LUISS

Bachelor's degree in Politics: Philosophy and Economics

Course of International Law

Analysis of the Rockhopper vs. Italy Case in International Law: Investment Disputes and Environmental Protection

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Table of content

Introduction

Topic Overview: Introduction to the issue of environmental protection within international investment law, with a focus on the Rockhopper vs. Italy case.

International investment law has historically been concerned with attracting and safeguarding foreign investment. In the last decades, within this field, environmental protection has emerged as a key issue. In international law, the concept of investors' rights is now challenged by environmental protection attempts. International investment agreements (IIAs)[1], which include bilateral investment agreements (BITs) and free trade agreements (FTAs), have historically prioritized investor rights, claiming for fair and equal treatment, protection from expropriation and ability to freely transfer funds[2].

However, these concepts might sometimes come into conflict with government measures aiming to protect the environment: States implementing protection measures can have an impact on the profitability of foreign investments, leading to disputes increasingly referred to international arbitration courts[3]. One of the most prominent cases illustrating this tension is the recent Rockhopper v. Italy case.

The dispute started when Italy, in response to environmental concerns, banned offshore oil and gas extraction beyond a specified radius of its coast. Following the Italian government's prohibition on oil and gas exploration in a coastal region where Rockhopper Exploration had interests, namely the Ombrina Mare oil field, the British company filed a lawsuit[4] against Italy.

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[1] The Center for the Advancement of the Rule of Law in the Americas (CAROLA) https://isdslac.georgetown.edu/international-investment-agreements-2/ (Accessed: 14 September 2024)

[2] United Nations Conference on Trade and Development (UNCTAD) (2022) *International Investment Agreements: Navigating the complex system of international investment treaties*. Available at: https://unctad.org/international-investment-agreements (Accessed: 12 September 2024)

[3] Sands, P., Peel, J., and Fabra, A. (2018) *Principles of International Environmental Law*. 4th edn. Cambridge: Cambridge University Press, pp. 906-907 (Accessed: 10 September 2024)

[4] Rockhopper Exploration PLC. (n.d.) Official Website. Available at: https://www.rockhopperexploration.co.uk/ (Accessed: 10 September 2024)

It claimed that the ban went under the terms of the Energy Charter Treaty (ECT)[5] and opened a case with the International Center for Settlement of Investment Disputes (ICSID)[6] in 2017. Established to assist in the arbitration and conciliation of investment disputes between governments and foreign investors, the International Centre for Settlement of Investment Disputes (ICSID) is an international organization. It offers an impartial platform for settling disagreements arising from investment treaties legislation or agreements. The Washington Convention often known as the ICSID Convention established ICSID in 1965[7]. It was the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Its procedures and operations are governed by this convention.

The complaint demanded important monetary damages to Italy. In August 2022, the ICSID found in favour of Rockhopper ordering Italy to give the firm around 190 million euros plus interests. The tribunal based its compensation calculation on the future profits Rockhopper could have made, a decision that drew criticism as it did not seem to consider the risks associated with energy transition and environmental regulations. As a result, some experts pointed that this approach could make climate action significantly more expensive for states willing to implement protective measures.

Research Objective: The primary research question concerning environmental protection in international investment law and arbitration.

Based on this case-study, the research will aim to examine a fundamental question in international investment law:

How can environmental protection be effectively integrated into the framework of international investment agreements (IIAs) and arbitration procedures without undermining the rights of investors?

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[5] Energy Charter Treaty (ECT). (n.d.) The official text of the Energy Charter Treaty. Available at: https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (Accessed: 14 September 2024)

[6] International Centre for Settlement of Investment Disputes (ICSID). (n.d.) ICSID Case Details: Rockhopper vs Italy. Available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/17/14 (Accessed: 12 September 2024)

[7] International Centre for Settlement of Investment Disputes (ICSID) 2006, *Convention on the settlement of investment disputes between states and nationals of other states*, ICSID, Washington, D.C. Available at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf (Accessed: 14 September 2024)

Given the increasing number of disputes challenging environmental regulations, this question aims to examine whether existing legal mechanisms within IIAs are sufficient to balance these often-conflicting interests. The inquiry will analyse how international arbitration tribunals have dealt with cases involving environmental action and investor rights, and whether current IIAs contain adequate provisions to ensure that environmental protection is not compromised in the pursuit of foreign investment.

Thesis Structure: Overview of chapters and key questions addressed in each section.

This research will be divided into three chapters, each addressing an aspect of the relationship between international investment law and environmental protection.

The first chapter will introduce the Energy Charter Treaty (ECT) describing its structure as well as its main objectives. It will examine how the ECT, originally imagined protecting foreign investment, intersects with environmental concerns. It will also investigate ongoing debates on whether the ECT supports or conflicts with current environmental objectives. In addition, it will consider Italy's withdrawal from the ECT, considering the impact of this political decision, the treaty's survival clause and the general trend of EU countries withdrawing from similar agreements. Overall, chapter 1 will provide the basis for understanding the case study examined in chapter 2.

The second chapter will focus on the Rockhopper v. Italy case, with the aim to illustrate the tension between investment protection and environmental regulation.
First, the facts of the case will be set out, including a reminder of Rockhopper's investment in Italy and the environmental regulations that have led to the dispute. It will also investigate the legal arguments put forward by both parties: Rockhopper's claim that Italy's regulations violate the ECT, and Italy's defence claiming that the measures are necessary for environmental protection and compatible with international law. The analysis will include a detailed enunciation and analysis of the tribunal's decision, its legal reasoning and from which perspective it decided to balance investor rights with environmental concerns. This summary of the implications of this case will help undertake a critical assessment of the Tribunal decision in the concluding chapter.

The last chapter will attempt to provide a critical assessment of the decision's consistency with the principles of international law and its broader implications for the field of international investment law. This chapter will examine whether the decision effectively balances investor protection and environmental priorities. It will also detail the possible implications of the decision taken for potential new cases. By reflecting on the lessons learned from the judgment, the chapter will provide insights into potential reforms of international investment law to tackle the issue of sustainability.

Overall, the aim of the research will be to provide a differentiated understanding of the complex dynamics between international investment law and environmental protection, highlighting the challenges and possible paths to reconciling often contradictory interests.

Chapter 1: The Energy Charter Treaty and the Controversy on Environmental Protection

Considering the Rockhopper v. Environmental Protection Act this chapter introduces the connection between the Energy Charter Treaty (ECT) and the expanding environmental protection concerns. The ECT framework is one topic that has been generating a lot of discussion among decision-makers and interested parties.

At first, the general framework of the ECT will be thoroughly examined at the beginning of the chapter. This section aims to give a historical overview of the treaty, highlighting its main goals, its historical background, and important provisions that are especially relevant to understand the legal and political aspects of the Rockhopper vs. Italy case. The purpose of this section is also to explain the ECT in the context of global energy governance.

The suitability of the ECT with goals related to environmental protection is the subject of the following section. The chapter will examine the current discussions and objections regarding the treaty alleged inconsistency with international initiatives to mitigate climate change and advance sustainable development. The topic of discussion will be how the investment protection measures of the ECT have come under close examination for possible violations of environmental laws.

The Rockhopper case and the larger discussion about the treaty future are significantly impacted by Italy's decision to leave the ECT. Therefore, a section analyses Italy's withdrawal, and more precisely the legally significant survival clause in the ECT, together with the subsequent wave of withdrawals by other EU members. Considering changing environmental priorities the analysis will look at how these developments reflect a growing dissatisfaction with the provisions of the ECT.

The chapter will close with a summary of the main ideas covered, emphasizing the key issues that emerge from the investigation. It will pave the way for a better understanding of the case itself.

Overview of the Energy Charter Treaty (ECT): Context, goals, and key provisions of the ECT relevant to the case.

The political background within which the Energy Charter Treaty was originated was established in the late days of the Cold War and by the disintegration of the Soviet Union. In the early 1990s, Western Europe attempted, with the intention of developing a considerable energy security player, to obtain access to the gigantic energy resources of the former USSR and other regions of Eurasia[8]. At the same time, the countries of the Soviet bloc successor wanted to attract foreign investments to renovate their energy infrastructures and develop their resources. The Energy Charter, in this respect, was signed in 1991 with the direct purpose of setting the principles of cooperation in this field.

However, it did not offer exactly what investors and countries were looking for to establish clear objectives and a legally binding framework. For this reason, the ECT was negotiated and signed only in 1994, with the ambition of guaranteeing the security of foreign investment against political risks, of improving energy trade, transit, and settlement of disputes among the states and investors. The treaty came into effect in 1998 and assures against direct or indirect expropriation. It is expressed in Article 13[9], stating that it must be provided that there is instant

[8] Wälde, T.W., 1995. European energy charter conference: final act, energy charter treaty, decisions and energy charter protocol on energy efficiency and related environmental aspects. *International Legal Materials*, 34(2), pp.360-363. (Accessed: 14 September 2024)

[9] Energy Charter Treaty (ECT). (n.d.) Article 13 - Expropriation. Available at: https://www.energychartertreaty.org/provisions/part-iii-investment-promotion-and-protection/article-13-expropriation/ (Accessed: 14 September 2024)

1) *Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:*
    a. *for a purpose which is in the public interest.*
    b. *not discriminatory.*
    c. *carried out under due process of law.*
    d. *accompanied by the payment of prompt, adequate and effective compensation.*

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").
Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency based on the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

2) *The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph 1).*
3) *For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.*

payment by the contracting parties to the foreign investors, and immediate payback should the assets get seized by that country.

Signing States are further under an obligation to concede to investors fair and equitable treatment within the meaning of Article 10 of the ECT[10], including protection against arbitrary and discriminatory actions. Another advantage is that the Treaty further provides a strong dispute settlement mechanism between the investor and the host state, notably through international arbitration with the possibility to circumvent national courts, including their supreme jurisdictions, under Article 26[11], at the heart of the Rockhopper vs. Italy case. The Western Balkan states EFTA[12]/EEA (European Economic Area) nations and the United Kingdom are among the other European nations that have ratified the Treaty. During the Cold War the former USSRs energy-producing and energy-transporting nations established supply chains for energy to Western Europe making up the remaining contracting parties. Even at the time, environmental preoccupations were in the mind of the EU commission with a willingness to reduce CO2 emissions and optimise fossil fuel transportation. Scholars believed that the Treaty was leading Europe in a good direction for the reduction of CO_2 emissions through an optimised energy supply chain.

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[10] Article 10(1), ECT: Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security, and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

[11] Article 26(1) ECT: Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

Article 26(2) ECT: If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

a. to the courts or administrative tribunals of the Contracting Party to the dispute.
b. in accordance with any applicable, previously agreed dispute settlement procedure; or
c. in accordance with the following paragraphs of this Article.

[12] "The European Free Trade Association (EFTA) is the intergovernmental organisation of Iceland, Liechtenstein, Norway and Switzerland, set up for the promotion of free trade and economic integration between its members, within Europe and globally." EFTA official website. Accessed at: https://www.efta.int/ (Accessed: 14 September 2024)

Rockhopper Exploration brought a claim against Italy after legislation[13] banned new oil and gas exploration activities near the Adriatic coast, thereby affecting the company's investment in a petroleum project. Using the terms of the ECT, Rockhopper claimed that this legislative change "directly expropriated investments without compensation" and therefore violated Art. 13, and that it further breached the obligation for "fair and equitable treatment". Under Art. 26 of the ECT, recourse to arbitration resulted in a ruling that obliged Italy to pay huge compensations to the firm as the ruling went in favour of Rockhopper. This case shows how the ECT will protect foreign investors from changes in national legislation that affect their investments. However, it also very lucidly underlines the challenge of the conflict of protections to investors with state sovereignty in carrying out public policies, especially about the global energy transition. All this will be deepened later in the text.

