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Research article

## On how the ECT fuels the fossil fuel economy: *Rockhopper v Italy* as a case study

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## Abstract

The central thesis of this article is that the Energy Charter Treaty can be deployed to expand the fossil fuel industry's rights and contextually counter democratic forces that animate the ecological transition. More specifically, the article shows the entanglement between the suppression of ecological democracy and the expansion of fossil rights. To offer a more granular understanding of how the Energy Charter Treaty empowers the fossil industry, this article zooms in on the case of *Rockhopper v Italy*. The case was launched in 2017 by the UK company Rockhopper against the Italian Republic because the latter denied a production concession for offshore oil drilling off the coast of Italy. After a long process of resistance from local communities, in 2016, the Italian government adopted a law of general applicability banning offshore drilling within 12 nautical miles of the

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coast. Drawing on political theory, this article conceptualises people's successful forms of resistance to the oil extractivist project as ecological democracy. By unpacking the main facts underpinning this case and the legal reasoning in the award, the article shows how the Rockhopper award has bestowed new property rights on the fossil fuel investor while contextually compressing democratic spaces vital for the ecological transition.

**Keywords** Energy Charter Treaty; climate change; ecological democracy; fossil fuel; property rights; precautionary principle

## 1. Introduction

Humanity is headed towards ecological collapse. The scientific community has unambiguously concluded that catastrophe will soon follow if human-induced climate change continues at the current pace. It is simple: to avert disaster, we should stay within the 1.5°C scenario. Confronted with such alarming evidence, people remain somewhat apathetic, carrying on with business as usual. This incapacity to react can be partly attributed to legal institutions, as recognised by the International Panel on Climate Change (IPCC), which mentions 'legal norms designed to protect the interests of owners of fossil assets' as an obstacle to aligning international cooperation with climate mitigation goals.<sup>1</sup> The Energy Charter Treaty (ECT) establishes such norms and is considered one of the stumbling blocks for energy transition.<sup>2</sup> Negotiations to 'modernise' the ECT, launched to remedy some of these deficiencies, have been judged unsatisfactory and have led the European Parliament to adopt a resolution calling on the EU Commission 'and the Member States to start [to] prepar[e] a coordinated exit from the ECT'.<sup>3</sup> In its 2023 non-paper, the EU Commission also portrayed the EU withdrawal as 'unavoidable' given the conflicts with 'EU policy on investment protection and the EU Green Deal'.<sup>4</sup> At the same time, the ECT secretariat has worked to attract several African states to its membership. With the EU working its way out and African states allured to join, it is essential to unpack further how the ECT may foster the fossil fuel economy.

This article contributes to the existing scholarship on the nexus of international investment law and climate policy by offering an analysis of *Rockhopper v Italy*, which shows how the ECT can be deployed to expand the property rights of the fossil fuel industry and to counter ecological democratic forces. By unpacking the main facts underpinning this case and the legal reasoning in the award, I demonstrate how the tribunal has bestowed new property rights on fossil fuel investors and created a right to obtain a concession for the production of hydrocarbons that was nowhere to be found under Italian law. It is further argued that this expansionary interpretation of property rights (and expropriation) is typical of investment law. I also show how the tribunal is eviscerating environmental law of its transformative potential by vilifying democracy. Through problematic interpretative practices, the ECT has acquired thaumaturgic properties enabling the transformation of the ever-expanding aspirations of the fossil fuel industry into property rights. Certainly, the ECT is part and parcel of a more extensive legal system with investor–state disputes (ISDS) mechanisms, whereby the fossil fuel industry can protect its profits and

<sup>1</sup> IPCC, 'Climate Change 2022: Mitigation of Climate Change' (Working Group III Report, 2022), chapters 14–81 <<https://www.ipcc.ch/report/ar6/wg3/>> accessed 15 August 2023.

<sup>2</sup> K Tienhaara and L Cotula, 'Raising the Cost of Climate Action? Investor–State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets' (2020) 49 IIED Land, Investment and Rights series 27 <<https://pubs.iied.org/pdfs/17660IIED.pdf>> accessed 15 August 2023; see also L Di Salvatore, *Investor–State Disputes in the Fossil Fuel Industry* (IISD 2021) <<https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry>> accessed 21 July 2023.

<sup>3</sup> European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)).

<sup>4</sup> EU Commission, 'Non-paper from the European Commission: Next Steps as Regards the EU, Euratom and Member States' membership in the Energy Charter Treaty' <[https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper\\_ECT\\_nextsteps.pdf](https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf)> accessed 21 July 2023.

curb democracy. The ECT is special only insofar as it distinctively covers energy investments, being ‘the greatest contributor’<sup>5</sup> to ISDS claims relating to oil and gas projects.

By focusing on a single case study, the article offers a more granular understanding of how the ECT empowers the fossil industry. *Rockhopper v Italy* can be considered as a ‘critical’ case study; that is, it is a case from which it is possible to generalise.<sup>6</sup> *Rockhopper v Italy* gravitates around the denial of a production concession for offshore drilling close to the Italian coastline. The permit was denied based on a general law banning offshore drilling within five nautical miles of the coast. The circumstances of this case are likely to be recurring when states decarbonise their economies; denials or revocations of permits are to be expected if governments want to stay within the 1.5°C carbon budget.<sup>7</sup> Given the material power of the fossil industry (to be discussed in Section 2), the process of adopting such environmental policies will likely be met by opposition and lobbying, as happened in Italy. Regulatory acts restricting the extraction of hydrocarbons may then come into being, slowly and not always following linear procedures, becoming more prone to attacks under investor–state arbitration. There are no reasons to assume that the Italian regulatory and legislative authorities are more susceptible to lobbying than other countries rich in hydrocarbons. In fact, with a gross domestic product higher than many hydrocarbon-rich countries in Africa and Latin America, Italy may be able to resist the pressure of the fossil industry more effectively. However, the *Rockhopper* case exemplifies how the fossil industry, capitalising on its material and political power to influence domestic regulations, can further deploy the ECT to ostracise climate change policy.

The article is structured as follows. In Section 2, I argue that focusing on the fossil fuel economy, rather than climate change only, may be more productive as it draws attention to the broader ecological crisis and the most significant, responsible actors. I explain how the fossil fuel economy is implicated in the current ecological crisis by offering an overview of the various ways through which the fossil industry harms life on Earth. I then briefly review the wealth of empirical evidence on how the fossil fuel industry has used tactics to delay environmental regulation. By causing massive environmental pollution and successfully lobbying to preserve the status quo, the fossil industry is chiefly responsible for the current socio-ecological crisis. I further argue that the ECT is complicit in delaying the green transition by ossifying and amplifying the fossil industry’s property rights. Section 3 zooms in on the facts underpinning *Rockhopper v Italy*. Here it is shown how environmental regulation that prohibited offshore oil extraction close to the Italian coast was achieved through an intense process of democratic participation. I then expound on the idea that such a form of participation and resistance is to be understood as ‘ecological democracy’. Drawing on political theory, Section 3 briefly explains this concept and concludes that ecological democracy is necessary for transformative change. The section further shows how *Rockhopper* deployed the ECT to contrast the successes of bottom-up civic engagement. In Section 4, I critically review the 2022 *Rockhopper* award and illustrate how the legal reasoning underpinning the award aligns with past arbitral practices, which can be seen as technologies for expanding investors’ property rights. The reasoning in the *Rockhopper* award exemplifies how, in practice, the ECT has been applied to inflate fossil fuel property rights at the expense of ecological democracy and precautionary regulation. Section 5 concludes.

## 2. The fossil fuel economy and the ecological crisis

### 2.1. The negative impacts of fossil fuels

Climate change, one of the most imminent threats to humanity, is interconnected with several risks to life on Earth, such as the loss of biodiversity and land system changes.<sup>8</sup> The fossil fuel economy is an essential driver of the socio-ecological crisis, being responsible for climate change and harming

<sup>5</sup> K Tienhaara and others, ‘Investor-State Disputes Threaten the Global Green Energy Transition’ (2022) 376(6594) *Science* 701–3, at 702.

<sup>6</sup> B Flyvbjerg, ‘Five Misunderstandings About Case-Study Research’ (2006) 12(2) *Qualitative Inquiry* 219–45, at 229 et seq.

<sup>7</sup> K Trout and others, ‘Existing fossil fuel extraction would warm the world beyond 1.5°C’ (2022) 17(6) *Environmental Research Letters* 064010.

<sup>8</sup> In an article published in 2022, 15 scientists concluded that we have already crossed the 5<sup>th</sup> of the nine planetary boundaries. L Persson and others, ‘Outside the Safe Operating Space of the Planetary Boundary for Novel Entities’ (2022) 56(3) *Environmental Science & Technology* 1510–21.

biosphere integrity and human life in multiple ways. There are at least four typologies of impacts of the fossil fuel economy worth mentioning: (1) impacts of oil and gas extractive activities on the local communities and environment; (2) impacts from usage on air quality and the marine environment; (3) impacts from the production of greenhouse gases on ocean acidification; and (4) climate change.

The adverse effects of the fossil fuel economy are first felt at the level of upstream extraction. According to a meta-analysis, an estimated 70,000 oil fields impact approximately 600 million people globally.<sup>9</sup> While there are no systematic studies of the effects of oil extraction, we know that extractive activities cause widespread contamination of soil and water (including surface and drinking water) and harm to wildlife. Upstream oil extraction also entails high mortality and morbidity risks<sup>10</sup> for people living and working in the area, such as increased cancer risks and birth malformations; other risk factors include oil spills and air pollution from flaring. Offshore extraction entails marine pollution, risks to human life and damage to local economies from oil spills.<sup>11</sup> Think, for example, of the Deep-Water Horizon oil spill; it contaminated over 2,000 kilometres of sea shores and killed millions of marine mammals and birds, with its devastating effects on the ecosystem still being felt.<sup>12</sup>

The fossil fuels extracted are mainly burned by cars and power plants. The combustion of fossil fuels causes the production of airborne fine particulate matter (PM<sub>2.5</sub>), which is 'a key contributor to the global burden of mortality and disease'.<sup>13</sup> According to a 2021 study, burning fossil fuels contributes to 'a global total of 8.7 million premature deaths' annually.<sup>14</sup> Fossil fuels are also used to make plastic, a significant stressor for the Earth's ecosystem. In less than 10 years, the production of plastic has doubled, increasing from 234 million tonnes (Mt) in 2000 to 460 Mt in 2019.<sup>15</sup> In 2019 global annual plastic waste amounted to 353 Mt. Aquatic environments are also severely polluted with plastics (109 Mt accumulated in rivers and 30 Mt in oceans).<sup>16</sup> Plastic waste is largely mismanaged<sup>17</sup> and often disposed of in the poorest countries, leading to serious environmental injustice.<sup>18</sup>

Finally, burning fossil fuels is primarily (in)famous for producing anthropogenic greenhouse gases, particularly carbon dioxide (CO<sub>2</sub>): 'Over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions' are attributable to fossil fuels.<sup>19</sup> Not only is CO<sub>2</sub> a significant driver of climate change, approximately 30 per cent of CO<sub>2</sub> is sequestered by the oceans. While this may be good for slowing down climate change,<sup>20</sup> CO<sub>2</sub> leads to ocean acidification disrupting marine

<sup>9</sup> For a meta-analysis of studies about the impacts of oil extractivism, see JE Johnston, E Lim and H Roh, 'Impact of Upstream Oil Extraction and Environmental Public Health: A Review of the Evidence' (2019) 657 *Sci Total Environ*, 188–99. For the sake of simplicity, this overview does not include the effects of unconventional natural gas extraction. For a public health analysis of those effects in the US, see JL Adgate, BD Goldstein and LM McKenzie, 'Potential Public Health Hazards, Exposures and Health Effects from Unconventional Natural Gas Development' (2014) 15 *Environmental Science & Technology* 8307–20.

