*, Padova 2005.

specific category of “*interessi diffusi*”¹¹, which we can translate as “common interests”, recalls the idea of rights which are not precisely ascribable to one organized group, but widespread in society and somehow connected and useful for the best safeguard of public interests. And this distinction and separation of environmental interests from general public interest represents the novelty, signaling a growing sense of unease by local and federal authorities with the inefficiency and insufficient concern of environmental quality and living standards.

Citizens feel administrative action takes inadequate care of nature and try to replace it organizing in environmental advocacy groups. If a local authority does not order the closing of an old and polluting incinerator after a petition by local residents, residents would probably spontaneously create a group or organization with the purpose to guarantee living standards. If urban planning provisions contemplate a new industrial area not far from the green area where residents enjoy their summer, notwithstanding the participatory proceeding and the community and local authorities involvement which may have occurred, the residents would call for a committee concerned with the potential destruction and degradation of ecosystems, climate change and global warming.

These emerging common interests could not find a proper position in a judicial system based on individual situations and rights. So scholars and jurisprudence tried in some way

¹¹ Italian scholars have studied in depth the category. In sum the most important essays on the topic are: N. Trocker, *voce Interessi collettivi e diffusi*, in *Enc. giur.*, XVII, Roma, 1989, F. G. Scoca, *Tutela dell'ambiente: la difforme utilizzazione della categoria dell'interesse diffuso da parte dei giudici amministrativo, civile e contabile*, in *Dir. soc.* 1988, 655, G. Berti, *Interessi senza struttura (i c.d. interessi diffusi)*, in *Studi in onore di A. Amorth*, Milano, 1982, I, 67, R. Ferrara, *voce Interessi collettivi e diffusi (ricorso giurisdizionale amministrativo)*, in *Dig. disc. pubbl.*, vol. VIII, Torino 1993, 482; M. Nigro, *Le due facce dell'interesse diffuso: ambiguità di una formula e mediazioni della giurisprudenza*, in *Foro it.*, 1987, 10; R. Federici, *Gli interessi diffusi: il problema della loro tutela nel diritto amministrativo*, Padova, 1984, R. Lombardi, *La tutela delle posizioni giuridiche meta-individuali nel processo amministrativo*, Torino, 2008 and C. Cudia, *Gli interessi plurisoggettivi tra diritto e processo amministrativo*, Santarcangelo di Romagna, 2012.

to justify the collocation of common interests in individual situations, in order to ensure common interests judicial standing.

The inadequacy of the category and the inappropriateness of existing tools in legal order somehow recall the new property paradigm: The need to apply safeguards of due process clause to administrative benefits stretched the property category as to take care even of those new positions¹².

Nevertheless this interpretation is the incentive and encouragement for a legislative reform in order to supply the incongruence of the legal order.

Alberto Romano¹³ highlighted that referring to common interests as individual positions could lead to a rethinking of administrative judicial review proceeding, if not revolutionizing it. Constitutional clauses take care of individual positions, but, as all safeguard provisions contemplate for a minimum, and do not preclude a wider protection.

The lack of judicial access for environmental advocacy organizations sets the issue of finding the right way to open trial proceedings, giving space to these new meta-individual positions.

In looking for the best solution, legislators must keep in mind that the standing threshold represents a guarantee that the trial is connected and inherent to the position and subjective sphere of the plaintiff, as *actio popularis* must be exceptional¹⁴.

¹² For an Italian analysis see D. Sorace, *Il problema degli interessi non-diritti da tutelare nell'amministrative law americano (linee di un dibattito in corso)*, in *Scritti per Mario Nigro*, III, Milano, 1991, 581.

¹³ *Gli interessi "individuali"*, cit., 271.

¹⁴ M. Cappelletti, *Appunti sulla tutela giurisdizionale*, cit., 199.

3. THE ITALIAN SITUATION PERSPECTIVE...

Standing for organizations is a central issue in environmental common interests' protection and stretches the necessity of continuity between what the law says and how much the trial proceeding recognizes¹⁵.

Traditionally standing is a precondition which occurs when the plaintiff is entitled by judicial order to raise the cause or controversy in front of judicial authorities¹⁶.

In civil action standing is useful to avoid situations where judicial authorities decide cases in which the plaintiff is not entitled to relief, as where others people's interests have been damaged.