Fossil fuel investors then have been using the Energy Charter Treaty (ECT) an antiquated investment agreement to fight climate legislation and sue governments for substantial damages in investment arbitration. As nations respond to the climate crisis with greater rigor this trend is predicted to intensify. The International Pannel on Climate Change (IPCC)[14] emphasises that to keep global warming to 1. 5°C, significant emissions reductions must be achieved by 2030. The Investor-State Dispute Settlement (ISDS) mechanism of the Energy Charter Treaty (ECT) is perceived as a significant impediment to climate action by actors such as the Center for International Environmental Law (CIEL), as it may shield fossil fuel investments that are at odds with international climate objectives[15].

[13] Italian Ministry for the Environment. (n.d.) Italy's Environmental Laws and the 12 Nautical Mile Ban. Available at: https://www.minambiente.it/pagina/la-legge-italiana-sulla-protezione-dellambiente (Accessed: 12 September 2024)

[14] IPCC, 2018. *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*. Masson-Delmotte, V., Zhai, P., Pörtner, H.-O., Roberts, D., Skea, J., Shukla, P.R., Pirani, A., Moufouma-Okia, W., Péan, C., Pidcock, R., Connors, S., Matthews, J.B.R., Chen, Y., Zhou, X., Gomis, M.I., Lonnoy, E., Maycock, T., Tignor, M., and Waterfield, T. (eds.). Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 5-6.

[15] Center for International Environmental Law, International Institute for Sustainable Development & ClientEarth, 2022. The New Energy Charter Treaty in Light of the Climate Emergency. Available at: https://www.ciel.org/the-new-energy-charter-treaty-in-light-of-the-climate-emergency/ (Accessed: 14 September 2024)

Finally, a critical component to be mentioned is present in Article 47 of the treaty[16]. The so-called “sunset clause” ensures that investments made during a country's membership continue to be protected for an additional 20 years even after the country withdraws from the treaty. This provision, detailed in Article 47(4), specifies that the treaty's protections and obligations remain in force for 20 years following withdrawal. Article 47(3) supports this by confirming that the treaty's rules still apply to investments made while the country was a member. Essentially, the sunset clause provides long-term security for investors by maintaining protections even if the withdrawing country is no longer part of the ECT.

Current Controversies: Ongoing debates about the compatibility of the ECT with environmental protection objectives.

Today, the very substance of the Energy Charter Treaty is being tested in discussion over compatibility with global environmental and climate goals. What was initially a treaty designed to protect investment in energy during the 1990s has come under criticism due to clauses that could act as a deterrent for governments against taking policy actions for an energy transition.

For instance, instruments safeguarding investors against state expropriation and ensuring a so-called fair and equitable treatment were considered as tools to set up a barrier to more vigorous regulation restricting fossil fuel extraction. In other words, states that set limits on or ban energy projects based on ecological considerations, for example, the exploration and extraction of oil, are liable to be sued by corporations under the ECT to gain monetary compensation. This underscores the obligations of states under their climate commitments, especially the Paris Agreement[17], and the rights of investors that the ECT guarantees have been granted by their governments.

[16] Article 47(3), ECT: The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party’s withdrawal from the Treaty takes effect for a period of 20 years from such date.

[17] At the 21st Conference of the Parties (COP21) in Paris on December 12, 2015, the Paris Agreement was adopted. With efforts to keep the increase to 1. 5°C the goal was to keep global warming well below 2°C over pre-industrial levels. Participants have committed to lowering greenhouse gas emissions enhancing climate resilience and giving developing countries financial support as part of the agreement. Paris Agreement (2015). *Paris Agreement*. United Nations Framework Convention on Climate Change. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed: 12 September 2024)

In 2023, more than a hundred academics representing a range of disciplines such as economics environmental science and international law formally expressed their concerns to the UK government about the nations "continued membership in the Energy Charter Treaty (ECT)". They expressed concern about the ECTs potential effects on the transition to sustainable energy sources and global climate goals. They are pointing the Investor-State Dispute Settlement (ISDS) mechanism of the ECT as enabling foreign investors to contest laws and rules that they believe have a negative impact on their investments. The researchers note that fossil fuel corporations have been using this mechanism more frequently to file legal challenges against nations seeking to gradually phase out projects involving coal oil and gas in favour of renewable energy sources. Large compensation payouts to investors could in their opinion put a strain on public action and take funds away from "critical" climate initiatives, as the Rockhopper v. Italy case will demonstrate.

Literature emphasizes a lot on the necessity to find a compromise with the existing ECT. Tienhaara and Downie (2018)[18] critically examined the implications of the Energy Charter Treaty (ECT) for renewable energy policies in their *Global Governance*, focusing on investor-state dispute settlement (ISDS) cases. In their opinion, designed to protect foreign investments in the energy sector, the ECT has created "significant risks" for governments attempting to transition towards renewable energy.

The authors highlight how ISDS mechanisms under the ECT have enabled investors in the field of energy to sue states for policy changes, including those aimed at promoting the "noble cause" of renewable energy. This might create a "regulatory chill," where governments hesitate to introduce reforms for fear of litigation.

To tackle the dissuasive impact on new planet-friendly legislation, Tienhaara and Downie advocate for reforming or even terminating the ECT. They suggest reforms that could include excluding climate-related policies from ISDS challenges or amending the treaty to explicitly support renewable energy investments.

In addition, and in harmony, a report from the climate change think group E3G[19] stressed the "urgent need" to amend the Energy Charter Treaty (ECT) in view of the "rapidly changing"

[18] Tienhaara, K. & Downie, C., 2018. Risky business? The Energy Charter Treaty, renewable energy, and investor-state disputes. *Global Governance*, 24(3), pp.451-471.

[19] Velasco, I. A., 2022. *ECT modernisation: seven tests for a pro-clean investment energy charter treaty*. E3G. Available at: http://www.jstor.org/stable/resrep45415 (Accessed: 13 September 2024)

political and energy environments. They believe that to assist global clean energy transitions and respond to issues like the conflict in Ukraine, climate change, and the growing need to decarbonize energy systems, the ECT must be modernized. The author of the report, I.A. Velasco, lists some actions that would guarantee that the treaty is in line with contemporary energy objectives and that it encourages rather than discourages investment in clean energy.

The Think Tank suggested a variety of actions that rationally could facilitate a change for the better. The specific propositions are listed as follows:

- "*Clearly delimiting investment protection language*": Specify words carefully to stop fossil fuel companies from suing to impede the energy transition by using "ambiguous wording" in their lawsuits.
- "*Well-balanced expropriation rules*": Establish high criteria to make sure investors can't abuse the treaty to oppose laws that promote climate change.
- "*Exclusion of letterbox companies and other cheats*": Leave out "letterbox" businesses to ensure long-term investors' profit by preventing businesses from abusing investment safeguards.
- "*Full alignment with multilateral reform negotiations*": Comply with multilateral reforms: To ensure fairer arbitration, modify the dispute resolution procedure in line with international initiatives.
- "*Carving out fossil fuel*": By 2025, remove safeguards for investments in fossil fuels like coal, gas, and oil to redirect funds toward renewable energy sources.
- "*Protecting only reliable and proven energy solutions*": Preserve tried-and-true clean energy technology by concentrating investment safeguards on dependable, long-term fixes and ignoring less practical ones like carbon capture or biofuels.
- "*Ensuring consistency with climate and environmental agreements*": Verify that the ECT prioritizes climate policy over the preservation of fossil fuels, in line with the Paris Agreement.

Italy's Withdrawal and Recent Developments: Analysis of Italy's withdrawal from the ECT, the treaty's survival clause, and recent EU-wide withdrawals.

In that vein, Italy's withdrawal from the ECT in 2016 was an unprecedented act in its aim to challenge the treaty from the perspective of climate concerns. In the meantime, the withdrawal

is largely symbolic and yet opens a tangle of complexity. It is important to note that the country will, however, remain bound by the ECT's "survival" or "sunset" clause defined in Article 47(3) and 47(4), defending the treaty's investment protections for investment made before withdrawal for another 20 years. That will mean no prorogation from the costly disputes, like Rockhopper vs. Italy, which might hurt Italy every time it will try to define ambitious energy policy without the allowance for huge compensation.

On the meantime, other European countries were encouraged by Italy's actions to join the cause and question their membership in the ECT. France, Germany, Spain, and the Netherlands have also warned about the problem of harmonizing the ECT with their carbon reduction ambitions. In 2022, these countries had even agreed to leave the ECT simultaneously. Answerability emerges with these withdrawals through the fragmentation of the international legal framework and investment protection while increasing further pressure on negotiations to reform the ECT. To make it even more complicated, discussions of reform require all signatory states to reach a consensus, with third countries that might currently have priorities other than Europe, among them Israel or South Korea having to deal with other complex geopolitical issues.

The situation is such that the inherited legal structures from previous decades will be quite challenging to harmonize with the imperatives of the global energy transition. Over half of the ECTs members are still from the EU and its Member States, nearly all of which being initial contracting parties. At the beginning of 2022, every EU member state was still a party to the treaty except Italy. After ministerial notifications of 2022, France, Germany, Poland and Luxembourg left the Treaty[20].

In 2017 a modernization of the Treaty was launched[21]. Though there was a consensus in 2022 to update the treaty to include goals for clean energy and climate action, there have been a lot of challenges in the way. The UK and other EU members mentioned above made the decision to leave as they believed it would continue to support investments in fossil fuels, undermining efforts to combat climate change. In addition to the EU considering a coordinated exit, the UKs

[20] European Journal of International Law. (n.d.) *Germany, France, and the Netherlands to Exit the Energy Charter Treaty: A Turning Point for International Investment Law?* Available at: https://academic.oup.com/ejil (Accessed: 13 September 2024)

[21] Energy Charter Treaty (n.d.) *Modernisation of the Treaty*. Available at: https://www.energychartertreaty.org/modernisation-of-the-treaty/ (Accessed: 14 September 2024)

official withdrawal is scheduled to begin in April 2025[22]. Since the updated treaty protects fossil fuel investments for several additional years, many critics contend that despite modernization efforts it still does not fully align with global climate goals. The reform process of the treaty has stopped because of some EU nations particularly criticising these flaws. As a result, even though the ECT has undergone some modernization with 15 negotiation sessions since 2017, it is currently in a risky situation due to continuous withdrawals which suggest that the treaty may not remain in effect for exceedingly long.

The following table (table 1) provides an overview of the key developments of the Energy Charter Treaty from 1991 to September 2024.