<sup>10</sup> C O'Callaghan-Gordo, M Orta-Martínez and M Kogevinas, 'Health Effects of Nonoccupational Exposure to Oil Extraction' (2016) 15 *Environmental Health* 56.

<sup>11</sup> Johnston Lim and Roh (n 9).

<sup>12</sup> J Meiners, 'Ten Years Later, BP Oil Spill Continues to Harm Wildlife—Especially Dolphins' (*National Geographic*, 17 April 2020) <<https://www.nationalgeographic.com/animals/article/how-is-wildlife-doing-now-ten-years-after-the-deepwater-horizon>> accessed 15 August 2023; Deepwater Horizon Natural Resource Damage Assessment Trustees, 'Deepwater Horizon Oil Spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement' (*Gulf Spill Restoration* 2016) <[www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Draft\\_ERP-PEIS\\_Part\\_2\\_Chapter\\_4\\_through\\_Chapter\\_9.pdf](http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Draft_ERP-PEIS_Part_2_Chapter_4_through_Chapter_9.pdf)> accessed 15 August 2023. According to a 2020 study, the impacts of the spill were highly underestimated; see I Berenshtein and others, 'Invisible Oil Beyond the Deepwater Horizon Satellite Footprint' (2020) 6(7) *Science Advances* eaaw8863.

<sup>13</sup> K Vohra and others, 'Global Mortality from Outdoor Fine Particle Pollution Generated by Fossil Fuel Combustion: Results from GEOS-Chem' (2021) *Environmental Research* 195, 110754.

<sup>14</sup> Ibid; see also O Milman, "'Invisible Killer": Fossil Fuels Caused 8.7m Deaths Globally in 2018, Research Finds' *The Guardian* (9 February 2021) <<https://www.theguardian.com/environment/2021/feb/09/fossil-fuels-pollution-deaths-research>> accessed 15 August 2023.

<sup>15</sup> OECD, *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options* (OECD Publishing 2022).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., in 2019 only, '22 Mt of plastic materials' leaked 'into the environment'.

<sup>18</sup> K Brigham, 'How the Fossil Fuel Industry Is Pushing Plastics on the World' *CNBC* (29 January 2021) <<https://www.cnn.com/2022/01/29/how-the-fossil-fuel-industry-is-pushing-plastics-on-the-world-1.html>> accessed 15 August 2023.

<sup>19</sup> 'Causes and Effects of Climate Change' (UN, 21 March 2022) <<https://www.un.org/en/climatechange/science/causes-effects-climate-change>> accessed 15 August 2023; M Grasso, 'Oily Politics: A Critical Assessment of the Oil and Gas Industry's Contribution to Climate Change' (2019) 50 *Energy Research & Social Science*, 106–15.

<sup>20</sup> N Gruber and others, 'The Oceanic Sink for Anthropogenic CO<sub>2</sub> from 1994 to 2007' (2019) 363(6432) *Science* 1193–9; for other effects of the extraction of oil and gas, see '7 Ways Oil and Gas Drilling Is Bad for the Environment' (*The Wilderness*

life in the oceans and, according to scientific estimates, potentially impacting the life of up to 3 billion people who depend on marine and coastal biodiversity.<sup>21</sup> All the mentioned effects, from harm to the local communities to air pollution and climate change, tend to be disproportionately felt by poor and racialised communities, exacerbating existing inequalities.

## 2.2. Fossil power v environmental regulation (and justice)

While these effects have been known for a long time, regulation of the fossil fuel economy has been limited at best. Not only has the regulation to mitigate the environmental and public health effects of the fossil fuel economy been under-ambitious, the fossil fuel industry is one of the most subsidised in the world, with direct subsidies amounting to at least US\$447 billion in 2017.<sup>22</sup> A partial explanation for this state of affairs is that the industry has heavily lobbied for obstruction to climate action. According to a 2019 report, ‘the five largest publicly traded oil and gas majors ... have invested over [US]\$1 billion of shareholder funds on misleading climate-related branding and lobbying’.<sup>23</sup> Several updates to this report show how lobbying is an ongoing phenomenon.<sup>24</sup> A rich literature has further documented how the fossil fuel industry, following the playbook successfully established by the tobacco industry, has systematically manufactured doubt to delay regulatory efforts.<sup>25</sup> Next to delaying climate action, the fossil fuel industry has also frustrated regulatory measures to protect biodiversity. For example, research has shown that the International Association of Oil and Gas Producers (IOGP) and the American Petroleum Institute (API) have been some of the leading industrial associations to oppose ‘all major biodiversity-relevant policies and regulations’.<sup>26</sup>

The significant power of the fossil fuel industry has led scholars to talk of a ‘fossil bloc’, constituted of ‘fossil-fuel companies, governments, industry representatives, the financial system, institutions, and international managerial elites’, which work together to nurture the fossil fuel economy.<sup>27</sup> The allegedly equal distribution of power among all citizens exercised by voting is subverted through the monumental work done by the fossil industry to influence decision-making institutions. As the material power of the fossil fuel corporation is converted into political power, the much-needed green transition is being successfully thwarted by the fossil bloc. The ECT can be seen as further entrenching the fossil fuel economy.<sup>28</sup> By preserving the status quo, the ECT poses a paramount obstacle to environmental regulatory action and climate policy.<sup>29</sup> Like other investment agreements, the ECT puts the fossil industry’s property rights on steroids. This is done thanks to provisions on expropriation and fair and equitable treatment that can be, and have been, creatively interpreted to expand investors’ rights.<sup>30</sup>

Crucially, the resistance to fossil fuels is triggered at different levels. A critical juncture for this resistance is at the local level, where those oppressed by the extractive activities, being the most knowledgeable about the socio-ecological violence of the fossil fuel economy, are the first to stand

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*Society*, 9 July 2021) <<https://www.wilderness.org/articles/blog/7-ways-oil-and-gas-drilling-bad-environment>> accessed 15 August 2023.

<sup>21</sup> M Tarakanov, ‘How Carbon Emissions Acidify our Ocean’ (*International Atomic Energy Agency*, 8 November 2022) <<https://www.iaea.org/bulletin/how-carbon-emissions-acidify-our-ocean>> accessed 15 August 2023.

<sup>22</sup> ‘Energy Subsidies: Evolution in the Global Energy Transformation to 2050’ (2020) IRENA <<https://www.irena.org/publications/2020/Apr/Energy-Subsidies-2020>> accessed 15 August 2023.

<sup>23</sup> Influence Map, *Big Oil’s Real Agenda on Climate Change* (2019); Influence Map, *Industry Influence on Biodiversity Policy, A Pilot Study Demonstrating Industry Associations’ Engagement on Biodiversity-related Policy and Regulations*, (October 2022) (*Influence Map on Biodiversity 2022*).

<sup>24</sup> See Influence Map, *Big Oil’s Real Agenda on Climate Change* (2022).

<sup>25</sup> N Oreskes and EM Conway, *Merchants of Doubt* (Bloomsbury 2011); ‘The Climate Denial Machine: How the Fossil Fuel Industry Blocks Climate Action’ (*Climate Reality Project*, 5 September 2019) <<https://www.climateRealityProject.org/blog/climate-denial-machine-how-fossil-fuel-industry-blocks-climate-action>> accessed 15 August 2023.

<sup>26</sup> Influence Map on Biodiversity 2022 (n 23) 3.

<sup>27</sup> M Grasso and D Rodrigues, ‘Disrupting to Decarbonise Socio-Energy Systems: The “Carbon Transformation Axes” Framework’ (2022) 90 *Energy Research & Social Science* 102657 <<https://www.sciencedirect.com/science/article/abs/pii/S221462962200161X>> accessed 15 August 2023. On the power of the fossil fuel industry, see also P Newell and M Paterson ‘A Climate for Business: Global Warming, the State and Capital’ (1998) 5(4) *Review of International Political Economy* 679–703.

<sup>28</sup> For a seminal work on the chilling effects of ISDS on the energy transition, see K Tienhaara (2018) ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ 7(2) *Transnational Environmental Law* 229–50.

<sup>29</sup> Tienhaara and Cotula (n 2).

<sup>30</sup> See, eg, M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 191 et seq. For a more detailed discussion of the expansion of property rights of foreign investors through ISDS, see Section 4.1 below.

up against it (eg the Ogoni people in Nigeria, the Indigenous communities in Ecuador and local communities in Italy). Treating the effects of fossil fuels in isolation risks erasing vital counter-powers. While the recent emphasis on the impact of the ECT on climate action is to be welcomed, there is also a risk of creating blind spots on the adverse effects of fossil fuel, which extends well beyond climate change and on important sites of resistance to the fossil bloc. Against this background, the ECT is studied here, in relation not only to climate change but also to other socio-ecological ramifications of the fossil fuel economy. Shifting the attention to the fossil fuel economy thus serves at least three purposes: (1) to be reminded that the fossil fuel economy is at the centre of the ecological crisis, which includes but also goes beyond climate change; (2) to re-centre the analysis on the causes of ecological collapses, such as fossil extractivism; and (3) to understand how resistance to fossil fuels is born in struggle, typically from the ground up, and how such resistance can be weakened by legal instruments such as the ECT.

