INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ROCKHOPPER ITALIA S.P.A., ROCKHOPPER MEDITERRANEAN LTD, AND ROCKHOPPER EXPLORATION PLC

Claimants

and

ITALIAN REPUBLIC

Respondent

ICSID Case No. ARB/17/14

INDIVIDUAL OPINION BY PROFESSOR PIERRE-MARIE DUPUY

The Tribunal constituted to arbitrate this case, including the author of this opinion, who has a long-standing commitment to the defence of international environmental law[1], did not neglect to consider the general context and the concrete issues at stake in the question whether Rockhopper would ultimately be allowed to undertake drilling and exploitation at the *Ombrina Mar* oilfield. This could, in my view, have been emphasised even more in the text of the award[2].

In particular, it seems obvious to the author of the present opinion that the request for an exploitation permit on a site located close to the coast and in an area not devoid of seismic dangers could very legitimately give rise, as it actually did, to the concern and even the manifest disapproval of a large part of the local population. Moreover, this is a maritime region that has already been the subject of numerous drillings, the accumulation of which can be considered a legitimate cause for concern. In the long run, it seems furthermore indeed not unreasonable to have some doubts about the advisability of authorising oil exploitation in an area of this type.

Whatever the case may be, a tribunal constituted on the basis of the Energy Charter Treaty (ECT) is only competent to assess whether or not the host state of the investment breached its obligations under this legal instrument. Of course, this does not mean that the tribunal should refrain from interpreting the provisions laid down in this treaty in accordance with any rule of international law applicable in the relations between the parties, according to the rule codified in Article 31, 3, c) of the Vienna Convention on the Law of Treaties. In this context, two sets of legal grounds could be envisaged to establish the non-compliance of Italy's behaviour with its commitments. The first, under Article 10 of the Treaty, was whether the Claimant had been subjected to unfair and inequitable treatment by the Italian authorities; the second, under the terms of Article 13 of the ECT, was whether it had suffered an expropriation of its investment in conditions that did not comply with the latter provision.

1. With regard to fair and equitable treatment, both the extensive written arguments and the debates on both sides focused for a good part, in this case as in many others, on the question of what the Claimant's legitimate expectations were and to what extent they had been met or disregarded by the Respondent. Consideration of the first question (FET) was, however, dependent on the answer to the second (expropriation): the illegality of the expropriation under Article 13, if proven, would in itself entail Italy's responsibility and obligation to provide compensation for the damage thus created. If the expropriation had been carried out in accordance with the provisions of article 13, the Tribunal would still have had to consider the question of the existence of legitimate expectations, but such was not the case. In other words, it was only because the Tribunal was ultimately led to conclude that there had been

[1] *See* Pierre-Marie Dupuy and Jorge Vinuales, *International Environmental Law*, Second Edition, Cambridge University Press, 2018, 522p.
[2] *See* Award, ¶¶ 5-10.

an unlawful expropriation that it did not have to consider in the body of its award an issue that it had nevertheless discussed extensively in the course of its work, namely whether or not the Claimant could have legitimately expected the successful outcome of its claim for exploitation of the *Ombrina Mare* field.

2. This objectively resulted in an undeniable advantage for the Claimant: in my opinion, it would have been almost impossible to conclude, on the basis of the elements of the case, that Rockhopper could reasonably and legitimately expect a positive response from the Italian authorities to its application for an operating permit. The Respondent was able to demonstrate efficiently that no promise had ever been made by its administration to the investor to that effect, especially since, as confirmed by the Italian Council of State itself, the granting of an exploration permit by a company in no way entailed in domestic law the automatic granting of an exploitation permit[3]. Moreover, in view of the relevant legal context and its still recent development, the Claimant could not ignore that the entire area in question had previously been considered off-limits to drilling because of its immediate proximity to the coast and the very serious concerns that could rationally be entertained with regard to its ecological harmlessness. It was only after this general prohibition that certain exceptions were established, which were precarious and reviewable, and which the Claimant was able to benefit from.

As for the intrinsic profitability of the project itself, this was all the more worrying as other companies had already given up on an operation[4]; this explains the relatively low price at which Rockhopper was able to make its investment in the site in question as late as 2014[5]. Therefore, there was in my view no doubt that the Claimant could not seriously claim that its expectations were legitimate. If the Tribunal had only had to determine whether Italy was liable on this basis alone, I would certainly have answered in the negative. In any event, as already stated, the question of fair treatment was only relevant to establishing Italy's liability if this country had not expropriated the investment concerned under illegal conditions.

3. From this point of view, the Respondent's position ultimately proved to be unsustainable. In this case, as in many others, the provisions of the domestic law of the host State are decisive as it is in application of Italian law that operating permits are granted or refused.

There is no need to return here to the Italian legislative and regulatory developments relevant to the present case (in particular with regard to a prohibition of oil exploitation in the concerned Italian territorial waters as they were successively established in 2010 and then

[3] *See* Award, ¶¶ 103-104.
[4] *Id*., ¶ 96(4).
[5] *Id*., ¶ 242.

modified in 2012)[6]. The pertinent evolution has been carefully studied and even quoted, in Italian as well as in its English translation, in the body of the award.