History and Key Developments of the Energy Charter Treaty (ECT)[23]

Date	Event	Description	Outcome
1991	European Energy Charter	Signing of the European Energy Charter in The Hague by fifty-one countries.	Laid the groundwork for cooperation in energy security, supply, and infrastructure.
1994	Signing of the Energy Charter Treaty (ECT)	The Energy Charter Treaty was signed by over fifty countries, establishing legal grounds for cooperation on energy issues.	Created a legally binding framework for investment protection and energy trade.
1998	ECT enters into force	The ECT officially entered into force after ratification by enough countries.	Legal framework becomes enforceable, covering energy investments and transit.
2009	Russia's Withdrawal	Russia decided to withdraw from the provisional application of the ECT.	Marked a significant blow, with one of the largest energy exporters leaving the framework.
2015	Arbitration Cases Surge	A surge in investor-state arbitration cases under the ECT.	Sparked criticism of the treaty, particularly regarding its investor-state dispute settlement (ISDS) mechanism.
2018	Reform Talks Begin	Member states begin negotiations to modernize the ECT, focusing on sustainable development, energy transition, and reducing carbon emissions.	Effort to align the treaty with the Paris Agreement and global climate change goals.

[22] Department for Energy Security and Net Zero and Stuart, G. (2024) *UK departs Energy Charter Treaty: The UK government confirms its withdrawal from the Energy Charter Treaty after efforts to agree vital modernisation fail*. [Press release] 22 February. Available at: https://www.gov.uk/government/news/uk-departs-energy-charter-treaty#:~:text=The%20UK%20government%20confirms%20its,to%20agree%20vital%20modernisation%20fail.&text=The%20UK%20will%20leave%20the,today%20(Thursday%2022%20February).

[23] Wilson, A.B., 2017. *Energy Charter: A multilateral process for managing commercial energy relations*. Members' Research Service, European Parliamentary Research Service. PE 607.297. Available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607297/EPRS_IDA(2017)607297_EN.pdf

2020	European Commission Criticism	The European Commission raised concerns about the compatibility of the ECT with the EU Green Deal and its goals for decarbonization.	Calls for the EU to push for further reform or withdrawal from the treaty.
2022	France, Spain, and Netherlands Announce Exit	France, Spain, and the Netherlands announced plans to exit the ECT due to concerns over the impact of the treaty on their climate goals.	Intensified pressure for ECT modernization or collapse of the treaty altogether.
2023	Final Modernization Efforts	Discussions around modernizing the ECT to align with climate change goals and reduce fossil fuel protection in investment clauses continued, but with limited success.	Outcome uncertain; EU countries considered further exits amid climate and legal concerns.
2024	UK Announces Withdrawal	The UK officially announced its decision to withdraw from the ECT, citing its incompatibility with net-zero goals. The withdrawal will take effect in April 2025.	Marks another significant exit as major economies turn away from the treaty due to climate concerns.
2024	EU announces Withdrawal	On 30 May 2024, the Council of the European Union adopted the withdrawal proposition from the European Commission to withdraw from the ECT.	The decisions allow the EU's remaining member states the option to support efforts to modernize the treaty, pending a vote during the upcoming Energy Charter Conference.

On behalf of the EU, the Commission had started negotiating an update to the ECT[24] that would align with the Union's energy and climate goals as well as its framework for investment protection. Nevertheless, the EU has not yet voted in favour of the ECT's modernization as Member States do not support it. Subsequently, the Commission suggested that the EU, Euratom[25], and the Member States leave the Treaty, mostly due to worries about safeguarding

[24] European Commission. (n.d.) *Energy Charter Treaty Modernisation*. Available at: https://ec.europa.eu/commission/presscorner/detail/en./ip_24_3513 (Accessed: 12 September 2024)

[25] "*Two treaties were signed on 25 March 1957 - the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom). Among the main aims of the Euratom Treaty are:*

- *promoting research and disseminating technical information*
- *setting uniform safety standards to protect the public and industry workers*
- *to facilitate research*
- *to ensure civil nuclear materials are not diverted to other uses, particularly military.*

The value of Euratom can be seen clearly in the context of enlargement. Nuclear power is an important energy source for many Eastern European countries, but safety standards in their nuclear power plants and the level of protection of the public and workers are not always sufficient. Euratom has provided the context for EU support." European Parliament. (n.d.) *Euratom Treaty*. Available at: https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/euratom-treaty (Accessed: 14 September 2024)

fossil fuel investments. In parallel, progress on the modernization and withdrawal processes was reached with Member States during the first semester of 2024[26].

To be a little more precise, the main objective of the European Commission's plan[27] to amend the Energy Charter Treaty (ECT) is to bring the treaty into compliance with the EUs energy and climate change objectives, especially regarding the European Green Deal[28] and the Paris Agreement. A key component of the reform is the gradual removal of protections for investments made in fossil fuels which would stop businesses from using the treaty as a legal defence against government initiatives to lessen dependency on fossil fuels. This aligns with the claims mentioned in the previous section. The goal of this modification would be to restrict the number of lawsuits that fossil fuel investors can file against states that pass laws addressing climate change. A crucial component of the reform involves guaranteeing that the treaty clearly pledges signatories to respect global climate accords like the Paris Agreement. In addition, the Commission wants to update the ECTs investment protection guidelines to reduce the number of cases that involve the Investor-State Dispute Settlement (ISDS) process. Through this reform investors would have less ability to contest government policies that encourage the switch to renewable energy sources and environmental regulations.

A "fair and just" transition to a sustainable energy system is supported by the proposed reforms provisions that encourage investments in sustainable energy guaranteeing that the treaty promotes investment in renewable energy sources. To go further into the process, in updating the ECT, the Commission seeks to protect investments compliant with green energy policies while ensuring that it no longer prevents EU efforts to decarbonize its economy.

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[26] Council of the European Union (2024) *Energy Charter Treaty: Council gives final green light to EU's withdrawal*. [Press release] 30 May. Available at: https://www.consilium.europa.eu/en/press/press-releases/2024/05/30/energy-charter-treaty-council-gives-final-green-light-to-eu-s-withdrawal/pdf/ (Accessed: 14 September 2024)

[27] Directorate-General for Energy (2023) *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*. 7 July. Available at: https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en#:~:text=The%20EU%20and%20its%20Member,and%20energy%20and%20climate%20goals. (Accessed: 14 September 2024)

[28] "*The European Green Deal is a package of policy initiatives, which aims to set the EU on the path to a green transition, with the ultimate goal of reaching climate neutrality by 2050. It supports the transformation of the EU into a fair and prosperous society with a modern and competitive economy*." European Council and Council of the European Union (n.d.) *European Green Deal*. Available at: https://www.consilium.europa.eu/en/policies/green-deal/ (Accessed: 14 September 2024)

Analysis of this situation was conducted by the International Institute for Sustainable Development (IISD)[29] in 2021, asking for the withdrawal despite remaining binding effects of the "survival clause". The paper also discussed neutralizing this clause and underlined that the strategy was already used in bilateral treaties but had not been tested in multilateral agreements like the ECT. It even stated at the time that a group of states could modify the treaty among themselves, neutralizing the clause without affecting non-withdrawing states.

The previous examples illustrate perfectly how, designed to protect energy investments from political risks and to enhance energy trade, the ECT now faces criticism for potential conflicts with international environmental goals. Italy's withdrawal from the ECT in 2016 highlighted the tension between investor protections and climate change policies, with other European countries following, pushing the EU to abandon the current treaty.

The next chapter naturally leads us to a detailed examination of the dispute between Rockhopper Exploration and Italy, analysing the legal arguments presented by both parties, the tribunal's decision, and its implications for the application of the ECT. This analysis will help us understand the practical challenges of the ECT mutation within the broader context of the energy transition and environmental policies.

[29] International Institute for Sustainable Development (IISD). (n.d.) Energy Charter Treaty Legacy. Available at: https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/ (Accessed: 06 September 2024)

Chapter 2: The Rockhopper vs Italy Case

This chapter examines the arbitration case Italy v. Rockhopper, which highlights the possible conflicts between national environmental laws and foreign investment objectives.

First, a brief overview of the case will be provided, along with background information on Rockhopper's Italian investment and any relevant local environmental laws that may affect this ambitious project. Subsequently, we will examine the legal arguments presented by both parties: On the one hand, Italy asserts that its laws adhere to legal standards, whereas Rockhopper claims that there have been violations affecting their investment. A detailed analysis of the tribunal's ruling will help elucidate the reasoning and legal principles that led to this decision. Overall, this chapter will help us understand the case and will give us all the necessary tools to undertake a critical analysis.

Case Facts: Description of Rockhopper's investment in Italy and the relevant Italian environmental regulations.

Back in 2002, the Italian gas company Concordia S.p.A. applied for an offshore exploration permit for the Ombrina Mare project[30]. Approved in 2005 and named after a fish[31], the "Ombrina Mare," the exploration project began in 2008, but from the start, faced opposition from local citizens who formed the "No Ombrina" movement[32]. The group found the permit problematic as it had been granted without conducting a prior impact assessment. On December 17th, 2008, Medoil Gas Italia S.p.A., which had since taken over the permit, applied for a concession to extract gas and oil.

On April 20th, 2010, the Deepwater Horizon platform exploded in the Gulf of Mexico[33], triggering the worst oil spill in history. Nearly 800 million litters of oil were spilled, covering

[30] Arcuri, A., 2023. On how the ECT fuels the fossil fuel economy: Rockhopper v Italy as a case study. *Europe and the World: A law review*, 7(1), pp.3. Available at: https://doi.org/10.14324/111.444.ewlj.2023.03 (Accessed: 14 September 2024)

[31] Caron, F., 2023. Ombrina: The Mediterranean fish with delicate and prized flesh. *Seafood Source*. Available at: https://www.seafoodsource.com/ombrina (Accessed: 14 September 2024)

[32] Buonomo, G., 2016. Giampiero Buonomo. *Diritto Pubblico Europeo-Rassegna Online*, (1), pp.14-27

[33] Environmental Protection Agency (EPA), 2024. *Deepwater Horizon – BP Gulf of Mexico Oil Spill*. Available at: https://www.epa.gov/deepwaterhorizon (Accessed: 14 September 2024)

an estimated 149,000 km² with oil slicks. Interestingly, Transocean, the company operating Deepwater Horizon, also owned the Galloway platform, which was used in the Ombrina Mare project. Considering the dangers posed by offshore platform explosions, the Italian government introduced the Prestigiacomo Decree in 2010[34], prohibiting oil extraction within 5 nautical miles of the coastline and 12 nautical miles from protected areas. With over 100 public objections and the Prestigiacomo Decree in place, the Technical Committee for environmental assessments issued a negative opinion on the permit.

Consequently, in 2010, Law No. 128 was enacted, prohibiting any new offshore drilling projects and thereby casting doubt on the project's viability. Article 1(1) of Law No. 128 of 2010[35] is significant as it addresses the regulatory framework for oil and gas exploration in Italy, which is central in the Rockhopper case. The law introduced changed the regulatory environment for energy exploration and production in Italy, affecting how permits and licenses were handled. The company's claim involving challenges to Italy's regulatory decisions under this framework, it is crucial to underline the implications of this article.

In 2012, the Italian government, led by Mario Monti, passed a new law (the Law Decree on Development[36]) that created an exception to the existing drilling ban (Prestigiacomo Decree). This allowed oil operators, like Medoil, who had already applied for production concessions to resume the approval process for their projects, including the Ombrina Mare oil field.