Instead, in administrative judicial proceeding Courts rarely distinguish standing from interest in the outcome, which regards the utility and advantage the plaintiff can reasonably attend from a favorable decision. Nevertheless the traditional meaning of standing is related to an individual position¹⁷, which immediately underlines the contrast with representation of common interests.

¹⁵ A. Travi, *La tipologia delle azioni nel nuovo processo amministrativo*, in *La gestione del nuovo processo amministrativo: adeguamenti organizzativi e riforme strutturali*, Atti del LXVI convegno di studi amministrativi, 23-25 maggio 2010, Varenna, Milano 2011, 75.

¹⁶ See R. Villata, voce *Legittimazione processuale*, in *Enc. giur.* and R. Villata, *Dodici anni dopo: il codice del processo amministrativo*, in *Il codice del processo amministrativo. Dalla giustizia amministrativa al diritto processuale amministrativo*, a cura di B. Sassani e R. Villata, Torino, 2012, 41.

¹⁷ A. M. Sandulli, *Il giudizio innanzi al Consiglio di Stato e ai giudici sottordinati*, Napoli, 1963, 210.

The function of standing, as a guarantee of exclusive positions which are selected and pertinent just to particular plaintiffs, succumbs as, with no doubt, more than one organization can advocate the same environmental interests.

In that sense, standing for environmental advocacy organizations and groups has a special meaning, referring not to the positions which must be safeguarded in the judicial proceeding, but instead to the ability and competence of the organizations and groups to guarantee the best protection and defense to environmental common interests.

The law enacting the Ministry of Environment as well established (art. 18 L. n. 349/1996) conditions and prerequisites that need to be respected by the organizations in order to be invested of judicial standing¹⁸. The conditions take in consideration the Statute of an organization and its activity, which must be widespread in the all country.

This provision has been criticized¹⁹ because jurisprudence in the meantime proposed different requirements for standing of environmental organizations. Particularly, judges²⁰ referred to the strict link, *vicinitas* or continuative and solid connection of organizations with the geographical area where the damaging activity was going on or was expected to go on. In that way Courts admitted to jurisdiction organizations which were not representative in a national perspective and so did not meet the legislative prerequisites, giving case by case solutions. Local committees could be plaintiff when environmental safeguard figures as a statutory scope and they show an adequate level of representation and a solid connection with the area where the natural ecosystem is in danger. Nonetheless Courts

¹⁸ A. Travi, *Lezioni di giustizia amministrativa*, Milano, 2012.

¹⁹ A. Police, *Il giudice amministrativo e l'ambiente: giurisdizione oggettiva e soggettiva?*, in *Ambiente, attività amministrativa e codificazione*, edited by D. De Carolis, E. Ferrari, A. Police, Milano, 2006, 320.

²⁰ Cons. Stato, Sez. IV, 13 July 1998, n. 1088, T.A.R. Veneto, 30 October 2006, n. 3591 and Cons. Stato, Sez. VI, 23 May 2011, n. 3107.

affirm - for the majority of the cases, even if sometimes they change their mind - local derivations of national environmental organizations do not meet the threshold of standing as the 1986 Law refers only to the national entities²¹.

In some cases judges focus not only on *vicinatas* but also to previous participation in administrative proceeding. Scholars²² made clear judicial standing and administrative proceeding standing meet different conditions so that the existence of the second is not sufficient for the existence of the first.

Finally, the Environmental Code contemplates (art. 309) that non-governmental organizations, promoting environmental protection, as individuated in Law n. 149/1986, are entitled to notify complaints and to demand authorities intervention for the safeguard of the environment.

Regarding environmental damages, art. 310 does not introduce a peculiar provision for NGOs, but also does not exclude them from standing: a Plaintiff is a legal entity who can be damaged or is entitled to participate to the administrative proceeding, even when that entity is an environmental organization.

In sum, if the legislative conditions for environmental organizations standing are clear, Courts often do not apply these simple conditions, but recalling general principles, adopt prerequisites other than those set forth in the law. In the Italian legal system this has a strong chilling effect.

²¹ T.A.R. Lombardia, Sez. IV, 15 December 2008, n. 5786 (with a critic note by A. Maestroni, *La legittimazione ad agire delle articolazioni territoriali di associazioni individuate ex art. 13 L. 349/1986. Un falso problema: il caso Legambiente Lombardia Onlus*, in *Riv. giur. amb.*, 2010, 601)

²² R. Villata, *Riflessioni in tema di partecipazione al procedimento e legittimazione processuale*, in *Dir. proc. amm.* 1992, 184. Recently, M. C. Romano, *Interessi diffusi e intervento nel procedimento amministrativo*, in *Foro amm.-C.d.S.* 2012, 1691 and, more generally, F. Gaffuri, *Contributo allo studio del rapporto procedimentale*, Milano 2012.