We will limit ourselves here to returning to the question of whether, beyond a legal period of time elapsing from the obtaining of certain administrative documents (in this case the production of a full and comprehensive impact assessment) the persistent silence of the administration following the formulation by the Claimant of an application for an operating permit automatically led to the granting of the permit.

In this respect, it is regrettable that the arguments put forward by the Respondent in its Counter-Memorial, which were debatable but not lacking in coherence, were far from being convincingly reinforced and decisively consolidated during the cross-examination of witnesses and experts during the oral hearings.

Here again, the text of the award was careful to reproduce, in particular, the answers given by Mr Terlizzese and by Professor Picozza, with regard to the aforementioned question concerning the legal effects of the passing of a very short period of 15 days without a response from the administration. In short, it follows from these testimonies that the Respondent was not able to provide irrefutable proof of the non-applicability of the provisions of article 16.3 of the Presidential Decree of 18 April 1994, N° 484, according to which "*the Ministry* [of economic development] *within fifteen days from the receipt of the environmental compatibility decree by the Ministry of the Environment, issues the decree for the award of the production concession*". Now, one should recall that the Ministry of the Environment had issued on 7 August 2015, the decree stating « *the environmental compatibility of the execution of the project 'Development of the Ombrina Mare deposit* (…)'" and that on 14 August 2015, the Claimant formally wrote to the qualified Ministry, referring to the above mentioned Decree N° 484, and posited that, at the latest, by operation of this provision, the grant of the production concession was legally due on 29 August 2015.

In the end, beyond the evident embarrassment shown by Mr Terlizzese and Professor Picozza, both were finally led to recognise that the time limit set out in the aforementioned provision did indeed constitute the law applicable to the application for a permit filed by the Claimant[7]. It should be noted, in particular, that it is one thing to recognise the actual and practical difficulty of complying with this legal time limit, and another to admit that it did indeed constitute the applicable law at the time.

Under these conditions, and whatever the understanding that all or part of the Tribunal may have had with regard to the environmental concerns expressed in particular by the regional authorities and the populations concerned, the arbitrators could only conclude that the permit requested by the Claimant had indeed been granted, particularly in view of the fact that, after

[6] Award, ¶¶ 99-104.
[7] *See* Tr. Day 5, 191:4-7 (Prof. Picozza); Tr. Day 3, 54:19-23 (Mr. Terlizzese).

the date resulting from the legal time limit, Rockhopper had provided with all due diligence the additional information that the administration had asked it to produce[8].

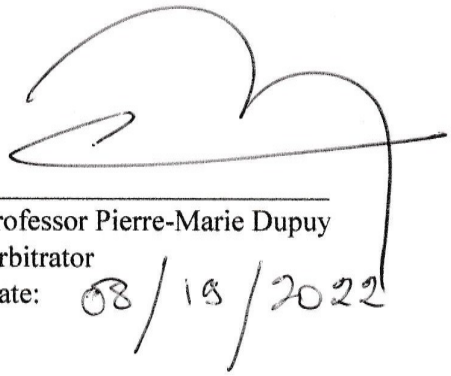
4. It is also certainly true that the precautionary principle, established both at regional, national and international level, could be applied in this case in view of the potential environmental effects of the exploitation of the area concerned. However, it cannot be said that the said principle was neglected by the Italian authorities, since the Ministry of the Environment itself had requested a thorough impact assessment (*Autorizazzione Integrata Ambientale*) from Rockhopper, which was then carried out by the Claimant and fully approved by the competent authorities of the Respondent[9]. This made it impossible for Italy itself to use the same principle to overrule what its own administration had considered appropriate with regard to the protection of the environment.

To sum up the conclusion reached by the Tribunal in this case, there can be absolutely no doubt about the power of the host State to amend its legislation, as it did in the present case with the adoption of the 2016 Law, nor can there be any doubt as to the public interest nature of the reasons that led Italy to adopt this new legislation.

5. Even beyond the finding that the operating licence granted to Rockhopper due to the legal consequences of the administration's silence, it could of course have been admitted that Italy proceeded to expropriate this investment as a consequence of the adoption of the 2016 law. However, this decision would have had to be accompanied, in accordance with the terms of Article 13 of the ECT, by the "payment of prompt, adequate and effective compensation". As a matter of fact, this has not been the case. No compensation was ever paid to the Claimant even though it was in legal possession of a title to exploit the *Ombrina Mare* oilfield.

6. With regard to the calculation of the compensation due by Italy to Rockhopper, one could certainly have had some doubts about the appropriateness of using the DCF method insofar as the exploitation of the *Ombrina Mare* deposit has never begun. There are, however, several precedents in the same direction and the use of the DCF method is still considered, including in the field of oil exploitation, as the reference method[10]. What was most important, however, and allowed me to agree with the solution proposed in the award in terms of compensation was that the baseline used in the award for the calculation of compensation was the actual rather modest value of the *Ombrina Mare* field at the time of Rockhopper's investment in 2014, contrary to the proposals put forward in this respect by the Claimant which were in my view inequitable.

[8] Award, ¶¶ 121-125, 151.
[9] *Id*., ¶¶ 121-125.
[10] *Id*., ¶¶ 219, 281.



Professor Pierre-Marie Dupuy
Arbitrator
Date: 08/19/2022