In January 2013, a Technical Committee fast-tracked the environmental review of Ombrina Mare, giving a positive evaluation. However, the Minister of Environment requested a more comprehensive environmental assessment, called the Integrated Environmental Authorization (AIA), which was more detailed than the standard Environmental Impact Assessment (EIA). Medoil opposed this, arguing it was unnecessary, and took the matter to the Administrative Tribunal (TAR) in Lazio. In 2014, TAR ruled that the AIA was legitimate, as it followed the

[34] Northern Petroleum plc (2011) 'Northern Petroleum's operations unaffected by Italian ban', *Northern Petroleum plc*, 13 July. Available at: https://www.rigzone.com/news/oil_gas/a/109073/northern_petroleums_operations_unaffected_by_italian_ban/ (Accessed: 14 September 2024)

[35] Original text Article 1(1) Law No.128 of 2010 - Legge 24 settembre 2010, n. 128 Articolo: Il presente decreto-legge, in attuazione del principio di semplificazione e di razionalizzazione dell'ordinamento giuridico, stabilisce disposizioni in materia di telecomunicazioni, con particolare riguardo alla semplificazione delle procedure amministrative e alla razionalizzazione delle funzioni di controllo e vigilanza.

[36] Art 35 Decreto Legge 22 Giugno 2012 n 83 (2012) *Gazzetta Ufficiale della Repubblica Italiana*, 22 June.

precautionary principle in Italy's legal system. The same year, Rockhopper acquired Medoil and decided to appeal the TAR decision without success[37].

To avoid the referendum, Law No. 208, adopted in 2015, removed the exemption, effectively subjecting Ombrina Mare to the drilling ban. This directly led to the rejection of Rockhopper's application.

Since then, Italy has enacted additional laws that forbid the exploration for oil and gas within 12 nautical miles of its shore[38]. The aim of these laws is to safeguard delicate marine ecosystems and to take care of the mounting worries regarding the environmental effects of hydrocarbon extraction. Because of this rule, Rockhopper's project was essentially put on hold and no more exploration or extraction was allowed in the area the business had selected. In addition, in line with Italy's international climate commitments, this policy was supported by European environmental rules[39] that focus on protecting natural resources and reducing greenhouse gas emissions.

Legal Arguments

Rockhopper's Claims: Analysis of the arguments presented by company.

Using several legal defences, mostly based on the Energy Charter Treaty (ECT) Rockhopper contested Italy's laws[40]. Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd., and Rockhopper Exploration Plc claimed that Italy's prohibition on oil exploration amounted to a

[37] Tribunale Amministrativo Regionale per il Lazio (Sezione Seconda Bis), 2018. *Sentenza N. 07325/2018 REG.PROV.COLL. N. 06060/2018 REG.RIC.* [online] 02 July. Available at: https://www.giurdanella.it/wp-content/uploads/2018/10/Tar-Lazio-Sez.-II-bis-2-luglio-2018-n.-7325.pdf (Accessed: 14 September 2024)

[38] Among which: Italian Government, 2006. *Legislative Decree No. 152/2006 on Environmental Regulations*; Italian Government, 2016. *Law No. 132/2016 Ratification of the Paris Agreement*.; Italian Government, 2020. *Legislative Decree No. 104/2020 Implementing EU Directive 2019/692*; Italian Government, 2020. *Legislative Decree No. 121/2020 on Renewable Energy Promotion*.

[39] Directive 2008/98/EC on Waste (Waste Framework Directive), Directive 2018/851/EU amending the Waste Framework Directive, Directive 94/62/EC on Packaging and Packaging Waste, Directive 2000/53/EC on End-of-Life Vehicles (ELV Directive), Directive 2006/66/EC on Batteries and Accumulators (Batteries Directive), Directive 2012/19/EU on Waste Electrical and Electronic Equipment (WEEE Directive) and Regulation (EC) No 1013/2006 on the Shipments of Waste.

[40] Rockhopper Exploration plc, 2017. *Commencement of international arbitration against Republic of Italy*. RNS Number 2604A, 23 March. Available at: https://otp.tools.investis.com/clients/uk/rockhopperexploration2/rns/regulatory-story.aspx?cid=441&newsid=856171 (Accessed: 12 September 2024)

direct expropriation of their interests, in violation of Article 13 of the Energy Charter Treaty (ECT). Rockhopper emphasized that this expropriation was unwarranted and that there was insufficient compensation, arguing that it was carried out in breach of the treaty's obligations because of Italy's legislative changes. They argued that the ECT's provisions about fair treatment and sufficient compensation, which are mandated by international law, were not followed during this expropriation.

In addition, Rockhopper claimed that Italy had not complied with Article 10 of the ECT's requirement that it "treat the investment fairly and equally." Rockhopper said that the regulatory changes were "capricious and unforeseen," effectively ending their capacity to continue exploring. The business claimed that this abrupt change in policy severely jeopardized its investment and financial interests because it was implemented without previous consultation. Rockhopper said that their ability to make money from their oil exploration activities, which had been planned and approved in accordance with current laws, had been "negatively harmed" by the suddenness of the prohibition and the lack of any preparatory talks.

The investor's "justifiable expectations," which were predicated on previous promises made by the Italian government, were allegedly broken, according to Rockhopper. The corporation had received reassurance from these pledges regarding the viability of the oil exploration projects. The investor contended that the regulatory modifications violated the fundamental principles of fair treatment inherent in the European Communities Treaty (ECT) and that Italy's actions were a direct contradiction to the guarantees previously granted. Rockhopper highlighted that their expectations about the stability of the legal and regulatory framework were reasonable when they made their investment in Italy, and that this stability was crucial to their choices.

Italy's Defence: Examination of the defender's counterarguments.

Italy on the other side defended its laws, claiming that they were in complete accordance with its international obligations[41] and the standards for environmental protection set forth in several treaties, such as the European Union's Treaty of Functioning (TFEU)[42] and the Paris Agreement

[41] United Nations Conference on Trade and Development (UNCTAD). (n.d.) Rockhopper vs Italy: Investment Arbitration Report. Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/938/rockhopper-v-italy (Accessed: 11 September 2024)

[42] Article 11, TFEU: Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

on climate change[43]. Italy contended that its environmental legislation had been enacted in good faith in accordance with Article 24 of the Energy Charter Treaty (ECT), which permits governments to implement required environmental protection measures so long as they are not discriminatory or unreasonable. According to the state, these actions were necessary to safeguard its natural resources and adhere to the ideas of sustainable development. Italy stressed that its actions complied entirely with the Environmental Covenant of 1989 (ECT), arguing that the rules were a fair and lawful reaction to environmental concerns rather than a breach of the treaty's terms.

Furthermore, Italy emphasized that, in view of the growing environmental concerns connected to oil exploration, the country's national interest "must not be subordinated to Rockhopper's justifiable aspirations." The state contended that investors should fairly anticipate regulatory changes in areas as sensitive as the environment and energy, where standards are always changing to protect "greater public interests." Italy said that since legislation in the extractive industry frequently change in reaction to environmental issues, businesses like Rockhopper ought to have "anticipated" these modifications in their business risk assessments.

Concretely, Italy presented two main legal arguments:

1) the claimants' extractive activities had never begun nor been authorized, which excluded the possibility of expropriation.
2) the legal ban on offshore oil exploration and the subsequent rejection of the claimants' request constituted a legitimate exercise of regulatory powers, thereby making any compensation for the potential economic impact on investors unclaimable.

Italy concluded that its environmental policies were both legal and compliant with larger international agreements pertaining to public welfare preservation and sustainable development. Italy contended that these steps represented a reasonable and progressive approach to resource management since they put the long-term health of the environment ahead of immediate financial gain. Considering this, the state maintained its position, claiming that

[43] United Nations Framework Convention on Climate Change (UNFCCC). (n.d.) Italy and the Paris Agreement. Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (Accessed: 13 September 2024)

its environmental laws were neither unjustifiable nor discriminatory but rather an essential response to the increased emphasis on environmental preservation around the world.

Tribunal Decision: Review of the tribunal's conclusions and the legal basis for its decision.

The tribunal responsible for adjudicating this case was composed of Klaus Reichert (Germany/Ireland, President), Charles Poncet (Switzerland, appointed by the claimants Rockhopper), and Pierre-Marie Dupuy (France, appointed by the respondent Italy). Klaus Reichert, Charles Poncet, and Pierre-Marie Dupuy are known for being prominent legal experts in international law. Klaus Reichert is a respected arbitrator and barrister, Charles Poncet is a Swiss lawyer specializing in arbitration, and Pierre-Marie Dupuy is a distinguished French professor and scholar in international law.

In the end, the international arbitration panel decided in Rockhopper's favour, concluding that Italy had broken the Energy Charter Treaty[44]. The panel held that Italy's restriction amounted

[44] International Centre for Settlement of Investment Disputes (ICSID), 2022. *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14). Award. Klaus Reichert, Charles Poncet, and Pierre-Marie Dupuy, Tribunal. Secretary: Paul-Jean Le Cannu. Date of dispatch: 23 August 2022. Available at: https://climatecasechart.com/non-us-case/rockhopper-v-italy/ (Accessed: 12 September 2024)

Extract from the Award:

For the reasons set forth above, the Tribunal decides as follows:

(1) Declares that the Tribunal has jurisdiction to decide this dispute under the ECT and the ICSID Convention and denies the Respondent's preliminary objections to the Tribunal's jurisdiction to decide the Claimants' claims;

(2) Declares that the Respondent has violated its obligation under: Article 13 of the ECT (the obligation not to unlawfully expropriate the Claimants' investment).

(3) Orders the Respondent to pay compensation to the Claimants in the amount of EUR 184,000,000.00 (pre-tax) and EUR 6,675,391 for decommissioning costs.

(4) Awards pre- and post-award interest at EURIBOR +4% compounded annually from 29 January 2016 (on any outstanding balance as may be the case from time to time) until payment in full save for the four months from the date of this Award during which period no interest shall accrue, as contemplated in paragraphs 319 and 320 above;

(5) Orders the Respondent to pay the Claimants GBP 3,500,000.00 by way of costs incurred in connection with this arbitration, including fees and expenses of the legal counsel, witnesses, experts and consultants;

(6) Orders the Respondent to pay the Claimant 80% of the expended portion of the Claimants' advances to ICSID, i.e. USD 301,284.18; and

(7) All other prayers for relief are hereby denied.

to a direct expropriation since it rendered Rockhopper's investment worthless without offering sufficient compensation. The panel also recognized that, although environmental conservation is a justifiable objective, Italy's actions were "out of proportion to that goal" and that a more sensible course of action might have been taken.

Regarding Italy's first argument previously mentioned, the tribunal observed that the expropriation action was related to the rejection of Rockhopper Italia's request, rather than to any extraction activity. The tribunal emphasized that the government's decision had deprived the claimants of their specific right to obtain the production concession.

Furthermore, the tribunal was not persuaded by Italy's argument based on police powers. According to the tribunal, the favourable opinion issued on August 7th, 2015, regarding the environmental compatibility assessment meant that all environmental concerns had already been reviewed and solved. Therefore, it was no longer possible to justify a legal expropriation on environmental grounds under sections (a)-(d) of Article 13(1) of the ECT, which outline the conditions a state must meet to avoid an abusive expropriation.

Italy has applied to an annulment of this decision, seeking to stay enforcement. Rockhopper explained[45] that it is exploring funding options to contest this action. They reminded that process may take 18 to 24 months, during which interest on the award will continue to increase.