### 3. Fossil fuel v ecological democracy: the facts in *Rockhopper v Italy*

#### 3.1. The story of the denied oil concession

In 2017 Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc, three companies incorporated under Italian and UK laws, respectively (hereinafter Rockhopper) complained to an international arbitration tribunal against the Italian Republic. The case, launched under the ECT, concerned the denial of a production concession for offshore oil extraction less than seven kilometres from the Italian coastline. The permit was denied based on a law outlawing offshore drilling near the coast. The law was adopted partly to meet the demands of a well-established *No-Oil* movement, reclaiming an environmentally just, non-oil-driven development model, which persuaded the Italian government to adopt rules protecting the coastal marine environment from offshore drilling. In 2022, the Italian Republic was ordered to pay Rockhopper approximately €240 million (*vis-à-vis* an investment of €36 million). In the following, I briefly describe the complex facts leading to the denial of the production concession. At the end of this section, a table with a synthetic overview of the main points is presented (see Table 1 below). For analytical tractability, I have grouped the main facts leading to the denial of the concessions into four clusters.

##### 3.1.1. The exploratory permit and the request for a production concession

The story has its roots in 2002 when Italian Gas Company Concordia S.p.A. requested an offshore exploration permit for the Ombrina Mare project, which was granted in 2005.<sup>31</sup> Audaciously named after a fish, the 'Ombrina Mare',<sup>32</sup> the exploratory project started in 2008, and from the outset it faced strong opposition from local citizens who formed the 'No Ombrina' movement.<sup>33</sup> The permit to explore was considered problematic by the movement because it was granted without a prior impact assessment being carried out.<sup>34</sup> On 17 December 2008, Medoil Gas Italia S.p.A., the company to whom the exploratory permit was later transferred, submitted a request for a concession to extract gas and oil.<sup>35</sup>

<sup>31</sup> Exploration Permit B.R269.GC, issued on 5 May 2005. The same day the permit was issued a branch of the company was sold to Società Intergas s.r.l. See Legambiente, 'DOSSIER Ombrina Mare, storie e numeri di un'operazione insensate' (*Issuu*, 10 April 2013) <[https://issuu.com/legambienteonlus/docs/dossier\\_ombrina\\_ver04](https://issuu.com/legambienteonlus/docs/dossier_ombrina_ver04)> accessed 9 February 2023.

<sup>32</sup> Ombrina is a species of fish swimming in the Mediterranean Sea, 'Ombrina: Pesce magro dalle carni pregiate e delicate' (*Alimentipedia*, 21 February 2017) <<https://www.alimentipedia.it/ombrina.html>> accessed 15 August 2023.

<sup>33</sup> M Cernison, 'The No Ombrina/No Triv Protests in Abruzzo: Organisational Models and Scales of Action' (2016) *Cosmos Working Paper Series* <<http://cosmos.sns.it/publication/the-no-ombrinano-triv-protests-in-abruzzo-organisational-models-and-scales-of-action/>> accessed 15 August 2023, and 'Oil drilling project Ombrina Mare, Abruzzo, Italy' (*Environmental Justice Atlas*, 13 May 2021) <<https://ejatlas.org/conflict/estrazione-di-idrocarburi-ombrina-mare>> accessed 15 August 2023.

<sup>34</sup> Legambiente (n 31) 3.

<sup>35</sup> Request for production concession d30 B.C.-MD, discussed in Legambiente (n 31) 5.

### 3.1.2. The 2010 ban on offshore drilling near the coast

In a dramatic turn of events, on 20 April 2010, the Deepwater Horizon rig exploded in the Gulf of Mexico.<sup>36</sup> This was the most severe marine oil spill in history, with almost 800 million litres of oil being spilt into the Gulf of Mexico 'with oil slicks covering an estimated area of 149,000 km'.<sup>37</sup> Incidentally, it is interesting that Transocean operated the Deepwater Horizon jack-up rig. The same company owned the Galloway rig used in the Ombrina Mare project. In the face of the clear risks of disastrous accidents from explosions of offshore oil platforms, the Italian government adopted a law decree in 2010 (named after the Minister proposing it, Decree Prestigiacommo) prohibiting oil extraction within 5 nautical miles of the coastline and 12 nautical miles from protected areas.<sup>38</sup> Confronted with more than 100 critical submissions from the public, together with the Prestigiacommo Decree, the Technical Committee in charge of the environmental assessment released a negative opinion regarding permit issuance. At this point, the permit should have been denied. However, the Ministry of Environment failed to act for about two years. This omission, heavily criticised by Legambiente, one of the leading Italian environmental NGOs,<sup>39</sup> had been particularly favourable for the Ombrina Mare project, as discussed in Sections 3.1 and 3.3.

### 3.1.3. Exceptions to the 2010 ban (re-opening the Ombrina Mare proceeding)

In 2012, pending the denial of the permit, a new law was adopted by a new government led by Mario Monti (Law Decree on Development).<sup>40</sup> This legislative decree carved out an exception to the Decree Prestigiacommo, exempting from the drilling prohibition oil operators who had already submitted a production concession application. The Ombrina Mare procedure could then be re-opened with the Technical Committee fast-tracking the environmental assessment, giving a favourable evaluation of the project in January 2013. The Minister of Environment then requested an additional Integrated Environmental Authorization (Autorizzazione di Impatto Ambientale). This assessment was more comprehensive than the simple Environmental Impact Assessment (EIA) and was deemed necessary for complex cases. Medoil challenged the request for this more comprehensive assessment before the Administrative Tribunal (TAR) in the Lazio region, arguing that it was improper to demand such an assessment. In 2014, the TAR ruled that the Integrated Environmental Authorization, as an expression of the precautionary principle, which is high up in the constitutional hierarchy of the Italian legal system, was legitimately requested by the Ministry.<sup>41</sup> On 11 August 2014, Rockhopper acquired Medoil and decided to appeal the TAR ruling, which the Italian Council of State eventually upheld.<sup>42</sup> Even before the Council of State verdict was issued, in August 2015, based on a positive assessment by the Technical Committee, the Ministry of Environment and the Ministry of Cultural Heritage issued a Decree of Environmental Compatibility for Ombrina Mare.<sup>43</sup> In October 2014, a new national law adopted under the Renzi government made it easier for the central governments to authorise the extraction of hydrocarbons.<sup>44</sup>

<sup>36</sup> 'Deepwater Horizon Oil Spill Environmental Disaster, Gulf of Mexico' (*Entry Encyclopedia Britannica*, 2010) <<https://www.britannica.com/event/Deepwater-Horizon-oil-spill>> accessed 15 August 2023.

<sup>37</sup> See Berenshtein and others (n 12).

<sup>38</sup> Legislative Decree 29 June 2010, n 128, Official Journal (modified Legislative Decree 3 April 2006, n 152 – cd. 'Correttivo Aria-Via-Ippc' [G.U. 11 August 2010 n 186, S.O. n 184]). This Decree is commonly referred to as Decree Prestigiacommo (after the Minister of the Environment who signed it). The Ministry of Environment requested an opinion of the Council of State, which helped clarify that the project Ombrina Mare was fully covered by the prohibition of the new law; see Parere del Consiglio di Stato n 282, 20 gennaio 2012, Numero Affare 00123/2011, also cited in Legambiente (n 31) 7.

<sup>39</sup> Legambiente (n 31) 8. See also the critical comments by the then President of Legambiente, Angelo di Matteo, in LegambienteAbruzzo, 'Dossier Ombrina mare, un'operazione insensata - Tg3' (*YouTube*, 1 May 2013) <<https://www.youtube.com/watch?v=74r5JZTBuj4>> accessed 15 August 2023.

<sup>40</sup> Most specifically see Art 35 Decreto Legge 22 Giugno 2012 n 83 (Decreto Sviluppo) (hereinafter Decree Development); see also Decreto Legge 9 Febbraio 2012 n 5.

<sup>41</sup> Ruling of Lazio Administrative Tribunal 4123, 16 April 2014.

<sup>42</sup> In the Italian legal system, the Consiglio di Stato, translated as the Council of State, is attributed administrative jurisdiction and functions as a court of second instance for trials before domestic administrative courts. See Ruling Council of State, n 943/2016, issued on 17 December 2015.

<sup>43</sup> Ministerial decree n 172/2015.

<sup>44</sup> See Law Decree 12 September 2014 (Sblocca Italia, Unblock Italy Decree).

### 3.1.4. Civic engagements and the final denial of the permit

Citizens coalesced against the 2012 and 2014 laws. Many protests, including pickets in front of the Parliament,<sup>45</sup> were organised, culminating in massive demonstrations attracting 40,000 people in the town of Pescara in 2013<sup>46</sup> and 60,000 in Lanciano in 2014. The struggle against the national laws and the possible issuance of a permit for the Ombrina Mare project trickled up at the national level, with a couple of associations requesting that the regions launch six referenda to abolish parts of the laws that were facilitating oil drilling (the so-called No Triv referenda). The success of such referenda would have meant the prohibition of all extractive projects within 12 nautical miles, with no exceptions.<sup>47</sup> The movement was so successful that the 2016 Stability Law, published on 30 December 2015, introduced new rules that made five out of six referenda unnecessary. The 2016 Stability Law categorically prohibited extraction within 12 nautical miles for all projects, including pending ones.<sup>48</sup> This was the final blow to Ombrina Mare – the project was still pending, and no production concession had been issued. On 29 January 2016, the Italian Ministry for Economic Development sent a letter to Rockhopper, notifying them that ‘the completion of the proceeding and the rejection of the application for the offshore production concession of liquid and gas hydrocarbons called “d 30 B.C.-MD”’.<sup>49</sup>

**Table 1. Diachronic overview of the main facts leading to the denial of the permit.**

August 2002	Gas Company Concordia S.p.A. requests a permit for offshore exploration for oil (d.491B.R.-GC)
5 May 2005	Gas Company Concordia S.p.A. obtains Permit B.R269.GC for offshore exploration to search for oil for six years (no EIA was performed)
28 July 2005	The part of the company owning the exploration permit is transferred entirely to Società Intergas Più S.r.l.
3 November 2006	Società Intergas Più S.r.l. requests a declaration of environmental compatibility for the realisation of explorative wells in the Ombrina Mare project (obtained on 6 December 2007)
22 March 2008	G.H. Galloway jack-up rig is built at ca. 6.5 km from the Ortona coastline
16 April 2008	The exploration permits are transferred from Società Intergas Più S.r.l. to Medoil GAS Italia SPA
17 December 2008	Medoil requests a drilling concession for four to six wells

<sup>45</sup> See a reportage of the first day of picket here, Qualenergia Web, ‘Blocca lo Sblocca-Italia, il presidio dei comitati davanti al Parlamento’ (YouTube, 16 October 2014) <[https://www.youtube.com/watch?v=gjN7\\_gaLLYo&t=3s](https://www.youtube.com/watch?v=gjN7_gaLLYo&t=3s)> accessed 15 August 2023; the law decree unleashed strong critiques and a set of targeted protests, known as ‘Block the Unblock Italy’, tailored against the decree; for comment, see Cernison (n 33) and P Dommarco, ‘Lo #sbloccatrivelle di Matteo Renzi’ (Altreconomia, 16 September 2014) <https://altreconomia.it/lo-sbloccatrivelle-di-matteo-renzi/>.