The interest for a narrow or open judicial access of environmental organizations becomes much more interesting and actual because of the Aarhus Convention²³ implementation in Europe with the Council decision 2005/370/CE. The Convention aims at regulating access to information, public participation in decision-making in order to produce the positive effect of a social control on environmental decisions. Article 9 requires Countries, parties of the Convention, to guarantee access to justice in environmental matters²⁴ when plaintiff has a “sufficient interest”, ambiguous formula that captured the attention of so many scholars in every Country.

By Regulation n. 1367/2006 European Union also became Party to the Convention. The Court of Justice, recalling the *Plaumann* precedent²⁵, affirmed only the existence of an

²³ See M. Macchia, *Global Administrative Review Mechanism: The Case of the Aarhus Convention*, in *Global Standards for Public Authorities*, edited by G. della Cananea and A. Sandulli, Napoli 2012, 109.

²⁴ Art. 9, par. 2 provides that “Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively,(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures

prior to recourse to judicial review procedures, where such a requirement exists under national law.

²⁵ C- 25/62 *Plaumann & Co v. Commission*. For a critic comment to the decision and the approach of the Court in the interpretation of art. 263 TFUE see B. Marchetti, *L'impugnazione degli atti normativi da parte dei privati nell'art. 263 TFUE*, in *Riv. it. dir. pubbl. com.* 2010, 1471.

individual and direct injury meets the threshold for standing: national or global NGOs, such as Greenpeace, have no particular and individual interests in the case and therefore do not have standing²⁶. The Court does not apply the same analysis when examining national provisions, which have been banned as not in compliance with the Convention²⁷.

This approach places too much emphasis on Aarhus Convention provisions. Those provisions need to be studied and analyzed in that framework, which enhance environmental interests in a composite structure where judicial access represents the natural latch to lock the all system. Article 9 is not, therefore, introducing a new popular action. The Convention, instead, stresses on the implementation of its provisions “within the framework of national legislation” and “in accordance with the requirements of national law” and in all of European Countries popular action, citizen suit is a very exceptional remedy which of course is not to be introduced by an International Convention.

We now turn to the U.S. legal system.

4. ...THE AMERICAN ONE.

Standing is a central question in U.S. law order because of how it affects separation of powers and because Courts – as we’ve just seen happens in Italy – often manipulate conditions in order to decide the case.

²⁶ Critically M. Eliantonio, *Towards an ever dirtier Europe? The restrictive standing of environmental NGOs before the European Courts and the Aarhus convention* and N. De Sadeleer e C. Poncelet, *Protection Against Acts Harmful to Human Health and the Environment Adopted by the EU Institutions*, in *Cambridge Yearbook of European Legal Studies*, 2012, 177.

²⁷ C-321/95 P.-Greenpeace and Others v. Commission. A new approach has been expressed in the Conclusions to case C- 401/12 P, C-402/12 P and C-403/12 P, but the decision can take a different direction.

U.S. statutory law does not provide specifically for standing. Thus, Supreme Court jurisprudence had and has a fundamental role in the definition of the threshold of standing²⁸. Disclosing some final considerations, we can say that Justice Scalia²⁹ and conservative approach played a determinant role in narrowing judicial access of environmental organizations.

In *Association of Data Processing Service Organizations v. Camp*³⁰, the Supreme Court elaborates standing doctrine interpreting Article III of the U.S. Constitution. The Court affirmed that “cases or controversies” limitation would be satisfied only if the plaintiff would be adversely affected: The plaintiff must demonstrate an injury-in-fact traceable to the defendant and which could be likely redressable by a favorable decision.

In 1972 in *Sierra Club v. Morton*³¹, for the first time, the Court found that harm to “aesthetic, environmental, or recreational” values³² were and adequate injury for standing. In the controversy a major environmental organization, Sierra Club, took an action to prevent Walt Disney Corporation from developing a ski resort in Mineral King Valley, in the Sequoia National Park. The Court recognized Sierra Club was alleging a harm to the ecosystem which could be qualified a legal injury, nonetheless the Court denied standing

²⁸ See Maxwell L. Stearns, *Standing back from the forest: justiciability and social choice*, 83 *Cal. L. Rev.* 1309 (1995), Richard Pierce Jr., *Is standing law or politics?*, cit., J. H. Adler, *God, gaia, the taxpayer, and the Lorax: standing, justiciability, and separation of powers after Massachusetts and Hein*, cit., e H. Elliott, *The functions of standing*, 61 *Stan. L. Rev.* 459 (2008).