Overall, the tribunal decided that Italy had not complied with its duty. Notwithstanding the fact that the restrictions were founded on justifiable environmental goals, the investor's reasonable expectations were undermined by their hasty implementation and lack of adequate consultation. Italy was consequently mandated to reimburse Rockhopper for a significant portion of the monetary damages the business suffered, 240 million € with interests, 184 million€ before interests: "*The Tribunal is confident in its judgment that EUR 184 million is the appropriate figure reflecting compensation under the ECT and international law in this case*."[46]

[45] Rockhopper Exploration PLC. (n.d.) Official Website. Available at: https://rockhopperexploration.co.uk/2022/10/request-by-italy-for-annulment-of-icsid-award/ (Accessed: 12 September 2024)

[46] International Centre for Settlement of Investment Disputes (ICSID), 2022. *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14). Award. Klaus Reichert, Charles Poncet, and Pierre-Marie Dupuy, Tribunal. Secretary: Paul-Jean Le Cannu. Date of dispatch: 23 August 2022. pp.105. Available at: https://climatecasechart.com/non-us-case/rockhopper-v-italy/ (Accessed: 12 September 2024)

By looking at the parties' legal arguments and the tribunal's ruling, the case brings to light the fundamental tension that exists between national environmental legislation and the protection of foreign capital, a prominent subject in modern international arbitration disputes. This decision might have a big impact on future arguments over investments in the energy sector and environmental regulations. We will therefore examine arbitration cases concerning national sovereignty in more detail in the upcoming chapter and ask ourselves to what extent nations could reconcile their environmental obligations with the need to draw in international investment.

The following table (table 2) provides a chronology of the main facts regarding Rockhopper vs. Italy case from 2005 to September 2024.

Table 2: Chronological Overview of the (Medoilgas) Rockhopper vs. Italy Case

Step	Date	Details
1. Exploration License Granted to Medoilgas	2005	Medoilgas, an oil and gas exploration company, is granted an exploration license for the Ombrina Mare field, located off the coast of Abruzzo, Italy, in the Adriatic Sea. The company begins exploration work to assess the oil and gas potential in the area.
2. Medoilgas Submits Development Plan	2008	After exploration, Medoilgas submits a development plan for the Ombrina Mare field to the Italian authorities. The plan includes drilling wells and building an offshore platform for oil extraction.
3. Initial Environmental Concerns Raised	2009	Local opposition and environmental groups begin to raise concerns about the potential environmental impact of offshore drilling near the coast, especially in areas reliant on tourism and fishing.
4. Italy Temporarily Suspends Approvals	2010	Due to growing environmental concerns and protests, the Italian government suspends the approval of new oil and gas projects within 5 miles of any coastline. This affected Medoil's plans for the Ombrina Mare field.

5. Rockhopper Acquires Medoilgas	2014	Rockhopper Exploration acquires Medoilgas, including its exploration and development licenses for the Ombrina Mare field. Rockhopper continues the plans for developing the field, aiming to secure final approval from Italian authorities.
6. Italy Expands Drilling Ban	2015	Italy passes a new law expanding the ban on oil and gas exploration and extraction within 12 nautical miles of the coast. This is part of efforts to protect the environment and coastal ecosystems, especially near sensitive areas such as the Abruzzo region. This legislation directly impacts the Ombrina Mare project, effectively preventing its development.
7. Rockhopper Begins Legal Action	2017	After being unable to proceed with the Ombrina Mare project due to Italy's expanded drilling ban, Rockhopper initiates a legal proceeding under the Energy Charter Treaty (ECT). The company claims that the authorities' actions violate its investment protections under the ECT, which guarantees fair treatment and protection from expropriation to foreign investors.
8. Italy's Withdrawal from the ECT	2016	Italy officially withdraws from the Energy Charter Treaty, although its obligations under the treaty still apply for investments made while it was a member. Italy argues that its withdrawal, as well as the environmental rationale for the ban, should limit its liability under the treaty. However, Rockhopper's investment has been made before Italy's exit, making the case eligible for arbitration.
9. Arbitration Process Begins	2017-2022	The arbitration process moves forward with both Rockhopper and Italy presenting their arguments. Rockhopper maintains that Italian legislative changes unfairly deprived it of its investment without compensation, while Italy argues that the drilling ban is a necessary and lawful environmental measure.
10. Arbitration Tribunal Decision	August 2022	The arbitration tribunal rules in favour of Rockhopper, concluding that Italy has violated the ECT by expropriating the company's investment in the Ombrina Mare field. Rockhopper is awarded €190 million (plus interest) as compensation.
11. Italy's Reaction and Future Implications	Ongoing	Italy expresses dissatisfaction with the tribunal's ruling and highlights concerns over the financial burden the award placed on the country. An appeal is still undergoing.

Chapter 3: Legal Critique of the Rockhopper vs Italy Case

After the explanation of what happened, we can now delve into the consequences of the tribunal's ruling in the Rockhopper v. Italy case for international investment law, with a focus on environmental laws. We will start with a thorough analysis of the tribunal's logic, noting how the ruling complies or deviates from accepted norms of international law. After that, the chapter will expand on its analysis to examine the case's broader implications for international investment law, with a particular emphasis on the conflict between environmental protection and investment protection. In conclusion, we will enumerate the main ideas and discuss the case's wider ramifications for upcoming international conflicts.

Critical Analysis of the Decision: Evaluation of the tribunal's decision in light of international law. What lessons can be drawn?

The Tribunal decision was very much criticized by many, illustrated by the Guardian[47] using the word "Outrage" to describe the situation. From a legal point of view, Scholars' analysis on the topic is quite interesting. Several important concerns regarding the status of Investor-State Dispute Settlement (ISDS) are brought to light by the tribunals ruling in the Rockhopper case. The tribunal recognized that there were environmental concerns in this case but in the end the decision seemed to ignore the social and environmental factors that the Italian government had considered. Non-Governmental Organisations such as War on Want[48] consider that the tribunal offered a "narrow view" of an event involving a region and a population with a long history of "legitimate" environmental concerns with government actions taken in response to these concerns.

Regarding countries contemplating withdrawals from the Energy Charter Treaty (ECT) in particular, this interpretation makes doubt emerge on how tribunals will weigh actions taken

[47] Moulds, J., 2021. Outrage as Italy faces multimillion-pound damages to UK oil firm. *The Guardian*, 25 July. Available at: https://www.theguardian.com/business/2021/jul/25/outrage-as-italy-faces-multimillion-pound-damages-to-uk-oil-firm (Accessed: 14 September 2024)

[48] War on Want. (n.d.) 5 things the Rockhopper case tells us about ECT's threat to climate justice. Available at: https://waronwant.org/news-analysis/5-things-rockhopper-case-tells-us-about-ects-threat-climate-justice (Accessed: 14 September 2024)

for environmental reasons in the future within a broader context. The concept of expropriation is central in this dispute. Rockhopper argued that Italy's ban on offshore oil exploration constituted an expropriation without adequate compensation in exchange. The tribunal agreed with Rockhopper, stating that Italy's actions had invalidated Rockhopper's investment.

This interpretation of expropriation is not without debate though[49]. States are free to regulate in the public interest without having to pay compensation, but this case shows how difficult it can be to tell the difference between expropriation and lawful regulation. Critics contend that the tribunal gave precedence to Rockhoppers monetary damages over Italy's entitlement to pursue environmental goals. Italy contended that its policies aligned with global environmental obligations specifically the Paris Agreement which places emphasis on climate action and sustainable growth. Even though Italy's actions served a legitimate public interest the tribunal determined that they were not commensurate with the "harm" that Rockhopper had endured.

Furthermore, the tribunal found that Italy had not complied with the ECTs requirement for "just and equal treatment". This idea protects investors from capricious or unforeseen regulatory changes that might endanger their expectations. The tribunal found that Italy had violated this requirement by suddenly altering its guidelines without first consulting Rockhopper or providing a substitute. It is unclear if Rockhopper could have legitimately ruled out the chance that environmental regulations could change in the future to better support international sustainability efforts. Italy's representative throughout the trial Pierre-Marie Dupuy observed in his Personal Opinion statement that it would have been "almost impossible to conclude that Rockhopper could rightfully and reasonably anticipate an affirmative answer from the Italian authorities".

The ruling also raises concerns about valuing investments that are not active businesses using discounted cash flows[50]. This method has faced criticism for its speculative nature, which is partly responsible for the significant increase in damages awarded over the past 20 years. As

[49] Dolzer, R. and Schreuer, C. (2012) Principles of International Investment Law. Available at: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0097%20%28with%20OCR%29.pdf (Accessed: 13 September 2024)

[50] Discounted Cash Flows (DCF) is a financial valuation method used to estimate the value of an investment based on its expected future cash flows. The DCF approach involves projecting the future cash flows that the investment will generate and then discounting these cash flows back to their present value using a discount rate. This method helps in determining the value of an investment or project, providing information into whether it is undervalued or overvalued. (Brigham, E.F. and Ehrhardt, M.C., 2016. Financial Management: Theory & Practice. 15th ed. Cengage Learning.)

more countries implement energy transition plans, the costs could become extremely high due to the uncertainty about how tribunals apply these valuation methods, especially for investments like Ombrina Mare that lack a history of profitable operations.

Toni Marzal, Senior lecturer at University of Glasgow, asserted in 2023[51] that the climate crisis completely changed our "approach to the future". In his opinion, "anthropogenic global warming" has introduced significant uncertainty and new risks, impacting not just corporate profits but also broader societal stability. With this regard, he clearly calls for a reassessment of how the mentioned risks is evaluated and managed.

Climate change has introduced substantial new risks, including those from potential natural disasters and evolving regulatory measures aimed at mitigating climate impacts. These new risks bring a level of economic uncertainty that challenges traditional asset valuation methods.

In this evolving context, the valuation of fossil fuel assets would in his opinion require a re-evaluation. Traditionally, asset assessments have concentrated on immediate economic benefits, but they would now also consider the long-term uncertainties and potential regulatory changes driven by climate change.

The tribunal in the Rockhopper case, however, did not incorporate these evaluations and risk considerations into its judgment. The idea that the tribunal should address the evolving landscape is rising as the author believing that the absence of consideration may be perceived as inadequate and out of touch with the current realities of climate change.

A report from the World Business Council for Sustainable Development[52] justifies Marzal's preoccupations. Their call for increasing integration of nature-based solutions (NbS)[53] into energy infrastructure underscores the growing risk and financial implications faced by energy companies. Climate concerns are increasing due to new regulations and unpredictable investor

[51] Marzal, T., 2023. *Polluter Doesn't Pay: The Rockhopper v Italy Award*. [online] 19 January. Available at: https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/ (Accessed: 14 September 2024)

[52] Guidehouse, 2023. *Leveraging Nature as an Asset for Energy Companies*. [online] Guidehouse. Available at: https://www.guidehouse.com/insights/leveraging-nature-as-an-asset-for-energy-companies (Accessed: 14 September 2024)

[53] "Nature-based Solutions (NbS) are actions to address societal challenges through the protection, sustainable management and restoration of ecosystems, benefiting both biodiversity and human well-being." IUCN, 2020. *Ensuring effective Nature-based Solutions*. [online] Available at: https://iucn.org/resources/issues-brief/ensuring-effective-nature-based-solutions (Accessed: 14 September 2024)

expectations. As a result, financial uncertainties are also rising. Energy companies are said to be "particularly sensitive" to the effects of natural disasters and severe weather events. They rely significantly on natural resources, like water for cooling and land for energy production, and recent trends show that as these risks increase, so do the financial impacts. For example, damage from natural disasters not only disrupts operations but also leads to substantial repair expenses, affecting profits and investor confidence. This precise point backs Marzal's opinion.