<sup>46</sup> The demonstration was supported by a big coalition, including ‘the [Abruzzo] Region, ... 178 Organisations, 3 Dioceses, 3 National Parks and 47 Local Municipalities’, see Cernison (n 33) 11.

<sup>47</sup> The associations were Coordinamento No Triv, A Sud Ecologia and Cooperazione ONLUS. For an overview of the referendums procedures, see <[https://it.wikipedia.org/wiki/Referendum\\_abrogativo\\_in\\_Italia\\_del\\_2016](https://it.wikipedia.org/wiki/Referendum_abrogativo_in_Italia_del_2016)> accessed 15 August 2023.

<sup>48</sup> See Art 1(239) Legge 28 dicembre 2015, n 208 (Stability Law 2016). For an account of the rules modified by the 2016 Stability Law, see ‘Sviluppo economico e politiche energetiche Interventi in materia di autorizzazioni alla prospezione, ricerca e coltivazione di idrocarburi: le trivellazioni’ <[https://temi.camera.it/leg17/temi/le\\_trivellazioni](https://temi.camera.it/leg17/temi/le_trivellazioni)> accessed 15 August 2023. For the final rejection of the Ombrina Mare project see Comunicazione 29 gennaio 2016, n 2457. Chiusura del procedimento e rigetto dell’istanza di concessione di coltivazione ‘d 30 B.C.-MD’ (29 January 2016) 8(2457) *Bollettino Ufficiale Degli Idrocarburi e Delle Georisorse* [Official Bulletin of Hydrocarbons and Geo-Resources] 9.

<sup>49</sup> Letter reported in Legambiente (n 31) 9 and also mentioned in Rockhopper Italia S.P.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v Italian Republic (ICSID Case No. ARB/17/14). Award (23 August 2022) (hereinafter Award). at para 96, pp 23–4.



**Table 1. Cont.**

December 2009	Medoil applied for an EIA to the Ministry of Environment
23 December 2009–25 May 2010	123 observations submitted in the EIA procedure
20 April 2010	Deep Water Horizon accident in the Gulf of Mexico
29 June 2010	Adoption of a law prohibiting the extraction of oil within five nautical miles from the coastline and 12 nautical miles from the coastline of protected areas (Decree Prestigiacomo)
7 October 2010	Negative Advice of the Technical Committee on Environmental Impact Assessment
7 October 2010–22 June 2012	Nineteen months of inaction by the Ministry of Environment, which should have issued a decree of environmental incompatibility
22 June 2012	The adoption of a law exempting oil operators who had already submitted an application for a permit from the prohibition of drilling within the five nautical miles
25 January 2013 3 April 2013	A favourable assessment of the Ombrina Mare project by the Technical Committee on Environmental Impact Assessment (opinion 1154, subsequently confirmed by opinion 1192)
13 April 2013	Massive protest in Pescara (40,000 people)
9 July 2013	Ministry of Environment orders to integrate the evaluation process with an Integrated Environmental Authorization
2013	Medoil lodges a complaint before the TAR (lower administrative Court) to annul the Ministerial decision on the Integrated Environmental Authorization
16 April 2014	The ruling by the TAR (lower administrative Court) rejecting the request of Medoil
23 May 2014	No <i>Ombrina</i> protest attended by 60,000 people in Lanciano
11 August 2014	Rockhopper acquires Medoil
2015	Rockhopper appeals the TAR ruling before the Council of State
6 July 2015	The mobilisation for the No Triv referenda starts
7 August 2015	The Ministry of Environment issues the Decree of Environmental Compatibility
December 2015	Council of State upholds the TAR ruling, declaring legitimate the decision of the Ministry to request an additional EIA
30 December 2015	2016 Stability Law introducing a ban on oil extraction within 12 nautical miles for all projects, including pending ones
29 January 2016	Denial of the permit application
14 April 2017	Rockhopper lodges a complaint before an international arbitration tribunal

### 3.2. Ecological democracy at play

Having briefly recounted the facts of the case, it is important to stress that the law prohibiting oil and gas offshore extraction in the coastal zone resulted from a democratic struggle.

In 2018, the IPCC concluded that 'civil society is to a great extent the only reliable motor for driving institutions to change at the pace required'.<sup>50</sup> The sizeable popular mobilisation against offshore drilling in Italian coastal areas squarely fits with what the IPCC alludes to. In this context, environmental struggles are important to *ecological democracy*. According to political theorist Matthew Lepori, ecological democracy should be understood as 'the efforts of ordinary people to leverage a politics of similarity that pairs ecological and democratic goals, forming a demos devoted to the achievement of ecological outcomes on the one hand and democratic outcomes of equality and solidarity on the other'.<sup>51</sup> His theory draws on the radical democratic theory by Sheldon Wolin, in which the idea of demotic formation is central to the conceptualisation of democracy.<sup>52</sup> As Lepori puts it, 'democracy occurs when ordinary people experiencing a common harm, inequality or exclusion catalyse a politics of similarity in order to build a solidaristic collective – a demos – that operates through protest and demand'.<sup>53</sup> In other words, the experience of common environmental harm unites and makes different people similar and animates bottom-up civil society struggles against environmental injustice.

In the case of the resistance to the Ombrina Mare project, ordinary people came together to enact a *politics of similarity* in defence of the environment, with an awareness matured over the years about the nefarious consequences of hydrocarbon extraction for their environment and their economy. In addition to participating in pickets and protests, people organised public debates and popular assemblies.<sup>54</sup> In public debates, civil society articulated many reasons why the project was problematic for the environment, public health and local economic development. At that time, it was public knowledge that the Italian regions where oil and gas were extracted suffered from heavy environmental pollution and increased public health harms (eg higher average cancer rates in the proximities of extraction facilities)<sup>55</sup> and tended to remain economically underdeveloped vis-à-vis other regions.<sup>56</sup>

A feature of the *No-Oil* movement was its engagement with scientists. In fact, within the movement, a committee composed of scientists was established.<sup>57</sup> The scientists involved took the time to evaluate the Ombrina Mare project's risks critically and submitted hundreds of comments to the technical committees assessing its environmental impacts.<sup>58</sup> For example, it was noted that, in the EIA, the seismic

<sup>50</sup> IPCC, 'Global Warming of 1.5°C' (2018) 352.

<sup>51</sup> M Lepori, 'Towards a New Ecological Democracy: A Critical Evaluation of the Deliberation Paradigm Within Green Political Theory' (2019) 28(1) JMHS 76. For a more in-depth discussion of the relationship between ecological democracy and the Ombrina Mare project, see A Arcuri, 'Resistant Governance, Sustainability and International Investment Law: Re-engineering Inclusion' paper presented at the Conference of the European Society of Internal Law (Utrecht University, 31 August 2022) (on file with the author).

<sup>52</sup> S Wolin, 'Fugitive Democracy' (1994) 1 Constellations 11

<sup>53</sup> Lepori (n 51) 76.

<sup>54</sup> Assemblies were held in San Vito Chietino, Pescara and Rome; see 'Tutto l'Abruzzo contro Ombrina' (*Globalproject.info*, 1 April 2015) <[https://www.globalproject.info/it/in\\_movimento/tutto-labruzzo-contro-ombrina/18889](https://www.globalproject.info/it/in_movimento/tutto-labruzzo-contro-ombrina/18889)>, accessed 15 May 2023; 'Blocca lo Sbocca Italia, Report dell'Assemblea di Pescara' (*Stop Ombrina 2015*, 29 May 2015) <<https://stop-ombrina.wordpress.com/2015/05/29/blocca-lo-sblocca-italia-report-assemblea-di-pescara-avvio-dei-gruppi-di-lavoro/>>, accessed 7 January 2016; 'Referendum Sociali, in centinaia a Roma all'assemblea nazionale. Scuola, Trivelle Zero, Inceneritori, Beni Comuni: Si parte!' (*Stop Devastazioni*, 14 March 2016) <<https://stopdevastazioni.wordpress.com/2016/03/14/referendum-sociali-in-centinaia-a-roma-allassemblea-nazionale-scuola-trivelle-zero-inceneritori-beni-comuni-si-parte/>>, accessed 18 March 2016. There were also protests against the Conference of Services, 14 October 2015, in which scientists from one of the No Ombrina Committee were excluded: C Russo, 'Ombrina Mare: Passo indietro del Governo, ma stop al Comitato Scientifico. Il racconto della protesta al Ministero dello Sviluppo Economico' (*Histonium.net*, 16 October 2015) <<https://www.histonium.net/notizie/attualita/36857/ombrina-mare-passo-indietro-del-governo-ma-stop-al-comitato-scientifico/>>, accessed 15 August 2023.

<sup>55</sup> See, for example, the reportage on the area in Sicily region where hydrocarbons have been extracted: M Forti, 'Chi avvelena la Sicilia' [Who poisons Sicily] *Internazionale* (17 April 2015) <<https://www.internazionale.it/reportage/marina-forti/2015/04/17/sicilia-petrolchimico>> accessed 15 August 2023; Linkestia, 'Il cuore nero del petrolchimico di Gela' [the dark heart of Gela] (*YouTube*, 23 February 2013) <<https://www.youtube.com/watch?v=waUra-jE6JU>> accessed 15 August 2023.

<sup>56</sup> See L Pellegrini and others, 'A regional resource curse? A synthetic control-approach to oil extraction in Basilicata, Italy' (2012) 185(1) *Ecological Economics*, 107041; see also E Alliegro, 'Il totem nero. Petrolio, sviluppo e conflitti in Basilicata' [The Black Totem. Petroleum, Development and Conflicts in Basilicata] (2012) 5(1) *Annuaire*, 313–16.