²⁹ Antonin Scalia, *Standing as an Essential Element of Separation of Power*, 17 *Suffolk L. Rev.* 881 (1983).

³⁰ *ADP Association of Data Processors v. Camp*, 397 U.S. 150 (1970).

³¹ 405 U.S. 727 (1972).

³² For a highlight on the content of this decision see Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 *Fla. St. U. L. Rev.* 433, 466 (2008), E. Longfellow, *A New Look at Environmental Standing*, 24 *Environ. Envtl. L. & pol'y* 3, Fall 2000, 17.

because Sierra Club had not claimed that any of its members would otherwise be affected by the development³³. In his dissent, Justice Douglas affirmed conferring standing upon environmental objects (Mineral King's Valley) to sue for their own preservation would be the correct answer.

As in Italy, in the U.S. concern for environmental interests increased in 1970s with the institution of the E.P.A., Environmental Protection Agency and the adoption of federal statutes which protect different natural elements, such as Clean Air Act, which entitles citizen to sue private parties or the Agency as well for the violation of statutes provisions. This focus also emerges in the National Environmental Protection Act provisions, which include mandatory risk evaluation for each agency whose activity has a "significant effect" on environment.

During that time, although the Supreme Court affirmed the public concern for protecting nature, they strongly reduced the standing of organizations with the requirement of a specific injury to the plaintiff³⁴, consisting of an individual member of the Sierra Club being disappointed and personally unhappy of the development of the Mineral King Valley.

In 1990 in the case *Lujan v. National Wildlife Federation*³⁵ the Court specified the sense of the injury-in-fact, requiring the injury is "concrete and particularized, actual or imminent, not conjectural or hypothetical". The National Wildlife Federation had no standing because - as Justice Scalia wrote - even if the desire to use or observe an animal species is undeniably a cognizable interest for purpose of standing, showing that the federal decision

³³ See Jan G. Laitos, *Standing and Environmental Ham: The Double Paradox*, in 31 *Va. Envtl. L. J.* 55, here 72.

³⁴ For an historical summary of this judicial approach see K.S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporation*, in 12 *Duke Environmental Law & Policy Forum* 183 (2001).

³⁵ 504 U.S. 555.

would lead to “increase in the rate of extinction of endangered and threatened species” was not sufficient to meet the threshold of standing. The Court excluded an organizational interest in environmental problems, differentiable from the general interest, so standing is met only when members of the organization had alleged a sufficiently concrete injury.

As affirmed in *Lujan*, the injury-in-fact test focuses on a personal stake, which environmental organizations do not have. This actual, as opposed to professed, stake in the outcome means the member of the organization has to allege a “geographic proximity” and not just a “vicinity” to the area, together with a “temporal proximity”. These conditions resemble the requirements specified by Italian administrative judges, but if Italian judges apply the conditions to open judicial access for organizations with no standing, U.S. courts use it to limit and narrow, once more, environmental interests access to trial. As such, standing is denied when there is not a specific outcome for the single organization.

This helps to enlighten the ideological and political approach which hides in Courts’ decisions. While Agency statutes recognize wide participation to environmental interests in lawmaking and adjudication proceedings, Courts restrict standing for environmental organizations, considering personal stake in the outcome rarely exists. Administrative proceedings – with a trial framework – are considered the correct and proper place for the scrutiny of those interests. Agency statutes with citizen suit do provide for a general remedy when specific provisions are violated, granting auxiliary activity when Agency or organizations are not efficient in environment protection. This evokes the 2011 introduction of special standing when Italian Antitrust Authority alleges an antitrust violation in administrative regulations, as a helpful tool for a correct implementation of law n. 287/1990 by legislator³⁶.

³⁶ See M. A. Sandulli, *Introduzione ad un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21-bis L. n. 287 del 1990*, in www.federalismi.it, R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990* in www.giustamm.it, F. Cintioli *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e*

Citizen suit provisions could solve questions of separation of powers, raising from a wide standing opportunity, as Congressional Statutes deliberately chose to open judicial access to those interests.