Broader Impact on International Investment Law: Discussion on how the case affects the ability of international investment law to address environmental concerns.

As explained by Paolo Mazzotti, PhD candidate and research fellow at the Max Planck Institute for Comparative Public and International Law[54], this judgment was "much awaited because it was seen as a potential indicator of how ISDS would be used to respond to a new wave of climate policy measures by States."[55] So to say, he clearly stated that The Rockhopper v. Italy case will have a significant impact on how international investment law develops going forward, especially in terms of how it handles environmental issues. The clash between environmental regulation and investor protection is a key takeaway from this case, one that is growing increasingly relevant as more nations impose stricter measures to address climate change.

Whether the current international investment law framework is appropriate for handling disputes arising from environmental legislation is a central topic of contention. Investment treaties, like the ECT[56], were initially intended to draw in foreign investment by offering robust protections against expropriation and guaranteeing equitable treatment, particularly in sectors

[54] The Max Planck Institute for Comparative Public Law and International Law is a leading research institute based in Heidelberg, Germany, focusing on the study of international law, European law, and public law from a comparative perspective. It promotes scholarly exchange and provides research resources, contributing to the advancement of legal understanding and policy development globally. Max Planck Institute for Comparative Public Law and International Law (2024) *The Institute*. Available at: https://www.mpil.de/en/pub/institute/the-institute.cfm (Accessed: 15 September 2024)

[55] Mazzotti, P. (2022) 'Rockhopper v. Italy and the tension between ISDS and climate policy: A missed moment of truth?', *Völkerrechtsblog*, 21 December. Available at: https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/ (Accessed: 13 September 2024)

[56] International Institute for Sustainable Development (IISD). (n.d.) The Energy Charter Treaty and its Impact on Environmental and Climate Policies. Available at: https://www.iisd.org/projects/energy-charter-treaty#:~:text=The%20Energy%20Charter%20Treaty%20(ECT,historic%20withdrawal%20from%20the%20treaty. (Accessed: 12 September 2024)

like oil and gas. Regulating these sectors with restrictions is often necessary due to the environmental policies of many states, particularly considering international agreements such as the Paris Agreement.

Investors in traditional energy sectors may find themselves in conflict with national rules more frequently[57] as states adopt more strict climate policies[58], which could result in additional cases like Rockhopper v. Italy. Illustrating this fact, several countries are advancing bans on fossil fuel exploitation[59]. For instance, Norway has halted new Arctic oil and gas exploration, while France has banned new oil and gas exploration permits effective from 2040. Additionally, the UK aims to end new oil and gas licenses and phase out coal use by 2024 as part of its broader climate commitments. The ruling in this case might create a precedent that incentivizes capitalists to contest environmental laws on the grounds of expropriation, which could stifle state efforts to enact environmental legislation.

According to a researcher of Columbia Center on Sustainable Investment[60], this trend might be lessened if environmental exceptions were more deeply integrated into investment agreements. For investor protections and the requirement for strict environmental regulation to coexist, investment treaties might incorporate environmental exceptions.

[57] Van Harten, G. (2007) Investment Treaty Arbitration and Public Law. Available at: https://academic.oup.com/book/12840 (Accessed: 13 September 2024)

[58] Climate Policy Database. (n.d.) Climate Policy Database. Available at: https://climatepolicydatabase.org/ (Accessed: 14 September 2024)

[59] Anderson, K., 2023. Why the ECT is hindering the fight against climate change. Ecology News updated 27 October. Available at: https://greenly.earth/en-us/blog/ecology-news/why-the-ect-is-hindering-the-fight-against-climate-change (Accessed: 14 September 2024)

[60] Coleman, J. (2020) *Modern Provisions in Investment Treaties: Integrating Sustainable Development*. Columbia Center on Sustainable Investment. Available at: https://ccsi.columbia.edu/sites/default/files/content/docs/Briefing%20Note_Modern%20Provisions%20in%20Investment%20Treaties_July%202020.pdf (Accessed: 14 September 2024)

An example of the effects of inadequate environmental safeguards in treaties is the United Mexican States v. Metcalclad[61] case under North American Free Trade Agreement (NAFTA)[62]. In 2000, Metalclad Corporation an American landfill management firm, filed a lawsuit against Mexico citing the North American Free Trade Agreement (NAFTA). Metalclad asserted that despite prior guarantees, Mexico had breached NAFTA by refusing a permission to run a waste facility there. Expropriation and the equitable treatment of foreign investors were at the heart of the case. The tribunal determined that Mexico's actions amounted to an expropriation without sufficient compensation and decided in favour of Metalclad.

The analysis of experts explains that in its Chapter 11, NAFTA did not contain clear exceptions for environmental protection which explains why the tribunal decided to rule in favour of the investor Metalclad over Mexico's environmental regulations.

On the other hand, by including clauses that expressly acknowledge states' rights to regulate for environmental goals, the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[63] embodies a more balanced approach. To reduce the likelihood of disputes over environmental regulations Article 8(9) of the CETA guarantees that states may adopt or maintain environmental measures without violating treaty obligations. Treaty exceptions that are precisely defined are also necessary as evidenced by the disputes Philip Morris[64] is facing

[61] Bernasconi-Osterwalder, N. and Johnson, L., 2011. *International Investment Law and Sustainable Development: Key cases from 2000-2010*. [online] IISD. Available at: https://www.iisd.org/publications/international-investment-law-and-sustainable-development-key-cases-2000-2010?q=library/international-investment-law-and-sustainable-development-key-cases-2000-2010 (Accessed: 13 September 2024)

[62] Aiming to lower trade barriers and boost economic cooperation between the United States, Canada and Mexico, NAFTA was implemented in 1994. The United States-Mexico-Canada Agreement (USMCA) took the place of NAFTA on July 1, 2020.

[63] McDougall, A. de L., Nyer, D. and Odynski, K., 2024. *Charting a new course: proposed expedited dispute resolution procedures for CETA*. [online] White & Case. Available at: https://www.whitecase.com/insight-alert/charting-new-course-proposed-expedited-dispute-resolution-procedures-ceta (Accessed: 14 September 2024)

[64] Philip Morris International Inc. is a global tobacco company known for its extensive portfolio of cigarette brands, including Marlboro and L&M.

with Australia[65] and Uruguay[66] for anti-smoking measures. Despite being focused on public health, these cases demonstrate the wider effects of treaty provisions on regulatory autonomy. Explicit environmental exceptions in treaties could provide clarity avert similar disputes and lower the expenses and complexity of legal disputes. Investment treaties with clear environmental exceptions may help future tribunals better strike a balance between environmental objectives and investor rights. NAFTA, CETA and the Philip Morris cases can serve as examples of how important it is to have clear regulatory provisions helping avoid conflicts and guarantee environmental protection.

As mentioned above, an intriguing point that raises important questions is the evaluation method based on discounted cash flows for investments that are not active businesses. Valuation methods like discounted cash flow have been criticized in the context of the Rockhopper v. Italy trial as overly speculative and partly responsible for the significant increase in the number of damages awarded in past years. As more countries embark on energy transition plans, the uncertainty surrounding the use of income-based valuation methods by courts, especially for investments without a track record of profitable operations, such as Ombrina Mare, could make the implementation of these plans exceedingly costly.

Valuation techniques such as asset-based approaches[67] or market comparable are proposed as more applicable substitutes for the discounted cash flow (DCF), especially for arbitration proceeds under the ICSID framework and pertaining to non-operational investments. Asset-based techniques, which provide a clear and less speculative estimate, are based on the net

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[65] Spooner, G. and Leong, S., 2016. *Philip Morris Asia v Australia: Tobacco plain packaging BIT dispute*. Norton Rose Fulbright. Available at: https://nortonrosefulbright.com/en/knowledge/publications/ded9c356/philip-morris-asia-v-australia#:~:text=On%20December%2017%2C%202015%2C%20the,the%20Agreement%20between%20the%20Government (Accessed: 15 September 2024)

[66] Olivet, C. and Villareal, A., 2016. *Who really won the legal battle between Philip Morris and Uruguay?* The Guardian. Available at: https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts (Accessed: 15 September 2024)

[67] Asset-based approaches are methods used to determine the value of a company or an investment by assessing the value of its assets. These approaches focus on the company's net asset value (NAV), which is calculated by subtracting the total liabilities from the total assets. The idea is to provide an estimate of what the business would be worth if it were liquidated, with all assets sold off and all liabilities paid.

Pike, R, Neale, B, Linsley, PM & Akbar, S 2018, *Corporate finance and investment: decisions and strategies*. 9th edn, Pearson Education. Pp 112-132 & 270-297. Available at: https://api.pageplace.de/preview/DT0400.9781292208589_A35840178/preview-9781292208589_A35840178.pdf (Accessed: 15 September 2024)

value of an organization's assets. This approach is especially useful for investments that do not have projected cash flows. Contrarily, market comparable evaluate value by a comparison of comparable market transactions, providing a reality-based valuation that takes into account current market conditions. In situations where cash flow estimates are ambiguous or unfeasible, these techniques are frequently thought to be more trustworthy than DCF, guaranteeing a more equitable and realistic evaluation of value.

The complexity of international investment law at the intersection of national environmental legislation is shown by the Rockhopper v. Italy case. The tribunal's ruling supported the investor, but it also brought up important issues regarding how far nations might go in enforcing public policy without going against their international commitments. The case also emphasizes how, as governments work to safeguard foreign investments while fulfilling their climate obligations, international investment law will increasingly need to change in response to environmental concerns.

Therefore, this case demonstrates not only the fragility of the balance between investor rights and state regulatory power, but also the possibility of future court conflicts over climate policies. The consequences are extensive: without specific provisions in investment treaties regarding environmental legislation, similar arguments may become more common, obstructing attempts to tackle climate change while preserving investors security.

Interviewed in February 2021, before the judgment, Giacomo Aiello, Italian State Attorney, stressed the fact that "private arbitration" was becoming a "Russian roulette"[68]. He explained that the numerus cases like the Rockhopper v. Italy, 11 at the time on the energy topic, were putting a lot of pressure on the State. However, he recognised that the issue with the Ombrina Mare zone was the potentially most expensive, the other cases being usually much less important in terms of compensation claims. In his opinion, the defeat against Rockhopper would be very dangerous for the Italian State and would encourage other companies involved in the expropriations to sue Italy.

Another remarkably interesting point the attorney underlined was the validity of such rulings. The issue at hand is that despite the European Court of Justice (ECJ) ruling against intra-EU

[68] Maggiore, M., 2021. *Giacomo Aiello, Italian State Attorney: "Private arbitration is becoming a Russian roulette"*. Investigate Europe, 23 February. Available at: https://www.investigate-europe.eu/fr/posts/italian-state-attorney-giacomo-aiello-fr (Accessed: 13 September 2024)

disputes, international arbitrators might disregard this ruling. For an arbitration award to be enforceable, it requires a "homologation" ruling by a court from any country, as stated in the 1958 New York Convention on the Enforcement of International Arbitration. Without this, the award cannot be enforced to obtain compensation from a State. As EU courts are refusing to enforce such awards, companies or States may ask for its enforcement in other countries, sometimes facing challenges. Spain was for example confronted with enforcement in Australia.