<sup>57</sup> The scientist members of the scientific committee included Francesco Brozzetti, Università D'Annunzio, geologist; Massimo Colonna, chemist; Piero Di Carlo, Center of Excellence, Cetemps Università dell'Aquila, physicist; Maria Rita D'Orsogna, California State University at Northridge, mathematician; Loredana Pompilio, Università D'Annunzio, geochemist; Francesco Stoppa, Università D'Annunzio, vulcanologist, geochemist. See the news article discussing their criticisms: 'Editori, Trivelle, docenti e scienziati per contrastare Ombrina e gli altri progetti' [Drilling, professors and scientists to contrast Ombrina and the other projects] *ChietiToday* (27 May 2015) <<https://www.chietitoday.it/cronaca/scienziati-contro-ombrina-abruzzo.html>> accessed 15 August 2023.

<sup>58</sup> The critical observations submitted in 2010 can be downloaded from MR D'Orsogna, 'Osservazioni relative al Progetto Istanza di Concessione di Coltivazione D 30B.M.C. Progetto Ombrina Mare' 32–3. <http://www.csun.edu/~dorsogna/nodrill/>

risk (which was high) was not properly considered.<sup>59</sup> Furthermore, the type of oil found in the Abruzzo region was sour crude oil, which is more dangerous than other crude oil due to its high concentration of hydrogen sulphide (H<sub>2</sub>S), the ingestion of which is lethal. This increased danger remained unaddressed in the EIAs.<sup>60</sup> The risk of accidentally releasing oil from offshore drilling is serious; in 2003, it was estimated that '38,000 tonnes [of oil] (11,000,000 gallons) worldwide' are emitted each year and that 'those releases from petroleum extraction activities that take place near [the] shore ... can pose significant risks to sensitive coastal environments'.<sup>61</sup> Considering that the Adriatic Sea, where the jack-up rig was located, is a relatively closed sea, these releases are likely, on average, to be more damaging.<sup>62</sup> Serious concerns were also expressed about the installation of the floating production, storage and offloading (FPSO) vessel next to the extractive wells, which was needed to store petroleum. There are about 80 FPSO vessels in the world, and none is close to the coast due to the risks of fire and explosions. The proximity of the FPSO vessel to the coast therefore entails risks that Medoil did not assess.<sup>63</sup> Moreover, the models used by Medoil to calculate emissions into the air were found to be incongruent and based on an inaccurate assessment of winds and climatological conditions.<sup>64</sup> Given that offshore drilling emits substances highly toxic to human life and the environment, such as volatile organic compounds (VOCs),<sup>65</sup> calculation errors may lead to a misappreciation of the health and environmental impacts. The Technical Committee, which released the final positive EIA, did not respond to the many submissions it received from the people, nor did it engage in any substantive dialogue. It is, at best, puzzling that the tribunal does not have a single reference to the debate on the risks of the Ombrina Mare project.<sup>66</sup>

This brief overview shows how popular protest was entrenched in a rational deliberative process, with in-depth considerations of the socioeconomic and environmental harm caused by the Ombrina Mare project.<sup>67</sup> The battles, which have been fought for years, could be seen as a prolonged moment of demotic formation, creating a shared political consciousness and consensus that offshore oil extractivism is toxic for the environment and is unnecessary for the economy. This political consciousness emerged in the 1970s when the people in Abruzzo successfully pushed back other extractivist projects by the petrochemical industry.<sup>68</sup> These bottom-up processes, which eventually led to the denial of the permit, are a hopeful manifestation of ecological democracy.

### 3.3. Harassing democracy

By contrast, the fossil fuel industry has worked against democracy since the beginning. The corporation Medoil lobbied the central government to obtain the drilling permit despite manifest popular resistance against the project. In developing the Italian legal regime on oil extraction, the industry (at that time Medoil) played an active role, arguably triggering the 2012 exception to the 2010 general ban on

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Ombrina2014\_D%27Orsogna.pdf, accessed 15 February 2023. The observations to the 2013 AIA are not retrievable from the Ministerial website, but some can be downloaded from the websites of organizations and single individuals. For a general overview of the activities of the movement, see Cernison (n 33).

<sup>59</sup> See, eg, the comments of F Stoppa, Full Professor in Vulcanology and Geochemistry, reported in <<https://www.ilnuovoonline.it/2013/04/13/sen-passera-e-clini-hanno-violato-la-costituzione-mettendo-a-rischio-il-futuro-dellabruzzo/>> accessed 15 August 2023.

<sup>60</sup> D'Orsogna (n 58) 32–3.

<sup>61</sup> Committee on Oil in the Sea, 'Oil in the sea III: Inputs, Fates and Effects. Divisions of Earth and Life Studies and Transportation Research Bard' (2003) National Research Council of the National Academies, Executive Summary <<https://www.ncbi.nlm.nih.gov/books/NBK220701/>> accessed 15 August 2023.

<sup>62</sup> D'Orsogna (n 58) 78–9.

<sup>63</sup> Ibid., 39–42; see also S Bragonzi, 'Trivellazioni in Adriatico: No a Ombrina Mare 2' (WWF, 29 July 2014) <<https://www.wwf.it/pandanews/ambiente/trivellazioni-in-adriatico-no-a-ombrina-mare-2/>> accessed 15 August 2023.

<sup>64</sup> L Pompilio, 'Observations to the Ombrina Mare Project' 27 July 2013 (OGGETTO: Contrarieta' al progetto Ombrina Mare [Mediterranean Oil and Gas d30 BC MD]) (on file with the author).

<sup>65</sup> NZ Muller, 'Air Pollution Damages from Offshore Energy Production: International Association for Energy Economics' (2014) 35(4) *The Energy Journal* 39–60. Air pollution from offshore drilling also includes the emission of nitrogen oxides, another highly toxic substance; see National Service Center for Environmental Publications, 'NO<sub>x</sub>: How Nitrogen Oxides Affect the Way We Live and Breathe' (1998) US EPA, Office of Air Quality Planning and Standards.

<sup>66</sup> Rockhopper Italia S.P.A., Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v Italian Republic (ICSID Case No. ARB/17/14). Award (23 August 2022).

<sup>67</sup> For a comprehensive analysis, see D'Orsogna (n 58). For a short overview of some of the concerns around the project, see Section 4.2 below.

<sup>68</sup> See E Graziani, 'La Sangro Chimica: Una vittoria per il futuro' *La società siamo noi/20* (Ires Abruzzo Edizioni 2009).

offshore oil extraction near the coastline. While macro data on fossil fuel influence on regulatory policy is being produced,<sup>69</sup> it is difficult to prove the existence of lobbying on specific cases, let alone a causal relation between lobbying and adopting a particular law. In our case, however, there are important indications. After adopting the 2012 Development Decree, Sergio Morandi, then CEO of Medoil, sent a much-criticised letter to the Minister of Environment, Corrado Clini, thanking him for his 'precious contribution' to the legislative process.<sup>70</sup> The letter reveals that the company had the opportunity to 'amply' represent its position. One of the arguments deployed was that the company could have asked for damages and had already quantified such damages: threatening legal action is part of the lobbying playbook of powerful corporations. The arbitration tribunal in *Rockhopper* also recognised this threat as the main reason for adopting the 2012 Decree: 'The Respondent specifically took this step to avoid litigation and claims for damages from such companies. The tribunal infers that it would have been reasonable for the Respondent to have had a clear sense of the number of companies in mind when considering avoiding the risk of litigation.'<sup>71</sup> This appears to be a variation on the theme of regulatory chill as the government backtracked on a major environmental regulation – call it regulatory regression. It is not public knowledge what the exact threat was; however, it should be noted that, at that time, the company had an exploratory permit but had received a negative opinion on the environmental compatibility of the extractive project. Under Italian law, such a dispute would have had very little chance, given that an exploratory permit does not give rise to any rights to obtain a concession. If the threat alluded to ISDS, we witnessed a self-fulfilling prophecy. A law was adopted to avoid litigation risks, only later becoming the essential factual/legal basis for awarding stellar damages. Thanks to the 2012 exception, dubbed as a law 'ad societatem' (law for corporations), the Ombrina Mare project was resuscitated. Rockhopper continued to engage in this struggle by initiating legal proceedings before the domestic courts. Having lost domestic court proceedings and confronted with the consequences of the 2016 law abolishing the 2012 exceptional regime, Rockhopper resorted to international arbitration in 2017. This international legal system is the one that best shields corporate capital from democracy.<sup>72</sup> The proceedings in *Rockhopper v Italy* were held behind closed doors, foreclosing public participation and silencing the voices of those who would have been most directly affected by the project.

In the 2022 award, the tribunal quotes the Claimant as lamenting that 'the period from 2008 onwards' has been a 'roller coaster ride'.<sup>73</sup> While the tribunal mentions this in passing, it is worth emphasising how this framing distorts reality. The sequence of events bears witness to the fact that the Prestigiacomio Decree set a clear legal landscape in 2010, according to which the Ombrina Mare project had to be outlawed. The legal landscape has likely changed because of the company's lobbying. The question then may be: for whom has the change in the legal landscape been a roller coaster ride?

It should go without saying that it is much more costly for ordinary people (with normal jobs and salaries) than for a company (with deep pockets) to stay engaged with a regulatory process of this kind. As explained, the changes in the law were the product of a legal environment put under pressure by the fossil fuel industry. This is not surprising when considering the power of the fossil fuel industry and its proven capacity to influence public decision-making.<sup>74</sup> From this vantage point, the successful pushback of the people may have been unexpected, but no less legitimate and legal. The pushback may be explained by the fact that the stakes for the people were high. The touristic vocation of the territory

<sup>69</sup> See notes 23, 25 and 27.

<sup>70</sup> Letter from Sergio Morandi to Corrado Clini (27 June 2012) Ministero dell'Ambiente della Tutela del Territorio e del Mare, prot. DIVA 16011 del 03.07.2012 (made available by the parliamentarians Gianluca Vacca e Daniele Del Grosso on 27 March 2013), also quoted by Legambiente (n 31); the letter, with critical reflections by Maria Rita D'Orsogna are available here: MR D'Orsogna, 'Morandi (Medoilgas) a Clini (Ministro Ambiente): grazie' (NO ALL'ITALIA PETROLIZZATA) ['Morandi (Medoilgas) to Clini (Minister of Environment): thank you' (NO TO PETROLIZED ITALY)] (22 April 2013) <<https://dorsogna.blogspot.com/2013/04/morandi-medoilgas-clini-ministro.html>> accessed 15 August 2023. Incidentally, years later, in 2021, Minister Clini was condemned by the Criminal Court of First Instance in Rome for corruption; see 'Corruzione, l'ex ministro dell'Ambiente Corrado Clini condannato a sei anni. La procura ne aveva chiesti 4 e mezzo' *Il Fatto Quotidiano* (26 March 2021) <<https://www.ilfattoquotidiano.it/2021/03/26/corruzione-lex-ministro-dellambiente-corrado-clini-condannato-a-sei-anni-la-procura-ne-aveva-chiesti-4-e-mezzo/6146631/>> accessed 15 August 2023.