In *Lujan v. Defenders* Justice Scalia offered a different construal, affirming a wide standing would represent a violation of Take Care Clause: Article II, section 3, provides the President “shall take care that the laws be faithfully executed”. By that approach the Court established prudential limits in order to prevent judicial access for “abstract questions of wide public significance even though judicial intervention may be unnecessary to protect individual rights”. Particularly the zone of interest test considers the party must be within the zone of interest protected by the Statute, excluding generalized grievances.

State Courts follow the approach of Supreme Court considering standing in environmental cases is not automatic and cannot be met by perfunctory allegations of harm, but requires the allegation of a true personal stake in the outcome³⁷.

4.1. The recent case – Law: much ado about nothing?

In some recent cases the Court seems to use a different approach, assuring new space to environmental organizations and to national States.

In 2000 in *Friends of Earth v. Laidlaw Environmental Service Inc.*³⁸ the plaintiff was a well established environmental organization, alleging a commercial wastewater treatment was discharging pollutants, mercury especially, in the North Tyger River. Members of

del mercato (art. 21-bis della legge n. 287 del 1990) in www.giustamm.it and S. Lucattini, Garante della concorrenza e certezza economica: alla ricerca delle giustizie per i mercati, in Dir. amm.2013, 509.

³⁷ [Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 890 N.Y.S.2d 405, 918 N.E.2d 917, 922 \(2009\)](#)

³⁸ 528 U.S. 167 (2000), for a critic coment see D. N. Cassuto, *The Law of Words: Standing, Environment and other Contested Terms*, in 28 Harvard Env.mental Law Rev. 79 (2004).

organization could no longer enjoy the river because of their fears about pollution. The majority of the Court states the “relevant showing for purpose Article III standing...is not injury to the environment but injury to the plaintiff”, but that “reasonable fear” about pollution is sufficient to meet the threshold of standing as it can sharpen the presentation of issues upon which the Court depends.

In the same year, in *Friends of the Earth v. Gaston Copper Recycling Corp.*³⁹, a Federal Court, following the precedent of the Supreme Court, affirmed that “*Threats or increased risk...constitutes cognizable harm. Threatened environmental injury is by nature probabilistic....by producing evidence that Gaston Copper is polluting Shealy’s nearby water source, CLEAN (Citizens Local Environmental Action Network) has shown an increased risk to its member’s downstream uses. This threatened injury is sufficient to provide injury in fact.*”

Federal judges open standing conditions not to the organization but to individual members who demonstrate a personal stake in a favorable outcome, even when the personal stake lays in the reasonable fear and concern about the effects of the defendant’s action on plaintiff’s use and enjoyment of the environment.

In 2007 in *Massachusetts v. E.P.A.*⁴⁰ the Court once again affirmed the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which a court so largely depends for illumination. While it does not matter how many people have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented

³⁹ 204 F. 3d 149, 159 (4 th Circ. 2000).

⁴⁰ 549 U.S. 497 (2007).

will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

In the specific case – which is known as the global warming case, concerning the lack of EPA regulation in CO2 gas emissions - the Court stated even a small probability of injury is sufficient to create a case or controversy--to take a suit out of the category of the hypothetical--provided of course that the relief sought would, if granted, reduce the probability. As the harms associated with global climate change are serious and well-recognized, the majority of the Court grant standing to the State of Massachusetts with a decision criticized by scholars⁴¹.

That issue is present even in Italian legal system, because in recent years administrative Courts affirmed local authorities' standing in cases where the citizens interests were threatened by private actions, authorized by national authorities⁴². This reasoning is baffling: Administrative authorities are entitled to take care of collective interests but this does not mean injuries to those interests is an injury for the local authority as well.

In 2009 these signals for a wider conception of standing ended. In *Summers v. Earth Island*⁴³ the plaintiff, member of an environmental organization, alleged an harm to Sequoia

⁴¹ Bardford Mank, *Should States Have Greater Standing Rights Than ordinary Citizens?": Massachusetts v. EPA'S New Standing Test for States*, 49 WM.& Mary L. Rev. 1701 (2008) and J. Gibbs Pleune, *Is Scalian Standing the Latest Sighting of the Lochner-ess monster?: using Global Warming to Explore the Myth of the Corporate Person*, 38 Env'tl. L. 273 (2008).