In fact, the High Court of Australia has upheld the enforcement of a €101 million arbitral award against Spain under the ICSID Convention[69], affirming that Spain's ratification of the convention constituted a waiver of its sovereign immunity from recognition and enforcement proceedings in Australian courts. The Court clarified that while Spain's was immune from execution, the seizure and sale of state property to satisfy the judgment was intact. In some way, the award can still be recognized and enforced as if it were an Australian court judgment. This decision underlines that states contracting are bound to accept the award's recognition and enforcement but not its execution, unless specified otherwise by local law. This ruling could impact how investors seek enforcement in Australia and potentially influence similar cases in other jurisdictions with comparable laws.

Aiello also highlighted the dangers of fostering a "very profitable arbitration market," as several Anglo-Saxon "super law firms" can secure investment funds to force companies into arbitration that they otherwise would not have been able to afford. Many of them would indeed not have enough cash for legal fees. The lawyers involved profit handsomely from it, but the state loses out on tax revenue from its residents. He claims that ordinary justice would fit better the settlement of cases as Rockhopper v. Italy, by giving more assurance of protection with independent judges and their financial independence.

Despite recognizing that the environmental concerns of Italy were known by Rockhopper before undertaking the investment, the tribunal did not focus its award on this point. In March 2024, Masumi and Hourani denounced this lack of consideration for environmental concern and opened a broader question on the way to incorporate potential environmental damages into

[69] Amorín Fernández, A. and Michael, A., 2023. *The High Court of Australia enforces ICSID Award against Spain and clarifies scope of sovereign immunity defence*. International Arbitration Outlook Uría Menéndez, (11). Available at: https://www.uria.com/en/publicaciones/8496-the-high-court-of-australia-enforces-icsid-award-against-spain-and-clarifes-scop (Accessed: 12 September 2024)

the awards[70]. They explain that the absence of environmental analysis in the award is partly due to a "predominance of cause-and-effect" approach that would not allow efficient analysis of the environmental damages the company would risk facing: "cause-and-effect tests in operationalising environmental damages diminishes the incentive for tribunals to take a longer-term view of climate-related risks".

The two authors also highlight in their article that, according to Andre Nollkaemper[71], environmental harm is caused by a variety of interrelated actors and causes. In the context of climate change, the term "collective action problems" refers to the slow accumulation of discrete, occasionally related activities that, while not meant to have major effects on their own, together cause significant environmental harm. The ongoing emission of greenhouse gases, which is what eventually causes in his opinion climate change, is one such instance. The authors suggest a collective causation theory to overcome the shortcomings of traditional causation theory, which links in their opinion environmental impact to individual and isolated episodes. This method would enable a more comprehensive view of climate change as the result of several unique but connected occurrences that add to the overall issue.

In contrast to a single direct cause, collective causation theory in investment law[72] addresses circumstances in which several actors or factors contribute to the harm or damage suffered by an investor. According to this theory disputes involving investments can involve intricate sequences of events in which the actions of several parties or regulatory rulings have a cumulative effect on an investor's rights or investment value. This method argues that all relevant factors should be considered when determining liability and compensation in investment arbitration even if they are not sufficient on their own to cause the harm. The theory of collective causation can be used to hold the state accountable for instance if a number of regulations implemented by the state significantly lower the investments value. In order to ensure that investors receive fair compensation for the combined effects of several measures

[70] Masumy, N. and Hourani, S., 2024. The invocation of the precautionary principle within the investor–state dispute settlement mechanism: Not seizing the occasion. *Laws*, 13(2), p.22. https://doi.org/10.3390/laws13020022. (Accessed: 14 September 2024)

[71] Nollkaemper, A. (2018) "The duality of shared responsibility", *Contemporary Politics*, 24(5), pp. 524-544.

[72] Tams, C.J. and Tzanakopoulos, A., 2013. The Proper Scope of Lex Specialis in International Law: The Question of "Self-Contained Regimes." *Netherlands Yearbook of International Law*, 44, pp. 19-22.

this enables tribunals to consider a combination of state actions or omissions that collectively cause harm.

Applying the notion of collective causation to environmental harm in the framework of investment law would require a change in the allocation of liability and obligation among investors, businesses, and states, particularly with reference to climate change. Conventional investment law frequently uses distinct, isolated incidents, such as contract violations or outright environmental standard violations, to assign blame. However, environmental deterioration and climate change are complex, protracted processes brought by a range of activities and numerous parties.

The collective causation argument is a tool used by states in investor-state disputes to defend themselves against investor claims (such as those pertaining to environmental restrictions that potentially lower investment profitability). States may contend that, despite influencing a single investment, their environmental laws are required to address the long-term harm brought about by numerous people acting in concert. The actions would be presented as a component of a larger plan to lessen the effects of cumulative environmental damage. In the case of isolated causation claims by investor, states could argue that, when considered in conjunction with other factors, the investor's operations considerably contribute to environmental deterioration, hence justifying strict rules, in response to investor complaints that state actions are unjust or excessive.

Of course, these hypothetical evolutions would need a refreshment of international treaties but the acceptance of collective causation theory in investment law could influence the development of customary international law and set precedents in investment arbitration.

To conclude on a key point, it must not be forgotten that the main reason explaining the condemnation was the so-called “sunset clause” in the Energy Charter Treaty, which requires states to continue protecting investments for up to 20 years even after exiting the treaty. This clause enabled Rockhopper to claim compensation despite Italy’s decision to refuse the concession. Given the evolving global focus on environmental sustainability and climate change, we can reasonably argue that such clauses should be reconsidered in future treaties to better align with societal expectations and environmental needs the society might have to face in the next 50 years. This was highlighted by Italian Mare Vivo Environmental Activist

Foundation in its critical reaction to the dispute settlement[73]: "*If one party leaves, there is a clause that provides (a so-called "sunset" or "zombie") that investments in fossil fuels can be protected for 20 years (Art. 45(3), letter b of the treaty).*"

The author, like many of his international colleagues, sees a day when the Energy Charter Treaty (ECT) is modified to better match with the objectives of the EU's environmental policies as well as the goals of the Paris Agreement. They suggest that the updated ECT should scale off safeguards for current fossil fuel investments progressively and exclude future investments from protection. This would encourage a change to more environmentally friendly energy methods: "*The modernised ECT would allow the contracting parties to exclude new investments from investment protection fossil fuels and to phase out protection for existing investments.*"

Despite this engagement, about 40 nations from the "Global South", including significant fossil fuel producers like China, Indonesia, and several African countries, are thinking about joining the ECT. Due to their large fossil fuel reserves, these nations could make the global energy transition more difficult by widening the economic gaps between the North and South, but this is another topic.

Additionally, the principle of a state's right to regulate in the public interest, particularly for environmental protection, must be clearly articulated within these agreements. Experts like Kate Miles[74], scholar in international environmental law, argue that IIAs should explicitly recognize the state's sovereign right to implement environmental measures without these actions being automatically construed as violations of investor rights. This can be achieved by incorporating "carve-out" provisions that permit regulatory actions aimed at environmental protection, even if they impact investments.

Arbitration procedures can also be reformed to better integrate environmental considerations. As noted by Professor Joost Pauwelyn[75], ensuring that arbitrators with expertise in

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[73] Calabrese, A., 2023. Rockhopper vs Italy: a controversial case. *Blue News*, 10 February. Available at: https://marevivo.it/en/blue-news-en/rockhopper-vs-italy-a-controversial-case/ (Accessed: 12 September 2024)

[74] Miles, K. (2013) 'The Origins of International Investment Law', in *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*. Cambridge: Cambridge University Press (Cambridge Studies in International and Comparative Law) pp. 372-378

[75] Pauwelyn, J. (ed.) (2010) *Global Challenges at the Intersection of Trade, Energy and the Environment. Geneva: Centre for Trade and Economic Integration, Graduate Institute of International and Development*

environmental law are involved in cases where environmental issues are central can lead to more balanced outcomes. Furthermore, the inclusion of mechanisms for third-party interventions, such as amicus curiae[76] briefs from environmental organizations, can bring critical perspectives into the arbitration process, ensuring that environmental impacts are thoroughly considered.

By adopting these strategies, IIAs can promote a sustainable investment environment where economic growth does not come at the expense of the environment. The challenge, as experts like Gus Van Harten[77][78] emphasize, is to find the delicate balance between protecting investor rights and allowing states the necessary space to fulfil their environmental obligations. Through careful drafting and a commitment to sustainable development, it is possible to create an investment framework that respects both the rights of investors and the imperative of environmental protection.

In this regard, treaties in the future may expressly acknowledge the responsibilities of nations under global environmental accords such as the Paris Agreement. These treaties could contain provisions protecting climate policy from accusations of expropriation or they might place restrictions on claims for compensation resulting from actions taken by states to mitigate climate change. As a result, instances like Rockhopper would not impede environmental

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Studies. Pp. 145-175 Available at: https://www.astrid-online.it/static/upload/protected/CTEI/CTEI-CEPR_Global-challenges.pdf (Accessed: 12 September 2024)

[76] Britannica : "*amicus curiae, (Latin: "friend of the court"), one who assists the court by furnishing information or advice regarding questions of law or fact. He is not a party to a lawsuit and thus differs from an intervenor, who has a direct interest in the outcome of the lawsuit and is therefore permitted to participate as a party to the suit.*
An amicus curiae normally may not participate except by leave of the court, and most courts seldom permit persons to appear in such a capacity. The Supreme Court of the United States, however, permits federal, state, and local governments to submit their views in any case that concerns them without obtaining the consent of either the court or the parties. Private persons may appear as amici curiae in the Supreme Court, either if both parties consent or if the court grants permission." Britannica, T. Editors of Encyclopaedia, 2024. *Amicus curiae*. *Encyclopedia Britannica*, 5 January. Available at: https://www.britannica.com/topic/amicus-curiae (Accessed 15 September 2024).

[77] Gus Van Harten is a Canadian legal scholar specializing in Administrative Law, Constitutional Law, and International Investment Law, currently teaching at Osgoode Hall Law School. He has authored several influential books on investor protection and trade agreements and has actively contributed to policy debates and media discussions on these topics.
Van Harten, G., n.d. *Gus Van Harten*. [online] Osgoode Hall Law School. Available at: https://www.osgoode.yorku.ca/faculty-and-staff/van-harten-gus/ (Accessed 15 September 2024)

[78] Newcombe, A. (2008) 'The Modern Law Review', *The Modern Law Review*, 71(1), pp. 147–151. Available at: http://www.jstor.org/stable/25151184 (Accessed: 15 September 2024)

advancement and a more equitable judicial system would be established, better representing the principles of sustainability and climate justice.

Conclusion

Summary of Findings: Reminder of the main conclusions from each chapter.

The Rockhopper vs Italy case has become an emblematic case in the field of international jurisdiction and ECT, which will certainly help to evolve models. During a time of geopolitical transition, the Energy Charter Treaty (ECT) intended to protect energy investments and promote trade. Strong safeguards against political risks as well as procedures for equitable treatment and dispute resolution were among the guarantees it made for foreign investments. However, the ECTs investment protections have come under fire for possibly stalling environmental advancement as climate concerns have grown.

Expropriation and fair treatment clauses in the treaty are seen as roadblocks for governments trying to enact strict climate regulations because they may result in expensive legal challenges from fossil fuel investors. The growing conflict between environmental policies and investment protections is best illustrated by Italy's 2016 withdrawal from the ECT. Italy's withdrawal underscored the difficulty of coordinating international investment agreements with climate goals motivated by its dedication to climate action. The treaty's survival clause which preserves investments made prior to the withdrawal binds Italy even after it leaves. The country's ability to pursue aggressive climate policies without fear of possible legal repercussions is complicated by this situation. To better align the ECT with modern environmental objectives there is a strong push for reform.