<sup>71</sup> Award (n 49) para 102, pp 31–2.

<sup>72</sup> D Schneiderman, 'Constitutionalizing Economic Globalization' (CUP 2008); NM Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7(3) *Transnational Legal Theory* 383–405.

<sup>73</sup> Award (n 49) para 97.

<sup>74</sup> See Newell and Paterson (n 27) and Influence Map (n 23).

was being threatened, and so was the very health of the people inhabiting the Costa Teatina and its pristine environment.

The tribunal's disregard of the fact that the permit should have already been denied in 2010 may reflect a more profound problem: the tribunal's disregard for democracy. It was only thanks to the inaction of the Ministry that Medoil was able to re-open the procedure. If one is critical of Italian laws and procedures, it should also be appreciated that the deficiencies of the Italian legal system have been deployed favourably by investors. As discussed below, one key argument in the Award centres around the lack of respect for a timeline established under a 1994 law. The facts of this case show how fossil fuel investors are the ones who capitalised on the delays. The Ministry of Environment did not act for 19 months (let alone the 15 days established by the 1994 Law), which could be considered unreasonably long by any (administrative) standards. While proving causality between lobbying and regulatory action may be difficult, the omission to deny the permit in 2010 certainly made it possible to restart the procedure for the production concession. Glossing over this omission, the tribunal remained oblivious to the right of Italian citizens to a clean and healthy environment, which were brushed away by the 2012 and 2014 regulations.

## 4. On the Constitution of Capital Rights

### 4.1. Constituting rights

In August 2022, the news broke that Rockhopper was awarded €190 million, plus interest (ca €240 million) in damages, vis-à-vis an investment of ca €36 million. Rockhopper announced that the collection of this Award could make 'a material contribution' to their Sea Lion project, a hydrocarbon extractive project in the North Falkland Basin.<sup>75</sup> In light of the scientific evidence that fossil fuels 'rate of production and use will need to reverse and decline rapidly to meet internationally agreed climate goals',<sup>76</sup> the generous rewards granted appear to be, at best, a perversion of climate action. The discounted cash flows model (DCM) method used to reach such a high figure has been lucidly criticised elsewhere.<sup>77</sup> While, on its face, this way of computing damages can be regarded as the most troubling part of this award, the reasoning underpinning the findings that Italy breached Article 13 of the ECT is of no less concern.

Article 13 of the ECT regulates expropriation. The tribunal concluded that 'as a matter of fact ... the Claimants had a right to be granted a production concession which was engaged as of 14 August 2015'.<sup>78</sup> This 'factual' finding is the *conditio sine qua non* for the finding on expropriation by the tribunal because, once this right is ascertained, the denial of the permit equates to deprivation of such a right. As put by the tribunal: 'The Claimants went, in one fell swoop, from a position where they had rights to a valuable production concession which would lead, under Italian law, to such production concession, to essentially nothing at all. No lengthy elaboration is required to arrive at this conclusion. There was, factually speaking, an immediate and complete deprivation of the Claimants' investment.'<sup>79</sup> Here, the tribunal envisages a 'right to a production concession' and de facto equates it to 'property'. As shown below, under Italian law, Rockhopper was never endowed with such a right, and even if a legitimate expectation may have existed (which, arguably, it did not), treating it as an irrevocable right is a way to augment investors' rights. Therefore, it is posited that the Award is *constitutive* of otherwise non-existing property rights.

The constitution of new rights is almost idiosyncratic to investor–state arbitration. Scholars have shown how investor–state arbitration tribunals can, and have, stretched 'the boundaries of expropriation' and investors' property rights, among others, by 'rejecting the historical notion of "property as things"

<sup>75</sup> See Rockhopper, 'Successful Arbitration Outcome' (Communication) RNS Number 1023X <<https://otp.tools.investis.com/clients/uk/rockhopperexploration2/rns/regulatory-story.aspx?cid=441&newsid=1618241>> accessed 15 August 2023, where the CEO Sam Moody is reported to have said in relation to the Award: 'This positive milestone builds on our recent transaction with Navitas and while work still needs to be done on Sea Lion, we believe after collection of the award, it will make a material contribution towards our share of the development costs'.

<sup>76</sup> D Welsby and others, 'Unextractable Fossil Fuels in a 1.5°C World' (2021) 597 *Nature* 230–4, 130.

<sup>77</sup> T Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (*EJIL Talk*, 19 January 2023) <<https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/>> accessed 15 August 2023.

<sup>78</sup> Award (n 49) para 191.

<sup>79</sup> *Ibid.*, para 194.

and expanding the legal concept to include market share and other intangible assets'.<sup>80</sup> For example, in the context of NAFTA, Nichols demonstrated how arbitrators interpreted 'ambiguous treaty provisions very broadly in a way that establishes new categories of protected property that did not previously exist'.<sup>81</sup> Similarly, Arato argued that 'arbitral jurisprudence gives the transnational property right a preeminence not found in any national legal order, justified in part by a misguided appeal to regional human rights case law'.<sup>82</sup> Such an expansion of investors' property rights may be related to the conception of property typically embraced by arbitrators. In this context, Perrone has contrasted wealth maximisation with a propriety conception of property rights and has argued that arbitrators privilege the former.<sup>83</sup>

The expansion of investors' property rights is likely reinforced by the asymmetric adjudicatory system riddled with conflicts of interest with biases favouring investors.<sup>84</sup> Given that, under investor–state arbitration, there is no appeal, any misconstruction of domestic law benefiting investors goes virtually unchecked. Treating domestic law as 'a matter of fact' makes that part of the Award almost automatically unreviewable. One case revealing the structural problems of the un-reviewability of the treatment of domestic law by arbitration tribunals is *Clayton/Bilcon v Canada*.<sup>85</sup> In this case, the Federal Court of Canada was called upon to decide whether to set aside the Award but refused to do so because 'factual questions' cannot be reviewed in setting aside proceedings.<sup>86</sup> Even if the Federal Court judge shared the analysis that the arbitral Award was applying a version of domestic law particularly favourable to the investor, it was allegedly in an impossible position to review such a reading of domestic law.<sup>87</sup>

The Award in *Rockhopper v Italy* is particularly illustrative of how arbitration tribunals can create new rights by expanding the boundaries of expropriation and by misreading domestic law. I will demonstrate how the tribunal bestowed foreign investors with previously non-existent rights in the following.

It may be recalled that *Rockhopper* was granted an exploratory permit only. Under Italian law, such a permit does not confer a right to obtain a production concession. So, how could the tribunal conclude that the Claimant had a right to the production concession? The argumentative edifice of the Award is anchored to the issuance of the Ministerial Decree on 7 August 2015 by the Ministry of Environment and Energy Security declaring the environmental compatibility of the project. Article 16 of Presidential Decree 484/1994 establishes that the Ministry of Economic Development should, 'within fifteen days from the receipt of the environmental compatibility decree by the Ministry of Environment, issue the decree for the award of the production concession'. Because the Ministry of Environment issued a Decree of Environmental Compatibility, the tribunal concluded that, after 15 days had elapsed, a right to a production concession was naturally established. In other words, the tribunal implicitly understands that a decree by the Ministry of Environment, together with the elapse of the 15-day term, constitutes a right to obtain a production concession. This led the arbitrators to conclude that 'the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015'.<sup>88</sup> While the reasoning may sound plausible, it is riddled with logical fallacies and grounded on misunderstandings of Italian law.

<sup>80</sup> S Nichols, 'Expanding Property Rights under Investor-State Dispute Settlement (ISDS): Class Struggle in the Era of Transnational Capital' (2018) 25(2) *Review of International Political Economy* 245 and 262; see also G Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56(2) *Int'l & Comp. L.Q.*, 371–94.

<sup>81</sup> *Ibid.*, 252.

<sup>82</sup> J Arato, 'Corporations as Lawmakers' (2015), *HarvIntLJ*, 260 and 285, respectively.

<sup>83</sup> NM Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) 8(4) *JIDS*, 673–94.

<sup>84</sup> G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall L.J.*, 211.

<sup>85</sup> William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada, UNCITRAL, Permanent Court of Arbitration (PCA) Case No 2009-04 – Award on Jurisdiction and Liability (17 March 2015).

<sup>86</sup> *Canada (Attorney General) v Clayton*, 2018 FC 436; eg paras 152–3, 163, 172 and 182.

<sup>87</sup> Interestingly the judgement of the Federal Court refers to and quotes an academic article, questioning how international arbitral tribunals apply domestic law; see C Adkins and D Grewal, 'Democracy and Legitimacy in Investor-State Arbitration' (2016) 126 *Yale L.J. F.* 57 at 65–76. In criticising the Award, the authors write: 'It seeks to serve two inconsistent goals: upholding a conception of investment arbitration as providing minimal fairness, consistent with democratic sovereignty, and carving out a special privilege for foreign investors to use what may prove favourable versions of domestic law. The Clayton majority functionally pursued the latter.' at p 73.

<sup>88</sup> Award (n 49) para 150.

At the outset, it should be mentioned that the respondent's expert witness stated that Articles 16–17 of Decree 484/94 were repealed by posterior law.<sup>89</sup> This is arguable because, under the new Italian Environmental Code (*lex posterior*), a 15-day timeline would be an impossible term to meet. Given that, under Italian law, *lex posterior* derogates previous law silently, these terms were likely not in force then. In this context, a Ministry of Economic Development witness stated that a permit was never granted in 15 days.<sup>90</sup> Even if this interpretation is not accepted, there are at least three other reasons why the 2015 Environmental Compatibility Decree could not have given the investor a right to obtain a production concession.