⁴² The decision is Consiglio di Stato sez. IV, 31 August 2010, n. 5898 with the comment of L. R. Perfetti e C. Clini, *Class action, interessi diffusi e legittimazione a ricorrere degli enti territoriali nella prospettiva dello statuto costituzionale del cittadino e delle autonomie locali*, in *Dir. proc. amm.* 2011, 1443, I. E. Nino, *La legittimazione ad agire degli enti territoriali a difesa degli interessi meta-individuali dei cittadini residenti*, www.giustamm.it. The book of A. Angiuli, *Interessi collettivi e tutela giurisdizionale: le azioni comunali e surrogatorie*, Napoli 1986 was entirely dedicated to that subject.

⁴³ 129 S. Ct. 1142 (2009), commented by M. Banda, 34 Harv. Env'tl. L. Rev. 321 (2010).

National Forest and the Court again stated that “general harm to the forest or the environment will not alone support standing” and denied standing as the member had failed to demonstrate his plan of going to the exact parcel of that forest to be logged.

4.2 The injury in fact as an improper condition.

As observed in the last paragraphs, the injury in fact test is a very ambiguous prerequisite which de facto leaves Court wide discretion and, at the same time, big margins of error.

The environmental cases are unique in that third parties are involved: The environmental association issues agency because of the authorization given to a Corporation or because of its inaction in regards of other Corporations activities, potentially harmful for the environment.

The presence of third parties, usually Corporations or other private entities, is the concrete reason for narrowing judicial approach to standing, especially because American legislator has not provided, differently from Italian Parliament, a legislative provision for environmental association standing.

The adversary connotation of judicial proceeding – similar to the Italian legal system – requires two subjects arguing and a concrete interest in the outcome, as judicial proceeding does not have a mere function of checking the proper application and respect of law provisions.

The ideological approach also plays an important role: If democratic judges are much more inclined to stand for legislative supremacy and a balanced judicial control, taking care of organizations’ interests and their members’ pleadings, conservative judges tend to deny standing both to association and individual plaintiffs. In Massachussets the focus posed in sovereignty of national State lead the majority to a favorable scrutiny of standing, with the determinant conservative support.

The very general interest in fact test leaves Court free to decide in the singular case with a peculiar solution, depending on its attitude to come to a decision. Environmental interests

are usually intended as public rights which the President protects, as Article II states, and judicial power must not intervene and overlap Agencies' choices, as Separation of power principle explains. Courts use those principles and dose them regarding the result they are striving for.

Even the statutory citizen suit provisions do not represent an efficient remedy for environmental interests' protection as they do not guarantee compensation for damages. They are not even functional to a proper control of administrative action: Administrative action consists of the negotiated balance of different interests in the specific case and judicial authorities do not have simply to verify the violation of law provisions, but to decide if that violation causes a significant harm to the interests of plaintiffs.

5. ONWARD CHALLENGES.

In Italian law order Courts have stressed the lack of environmental advocacy associations standing and that suggestion lead Parliament to adopt specific provisions in order to open judicial access to those organizations. These legislative provisions do not modify the structure of judicial proceeding, its adversary connotation and the redressability requirement.

The subsequent judicial decisions further specified the legal conditions for organizations' standing, in somehow modifying the borders and construing in single cases a peculiar position for the association. This creative role of Courts is to stigmatize, firstly because it is not proper with the peculiar role of administrative justice in Italy and, furthermore, considering the results of the U.S. system analysis.

In U.S. legal system Courts have the last word, but jurisprudence is deeply criticized. Scholars call for Congressional involvement, in order to dictate a specific provision about environmental interests standing.

Environmental associations well established and competent assure a great concern with nature protection: The Italian solution of legislative provisions for standing appears a good one.

In any case, the adversarial nature of judicial proceeding is not affected by legislative standing.

The provision of association standing does not exclude the distinct condition of a concrete interest in the outcome. Environmental associations are not therefore entitled of a general power of control in whatever activities interesting nature, but organizations must prove they have a reasonable interest in the favorable outcome of the case.

The protection of natural resources is a public interest conferred to administrative authorities and Courts have to intervene just in the pathological contest: Judges do not have to give advisory opinions on administrative agencies balancing interests, if that balancing is reasonable and proportional.

Third parties interests, as we said, need to be confident and entrust administrative decisions, after participated administrative proceeding has taken place.

Administrative proceedings must be the place where environmental interests are taken into consideration. Therefore the solution for a popular action is not the right choice and Aarhus Convention is not so demanding.