The suggested evolutions would include removing safeguards for investments in fossil fuels and strengthening support for renewable energy projects. By implementing these changes, the treaty should help achieve global climate goals rather than hinder them. Nevertheless, many difficulties arise when it comes to updating the ECT. Conflicting interests between signatories frequently impede complicated negotiations. The challenge of modernizing the treaty reflects larger issues with harmonizing legal frameworks with the need to address environmental issues.

Several significant issues emerged in the Rockhopper v. Italy case, highlighting the conflict between national environmental laws and safeguards for foreign investment. Local

environmental groups opposed Rockhoppers venture which began in 2002 with the Ombrina Mare project citing concerns over the absence of an impact assessment. Italian response to the Deepwater Horizon accident in 2010 resulted in stronger laws that forbade oil extraction close to the coast which further complicated the project. Law No. 128 prohibiting fresh offshore drilling had an immediate effect on Rockhoppers undertaking.

In 2012 Italian government extended the deadline for previously applied-for projects under specific restrictions and Rockhopper found itself in a difficult legal position. The central argument put forth by Rockhopper was that Italy had violated the Energy Charter Treaty (ECT) by seizing its investment through legal modifications. The rapid changes in regulations such as the complete ban in 2015 and the additional environmental restrictions led to a trial, with significative compensation demand. Rockhopper argued that these modifications went against the ECTs promise of just and equal treatment, but Italy defended its actions claiming that the environmental laws were both necessary to protect natural resources and compliant with its international obligations. In addition, the State contended that the regulatory modifications were a lawful use of its authority, and that the legal framework permitted such action. Specifically, Italy argued that the prohibition was a legitimate regulatory response to environmental concerns and that compensation was not necessary because Rockhoppers investment had not yet been engaged.

The arbitral panel decided that it constituted a direct expropriation and sided with Rockhopper. The tribunal concluded that although Italian environmental goals were legitimate the country's actions were excessive and poorly explained which undermined Rockhoppers expectations that had been established earlier based on assurances.

An interesting issue in the judgment was the use of discounted cash flow (DCF) to determine the compensation worth. Considering Time-value, the DCF method projects future cash flows to determine the value of an investment. But this method has come under fire for being overly speculative particularly when used for investments like Rockhoppers offshore exploration project, that haven't proven profitable in the past. The DCF method is criticized for relying on speculative future cash flows and performance assumptions about the investment which they claim can result in exaggerated damage awards. This element of speculation may have contributed to the large compensation sum granted in the Rockhopper case.

To tackle the phenomenon and to ensure a more relevant system, alternative approaches could be adopted instead. They include asset-based approaches, which calculates the net value of an investment's tangible and intangible assets, but also market comparable approaches which determine value by analysing comparable market events. Especially for investments without an operational history, these approaches are thought to be less speculative and might offer a more precise assessment of value.

An additional fundamental issue is whether the current international investment structure is appropriate for settling environmental regulation conflicts. The lack of environmental exceptions in many treaties exposes nations to lawsuits, as witnessed in the past, when verdicts frequently benefited investors. Treaties that incorporate specific environmental exclusions, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), strike a better balance between state regulatory power and investor rights by allowing countries to implement environmental measures while adhering to treaties.

The case also highlights the larger issues that international investment law faces in balancing investor safeguards with nations' growing emphasis on climate change policy. The decision highlights the need for more specific treaty provisions to address disputes between investor rights and environmental legislation. One key component is the "sunset clause" in treaties like as the ECT, which requires that investments be protected for up to 20 years after a state exits the pact. This clause was crucial in the Rockhopper case, allowing the investor to seek compensation despite Italy's reluctance to provide a concession due to its environmental standards.

Overall, the case underlined the fragility of the balance between investor rights and state regulatory authority, implying that without clear treaty provisions governing environmental legislation, similar disagreements could stymie attempts to combat climate change. Future treaties must include changes to these clauses to better fit with changing global environmental priorities and social expectations.

Significance of the Rockhopper vs. Italy Case: Reflection on the broader implications for international law.

In terms of how international investment law could develop in relation to changing environmental concerns, the Rockhopper v. Italy case marks a critical turning point. This decision highlights the necessity for the international legal system to change as climate regulations tighten, especially in terms of how it balances investor protection with national sovereignty and the general welfare. Although competition between these objectives is not new, it is anticipated to increase in frequency and significance as the world moves toward decarbonization and sustainable development. Reform of international investment law is required because of the consequences in Rockhopper v. Italy, which show that the current framework is unable to deal with the increasing number of environmental restrictions.

Not to be left apart, the conflict between environmental standards and investor rights is one of the most important lessons to be learned from it. States will progressively enact stringent policies in order to fulfil their international climate obligations, since climate action is at the forefront of global policy conversations. These acts, however, can be in violation of already-existing investment treaties, such as the Energy Charter Treaty (ECT), which was created to promote foreign investment, especially in sectors that heavily rely on natural resources, like gas and oil.

In the future, international law will have to take states' rights to regulate in the public interest more seriously, particularly in the context of environmental protection. The Rockhopper case demonstrates how governments that impose environmental regulations may face severe financial penalties from investment arbitration tribunals, which dissuades the states from taking the required actions. Given the critical need to achieve global climate targets, this is especially concerning since investors may challenge severe environmental rules on the grounds that they amount to expropriation or unfair treatment.

It is also important to highlight the growing significance of the "regulatory chill" issue, which holds that governments may be deterred from enacting environmentally progressive laws by the possibility of expensive arbitration lawsuits. States' climate goals may be stifled by the fear of large financial responsibility for environmental regulation; this tendency is likely to persist until international law changes to give stronger protections for state regulatory autonomy.

As said before, the case strongly suggests that international investment treaties, many of which were designed in an era of minimal environmental regulation, need substantial reform. One path forward is to incorporate clearer environmental exceptions into investment treaties. As evidenced in agreements like the Comprehensive Economic and Trade Agreement between EU and Canada (CETA), which explicitly allows states to regulate for environmental purposes without violating treaty obligations, the future of international investment law may increasingly hinge on the inclusion of similar provisions.

Agreements like the Energy Charter Treaty (ECT) and NAFTA, which governed the decision in Metalclad v. Mexico, are examples of treaties without environmental provisions that run the danger of being seen as antiquated and inappropriate in the present global context of climate urgency. These earlier accords have frequently come under fire for putting investor protection ahead of the interests of the public, especially those related to the environment. The Rockhopper case and similar cases highlight the need for new accords that better strike a balance between the rights of investors and state autonomy to implement environmental rules.

A regrettable difficult situation faces all parties concerned in the present situation as demonstrated by the Rockhopper versus Italy case. Enacting and enforcing policies that are crucial for addressing global climate change is becoming more challenging as states work to meet their climate obligations and adopt stricter environmental regulations. On the one hand they face the prospect of expensive legal disputes and compensation claims. This monetarily burdens governments, and it also deters bold environmental action because of the threat of lawsuits from influential investors. Conversely as national priorities shift toward sustainability and decarbonization investors who entered into agreements based on prior legal and regulatory frameworks now find their investments at risk. The protection of investor rights and the worldwide push for environmental sustainability seem incompatible and this legal dispute contributes to the atmosphere of uncertainty. International investment law ultimately burdens both states and investors making everyone worse off in the long run and effectively undermines efforts to address the climate crisis.

Future Perspectives: Insights on potential future developments in international investment law and environmental protection.

Integrating environmental protection into International Investment Agreements (IIAs) and arbitration procedures, while safeguarding investor rights, requires a nuanced approach that aligns economic interests with environmental sustainability. As we said, experts suggest that one effective method is the inclusion of “green clauses” within IIAs, which explicitly require investors to comply with host country environmental regulations and international environmental standards. According to many, embedding environmental obligations directly into IIAs would ensure that environmental protection is not merely an add-on but a core component of the investment framework.

In the same way, states have the authority to regulate in the public interest, particularly when it comes to environmental protection, and this right should be expressly stated in international investment agreements (IIAs). This might be accomplished by incorporating clauses that let states to enact environmental regulations without these actions being instantly interpreted as breaches of investor rights. This could guarantee that regulatory activities intended to safeguard the environment are acceptable, even if they have an impact on investments.

Environmental factors could also be more effectively included into arbitration proceedings through updating them. Fairer results may result from the involvement of arbitrators with environmental law competence in pertinent instances. Allowing third parties to intervene, as in the case of environmental organizations' briefs, can also yield insightful insights and guarantee that the arbitration procedure sufficiently addresses environmental effects.

These strategies would support the development of an investment climate that strikes a balance between environmental preservation and economic growth. Protecting investor rights while allowing nations to fulfil their environmental obligations is the main difficulty. Future treaties might prohibit compensation claims connected to climate mitigation measures or explicitly recognize governments' commitments under international environmental agreements, like the Paris Agreement. They might also contain safeguards that shield climate policy from being contested as expropriation. This would promote a more equitable and long-lasting legal system and stop legal disputes from impeding environmental advancement.

In the end, how can environmental protection be effectively integrated into the framework of international investment agreements (IIAs) and arbitration procedures without undermining the rights of investors?

To be very concise, we could say that effectively integrating environmental protection into international investment agreements (IIAs) and arbitration procedures would require balancing environmental concerns with the rights of investors. An approach would be to include explicit environmental provisions within the text, setting clear obligations for investors to comply with environmental regulations. These agreements could also incorporate exceptions that would allow states to implement environmental measures without going against investor rights, if these measures are non-discriminatory and proportionate. Additionally, arbitration procedures could be reformed to ensure that environmental considerations are given appropriate weight in disputes, allowing environmental laws to be applied along with investment protections. This approach could reasonably foster responsible investment practices while maintaining investor rights effective, creating a more sustainable investment framework.

The questions one might have after this review is the realism of the proposed solutions, and how fast the legal framework will change in reaction to environmental concerns accelerating at unprecedent pace.

To finish with a cynical point, the situation remains complex because the views of the financial markets and the public, frequently diverging. For example, Rockhopper experienced a sharp increase in its stock price because of successful court decisions. Recently, a monetary settlement with Italy[79] had the same outcome. The financial markets reacted favourably to the news expecting better financial prospects for the company, which is reflected in the increase in stock value. The impact may be less obvious or less significant to most people, especially those who are not directly involved with the company or its investments and those concerned by ecosystems protection. Rockhopper's rising stock price and the settlement in court does not benefit them at all.

Furthermore, wider concerns like the moral ramifications of these settlements, their effects on the environment or other socioeconomic variables may worry the public. As financial markets

[79] Marketscreener. (2022) "Rockhopper Exploration Wins $189 Million Arbitration Against Italy: Shares Surge 106%", *Marketscreener*, 24 August. Available at: https://www.marketscreener.com/quote/stock/ROCKHOPPER-EXPLORATION-PL-4005463/news/Rockhopper-Exploration-Wins-189-Million-Arbitration-Against-Italy-Shares-Surge-106-41403036/ (Accessed: 15 September 2024)

and public opinion are not always in line, this distension makes improvement challenging especially from a public perception. Financial markets react to legal and financial developments by immediately and frequently dramatically altering stock prices, not even addressing the priorities and concerns of society.