First and most significantly, the application for the production concession was formally lodged on 14 August 2015, and the procedure was still pending when the 2016 Stability Law was adopted.<sup>91</sup> Under the 2015 Italian legal framework, the Ministry of Economic Development is the only competent authority to complete this procedure and issue the permit. In the award, the tribunal conceded that the proceedings were still pending in December 2015 when it referred to the fact that, in the course of the pending procedure, and upon the request (on 11 December 2015) of the Ministry of Economic Development, a number of documents were submitted by Rockhopper (on 14 December 2015), ranging from financial statements to bankruptcy certificates.<sup>92</sup> By maintaining that '11 December 2015' was the moment when the last items of the 'required information' were to be produced, the tribunal contradicted its own finding that the right to obtain a concession was held as of 14 August 2015.<sup>93</sup> The tribunal seemed to think that the Ministry of Economic Development had no duty to seriously evaluate the documents submitted in December. Yet, if a procedure requires certain documents to be submitted, it is arguable that these are proofs of material conditions necessary for permit issuance. Among these documents is the Report on Health, Safety, Environment and Waste Management.<sup>94</sup> Should the Ministry have accepted any documents without controlling their content? This seems to be the position of the arbitration tribunal.<sup>95</sup> However, under Italian law (and arguably under any administrative procedures in advanced democracies), the documents to be supplied by the applicant serve as proof for evaluating their economic and technical capacity.<sup>96</sup> By way of an example, among the documents to be produced was a report on the technical competencies of the operator, which, for complex projects – and Ombrina was arguably such – must include the reprocessing of all seismic data.<sup>97</sup> This assessment serves the purpose of protecting the

<sup>89</sup> Because of the limited scope of this article, I am not delving into some more technical issues. Most significantly, the temporary limits of the laws discussed were all non-peremptory. This means that no rights can accrue when the time limit elapses. The (non-)peremptoriness of the time limits is clearly regulated by Italian law and it is likely that the Respondent had this explained to the tribunal during the proceeding. Yet the tribunal decided to not reflect on the peremptory nature of the time limits and had a casual quote of the cross-examination of a witness where the reasoning on the peremptory nature of the terms is cut off (Award [n 66], para 140, 57). In the tribunal's own reasoning, there is no discussion of this legal matter. Yet the tribunal implicitly treats these time limits as peremptory without giving a reason why it does so. Here, it could be argued that the Award lacks reasoning.

<sup>90</sup> Award (n 49) para 138, 54.

<sup>91</sup> *Ibid.*, para 150.

<sup>92</sup> In the Award part of the letter of the respondent is reported, dated 11 December 2015, in which the Claimant was invited to transmit documentation 'regarding its technical-economic capability in the light of the ... Management Decree of 15 July 2015 – Implementing Operational Procedures of Ministerial Decree dated 25 March 2015 and Performance Procedures for the Prospection, Research and Exploitation of Liquid and Gas Hydrocarbons Activities and related Checks' (3 September 2015) Official Journal 204 and, in particular, 'the corporate and technical data pursuant to the provision of Article 6 thereof, "Evidence of the applicant's technical and economic capabilities"', Award (n 49) para 157; the list of documents supplied by the Claimant on 14 December 2015 is reported in the Award at para 159.

<sup>93</sup> See Award (n 49) para 158.

<sup>94</sup> See *Ibid.*, para 159.

<sup>95</sup> On this, see the convoluted reasoning in *Ibid.*, para 158, where the tribunal equates the submission of the documents by Rockhopper to the fulfilment of the requirements: 'it must logically follow that nothing else, over and above these specific items were needed by the Respondent. The tribunal can infer, therefore, that the four Annexes mentioned in the Respondent's Decree of 7 August 2015 were either fulfilled by this time or were subject only to fulfilment by the addition of information requested on 11 December 2015. In either case, the factual position as of 11 December 2015 emerges clearly, namely, the very last items of required information were unambiguously articulated.' The tribunal further justifies its position on the basis that Italy did not provide proof that it was evaluating the documents in late 2015; see *Ibid.*, para 166.

<sup>96</sup> For a list of substantive requirements to be met, see Articles 4–6 of Decree 15 July 2015, GU 3 September 2015 (Procedura operativa di attuazione del decreto 25 marzo 2015 e modalità di svolgimento delle attività di prospezione, ricerca e coltivazione di idrocarburi liquidi e gassosi e dei relativi controlli, ai sensi dell'art. 19, comma 6, dello stesso decreto) [Implementing Operational Procedures of Ministerial Decree dated 25 March 2015 and Performance Procedures for the Prospection, Research and Exploitation of Liquid and Gas Hydrocarbons Activities and related Checks] (3 September 2015) Official Journal 204.

<sup>97</sup> *Ibid.*, Art 6, para 14.

public interest vis-à-vis the potential risks of extracting hydrocarbons. It should also be noted that the importance of these values has been legally entrenched by various laws, including EU Directive 94/22/EC on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons, where it is explicitly provided that the technical and financial capability of operators is a criterion for granting authorisations.<sup>98</sup> It would have been *contra legem* and against the public interest to blindly accept the documents submitted by Rockhopper. No rights could have been matured until the procedure was completed. It is unreasonable to assume that a public administration could have evaluated the documentation submitted by 30 December 2015 (in less than two working weeks and in a period dense with public holidays). The tribunal's reasoning strips the Ministry of Economic Development of any regulatory agency, treating it as a rubber stamp at the service of oil corporations. It was always under the remit of the Ministry of Economic Development to deny the permit. Incidentally, a permit can also be revoked in cases where the conditions upon which it was granted could not be fulfilled (eg the company was not operating safely), which is a precious reminder that permits are never absolute rights; they remain conditional for their entire life and on meeting certain conditions.

Second, the environmental compatibility declared in the Ministerial Decree is *conditional* on fulfilling various requirements. As cited in the Award, the Ministry decreed 'the environmental compatibility of the execution of the project ... *on the condition that* the prescriptive and administrative requirements indicated in the following Annexes, which are *an integral part* of this decree, are fulfilled'.<sup>99</sup> It is hard to see how an administrative act that sets conditions to be fulfilled can be considered constitutive of rights. If those conditions are not met, there is no environmental compatibility. It could be counter-argued that, even if conditional and qualified, the investor still had a right. Yet it is troubling that the tribunal seems to assume that all conditions were met, but only because Rockhopper supplied the last requested documents by December 2015. Incidentally, in using the DCF method to award damages, the tribunal was oblivious to the many costly conditions that had to be met by the oil operator to obtain and keep the permit.

Third, under Italian law, the Ministerial Decree could be appealed before the administrative domestic courts and the President of the Republic within 60 and 120 days, respectively, from the publication date in the *Official Gazette*. How could a vested right have emerged within 15 days before the appeal deadline elapsed? This reading of the law will numb the rights of those potentially affected by the project to have the environmental compatibility decree reviewed. On this, the Award contains mystifying findings when it states that 'the Claimants' conduct from August 2015 right up to 30 December 2015 ... demonstrates that they were a party clearly understanding themselves to be possessed of such a right, and none of the correspondence or actions taken by them throughout that time is irreconcilable with that viewpoint'. By contrast with what the arbitrators write, the Claimant must have been aware of the appeal rights of third parties, as evidenced by its conduct. In fact, on 13 August 2015, Rockhopper published a note in the Italian *Official Gazette* about the Ministerial Decree and the existing rights of the public to appeal the Ministerial ac.<sup>100</sup> Rockhopper knew that, under Italian law, they could not have possessed a *right* to a concession at least until the time for appeal elapsed, and this was certainly much longer than the said 15 days.

At this point, it could be counter-argued that the Italian law regulating the procedures for obtaining hydrocarbon production concessions is poorly written. That is a fair point. Yet it could not lead to the conclusion that a (property) right was created or taken under Italian law when the law is clear that a production concession can only be obtained through the final decree of the Ministry of Economic Development after procedures aimed at assessing the existence of a series of substantive conditions are completed.<sup>101</sup> Indeed, whether the company had been treated unfairly and its legitimate expectation had been violated due to a difficult legal environment could be questioned. Regrettably, the tribunal did

<sup>98</sup> Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons [1994] OJ L 164, 3–8.

<sup>99</sup> Ministerial Decree n 172/2015 (n 43), also cited in the Award (n 49) para 126 (emphasis added). It is to be noted that four Annexes are mentioned in the Ministerial Decree.

<sup>100</sup> See Rockhopper (2015) 93 *Gazzetta Ufficiale* 56 <<https://www.gazzettaufficiale.it/eli/id/2015/08/13/TS15ADE11054/p2>> accessed 15 August 2023; the act could have been appealed within 60 days before the Administrative Tribunal and within 120 days before the President of the Republic.

<sup>101</sup> Under Italian law, by virtue of Article 26 of the Royal Decree 262 of 16 March 1942, on Approval of the text of the Civil Code, 'liquid and gaseous fluid' are part of the 'non-disposable patrimony of the State'. Hence, a company cannot be endowed with a property right, only a legitimate interest in the concession.



not delve into this issue and maintained that this was a case of direct expropriation. In his opinion, Dupuy briefly discusses the question of legitimate expectations, concluding that Rockhopper had none.<sup>102</sup> It is puzzling how Dupuy managed to find expropriation while asserting that the Claimant could not have had legitimate expectations to obtain the permit. How could an actor without legitimate expectation to get a production concession be contextually considered as having a right to it?

To sum up, the tribunal constituted new rights for the fossil fuel company in two intertwined ways. First, it misconstrued Italian law, creating a right to obtain a concession for the production of hydrocarbons which was nowhere to be found under Italian law. Next, in line with neoliberal developments of international investment law, the tribunal extended the property rights and the concept of expropriation by equating an alleged right to obtain a production concession to property rights that could be expropriated. With this double move, the tribunal contributed to broadening the rights of the fossil fuel industry and, indirectly, helped foster the fossil economy.

On a side note, it is worth reflecting on the asymmetrical gaze of the arbitral tribunal on the facts of this case. It may be recalled that on 7 October 2010 the Technical Committee issued a negative EIA for the Ombrina Mare project. If the tribunal had considered good governance, it could have reflected on the implications of this fact. Article 16 of the 1994 Decree, so important to the tribunal, established that a production concession was subordinated to the Decree of Environmental Compatibility. Had no clock started to tick when the Ministry of Environment should have declared the environmental incompatibility? Or should investment law only carve out spaces of good administration for foreign investors and relegate citizens to the status of a pariah in the administrative state? Is this the Rule of Law ideal that many profess underpins the investment law system? Could the long and suspicious inaction by the Ministry of Environment have been considered an infringement on people's rights to a clean and healthy environment? Arguably, the citizens who strenuously resisted the project (as discussed in Section 3.2) had matured their right to an oil-free environment in 2010. If the Rubicon was crossed, then it may have been crossed twice.

## 4.2. Numbing precaution

The expansion of investors' rights in investment-treaty arbitration has been partly constrained by applying the doctrine of police powers, according to which non-discriminatory regulatory action enacted for a public purpose is not to be considered expropriatory.<sup>103</sup> At the same time, the way the police power doctrine is applied remains nebulous, and the deployment of a proportionality test has often meant paying lip service to the public interest when, in practice, the protection of the environment and public health concerns were neglected while the rights of investors were symmetrically enhanced.<sup>104</sup> In *Rockhopper*, the tribunal has found this to be a 'direct expropriation' case.<sup>105</sup> As one tribunal put it: 'It is generally understood that a "direct" expropriation occurs where the investor's investment is taken through formal transfer of title or outright seizure.'<sup>106</sup> Apart from one line in the Award,<sup>107</sup> there is no

<sup>102</sup> See Individual Opinion by Professor Pierre-Marie Dupuy, who writes: '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.' Individual Opinion by Professor Pierre-Marie Dupuy, attached to the *Rockhopper* Award (n 49), para 2, p 3.

<sup>103</sup> Several tribunals have treated regulatory measures as non-expropriatory when falling within the state's police powers, despite negatively affecting investors' property rights; eg *S.D. Myers, Inc. v Canada*, UNCITRAL, Partial Award, 13 November 2000, para 281; *Marvin Feldman v Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paras. 103–12. For a discussion of the doctrine of police powers in international investment law, see C Titi, 'Police Powers Doctrine and International Investment Law' (2018) in A Gattini, A Tanzi and F Fontanelli (eds) *General Principles of Law and International Investment Arbitration* (Brill 2018); N Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) 14(3) *Manchester Journal of International Economic Law*, 318–37.

<sup>104</sup> For a critique of how the proportionality analysis has been applied in practice, see A Arcuri and F Violi, 'Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives' (2021) in J Chaisse, L Choukroune, and J Sufian (eds), *Handbook of International Investment Law and Policy*, Springer, pp 1–27, at pp 21–2.

<sup>105</sup> Award (n 49) para 197.

<sup>106</sup> *Crystallex International Corp. v Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para 667.

<sup>107</sup> The only reasoning which could be related to the nature of 'direct' expropriation to be found in the Award is the following: 'There were no indirect actions, whether described as creeping or otherwise, cumulatively leading to such deprivation, but

reason why the permit denial would be a case of direct (rather than indirect) expropriation. Indeed, in this case, there was neither the taking of a formal title nor an outright seizure. This construction may have facilitated the tribunal's quick dismissal of the Italian defence invoking police powers, which is typically applied in cases of indirect expropriation. Regarding police powers, the tribunal referred to only a few paragraphs without offering any reasons other than those already articulated to find direct expropriation.<sup>108</sup> In rejecting the police powers defence, the tribunal displayed a certain disregard for the environment and democracy.

It is worth recalling that the basis of the denial of the permit was an Italian legislative act that outlawed offshore drilling near the coast, an environmental law of general applicability that protected people and the environment from the serious risk of an environmental disaster, as evidenced by the Deepwater Horizon spill in the Gulf of Mexico. In an analytically 'questionable' move, the tribunal acknowledged the environmental concerns and the fact that the precautionary principle could have guided public action in this case. However, the tribunal found that the precautionary principle was inapplicable. The reasoning on this point was short: 'The operation of the precautionary principle on environmental grounds' after 7 August 2015 was to be excluded.<sup>109</sup> The tribunal reached this conclusion because the precautionary principle was allegedly applied during the technical environmental assessment. Hence, it could not have been used later. If earlier in the Award, the Decree by the Ministry of Environment was considered as giving rise to investors' vested rights,<sup>110</sup> it was deployed here as a guillotine to cut out any considerations about the environment and public health.<sup>111</sup> The tribunal's reasoning is wrong in several respects.

On a formalistic reading, it is incorrect because the procedure for granting the production concession was far from complete on 7 August 2015. As explained in Section 4.1, the Ministry of Economic Development had to evaluate the technical capacity of the operator while considering the application for a production concession.<sup>112</sup> This part of the procedure could have started *only after* the Decree from the Ministry of Environment was issued. The appraisal of the technical and economic capacity by the Ministry of Economic Development, an evaluation mandated by law, clearly bears on the safety of the operation of oil and gas extractive activities. It is a gross misunderstanding of Italian law to state that the precautionary principle should not have been applied after August 7, when the Ministry of Economic Development was still expected to evaluate conditions inherent to the project's safety.

At a more fundamental level, confining the operation of the precautionary principle to the environmental assessment of one technocratic committee disregards the fact that the precautionary principle operates at the science-policy interface. The tribunal reasoning misconstrues the nature of the precautionary principle; the European Commission, in its 2000 White Paper, already recognised that the principle is eminently political: as put by Mariachiara Tallacchini, 'what the Commission makes very clear is that the PP is a political principle, namely the principle that considers certain risks as "inconsistent with the high level of protection chosen for the Community", and "an eminently political responsibility"'.<sup>113</sup> As recalled earlier, the Ministry of Environment has no decisional power in issuing a production concession. Hence, finding that the precautionary principle stopped applying after the Decree of the Ministry of Environment was adopted leads to the paradoxical result that the decision-maker cannot use the precautionary principle even if it is obliged to do so by law.

Most worryingly, the tribunal trivialised the reasons put forward by the people<sup>114</sup> and treated them as disconnected from the precautionary principle. In vilifying 'civic engagement', the tribunal displays, at

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rather a specific act on the part of the Respondent'; see Award (n 49) para 194. This contrasts with what the tribunal argued later; ie that the law published on 30 December 2015 and the denial of the permit infringed the Claimant's alleged rights (see *Ibid.*, para 193).

<sup>108</sup> *Ibid.*, paras 197–9.

<sup>109</sup> *Ibid.*, paras 154 and 198.

<sup>110</sup> *Ibid.*, paras 130 and 150.

<sup>111</sup> *Ibid.*, paras 153–4.

<sup>112</sup> See *supra* text accompanying notes 91–9.

<sup>113</sup> M Tallacchini, 'Before and Beyond the Precautionary Principle: Epistemology of Uncertainty in Science and Law' (2005) 207(2) *Toxicology and Applied Pharmacology*, 649.

<sup>114</sup> In dismissing the application of the precautionary principle, the tribunal implicitly juxtaposed the reason of the people to the application of the precautionary principle, finding that 'the more likely reason for the position taken by the Respondent culminating in the letter of 29 January 2016 is the political and civic engagements as discussed earlier in this Award.' Award (n 49) para 198.

best, a certain naivety about the relationship between science and law. It has been amply recognised in scholarly literature that democratic processes are key to rational decision-making and that science-based regulation cannot be divorced from public participation.<sup>115</sup> Italian people have articulated reasoned critiques of the technocratic assessment of the project, as briefly recounted in Section 3.2.<sup>116</sup> In adopting the Stability Law, the Italian legislator responded to the reasoned concerns of the people, scientists and regional political bodies.<sup>117</sup> Notably, the parliamentary records quoted in the Award refer to 'the need to revisit national energy policies in light of the agreement recently reached in Paris during the Conference of the Parties to the UN Framework Convention on Climate Change (COP21)' as a basis of the 2016 Stability Law.<sup>118</sup> The tribunal never considered potential environmental and public health risks, amply exposed by scientists who were critical of the EIA and concerned about climate change. The total lack of consideration of any environmental and health impact of the project in the Award is a deafening silence and one that does violence to the core of any environmental law. In light of the many well-documented risks of offshore drilling near the coast and the need to keep fossil fuels in the ground, the decision of the Italian state is an excellent example of responsive regulation based on the precautionary principle. In its reasoning, the tribunal has implicitly taken away an important regulatory power from the State. The surgical exclusion of the public from environmental decision-making made by the tribunal eviscerates environmental law of its transformative potential.

## 5. Conclusions

The *Rockhopper* case illustrates how, under the ECT, an arbitration tribunal can quash legitimate environmental regulations necessary to address the ongoing socio-ecological crisis. The facts underpinning the case tell a story of successful resistance to fossil power. Despite a persistent effort to obstruct environmental regulation through, inter alia, lobbying for an ad hoc exceptional regime, Rockhopper was denied the concession permit for extracting hydrocarbons in 2016. This was thanks to an engaged civil society that never stopped pointing at the very concrete environmental and socio-economic risks of the Ombrina Mare project. This type of engagement, praised by the IPCC as 'the only reliable motor for driving institutions to change at the pace required', was countered by the last move of Rockhopper: seeking international arbitration under the ECT in 2017.

Not only has the tribunal awarded Rockhopper an incredible sum of money that can be reinvested in oil extractive projects. In its 2022 Award, the tribunal has also expanded the property rights of the fossil fuel industry and has numbed the precautionary principle, caging it into the black box of one specific technocratic assessment. The lack of any reference in the Award to the substantive discussions about the risks of the Ombrina Mare project may be read as symptomatic of the disregard for the environmental and public health issues in the legal universe constituted by the ECT. As a critical case study, this analysis of *Rockhopper v. Italy* can be read as a cautionary tale for all those (African) countries tempted to join the ECT. It could also serve as precious confirmation to those ECT Members who decided to withdraw (and possibly as a nudge to those who are still undecided on whether to withdraw) as it reveals how, in practice, the ECT can be used to hollow out the precautionary principle and to delay energy transition.

Anno 2023, when the nefarious consequences of the fossil fuel economy have been amply documented, the ECT is the most important international treaty protecting fossil fuel investors. At its core, the treaty reproduces neoliberal legality, bestowing upon investors ever-expanding property rights and evacuating environmental law of its transformative potential. In so doing, it counters ecological democracy and augments the power of the fossil bloc. Rather than reckoning with the needs of our times – ie urgent action to address climate change and the destruction of biodiversity – the ECT continues to oil the fossil fuel machine.

<sup>115</sup> National Research Council, 'Understanding Risk: Informing Decisions in a Democratic Society' (1996) 17(3) *Journal of Radiological Protection*; and the Royal Commission on Environmental Pollution, 'Setting Environmental Standards, 21st Report' (1998); A Irwin, B Wynne (eds) *Misunderstanding Science? The Public Reconstruction of Science and Technology* (CUP 1996); D Winickoff and others, 'Adjudicating the GM Food Wars: Science, Risk, and democracy in world trade law' (2005) 30(81) *Yale Journal of International Law*, 81–123; E Fisher, 'Framing Risk Regulation: A Critical Reflection' (2013) 4(2) *European Journal of Risk Regulation* 125.

<sup>116</sup> See *supra* text accompanying notes 56–66.

<sup>117</sup> AC Stirling and I Scoones, 'From Risk Assessment to Knowledge Mapping: Science, Precaution and Participation in Disease Ecology' (2009) 14(2) *Ecology and Society*.

<sup>118</sup> Award (n 49) para 109.

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### Research ethics statement

Not applicable to this article.

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The author declares no conflict of interest with this work. All efforts to sufficiently blind the author during the peer review of this article have been made. The author declares no further conflicts.