



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London  
International Arbitration Case Law

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**Award Name and Date:** Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd., and Rockhopper Exploration Plc v Republic of Italy (ICSID Case No. ARB/17/14) – Decision on the Intra-EU Jurisdictional Objection – 26 June 2019

**Case Report by:** Aleksander Kalisz\*\*, Editor Ignacio Torterola\*\*\*

**Summary:** The Claimants invested in Ombrina Mare oil and gas field located off the Italian coast in the Adriatic Sea. The dispute arose out of the alleged failure of Italy to fulfil its legislative and regulatory commitments concerning the investment. The Respondent raised an objection that the Energy Charter Treaty (“ECT”) and ICSID Convention could not provide jurisdiction between nationals of one EU Member State and another EU Member State. The Tribunal based its decision on three authorities. Firstly, the *Achmea* Judgment was quoted as prohibiting intra-EU bilateral investment treaties (“BIT”). Secondly, the Declaration of 22 EU Member States (the “Declaration”) to terminate BITs between them. Finally, the Vattenfall case which concerned objections to intra-EU arbitration brought pursuant to the ECT. The Tribunal rejected the Objection to Jurisdiction establishing that the *Achmea* judgment was to be confined to the specific BIT in that case, and that the Declaration did not create a binding rule of law. The ECT was deemed to be different from intra-EU BITs, in particular because the EU itself and the EU Member States are separate Contracting Parties.

**Main Issues:** Intra-EU BITs; objection to jurisdiction arising from intra-EU BITs; separate legal personality of EU itself and EU Member States.

**Tribunal:** Mr. Klaus Reichert SC, President of the Tribunal Dr. Charles Poncet, Arbitrator Prof. Pierre-Marie Dupuy, Arbitrator.

**Claimants’ Counsel:** Mr. Thomas K. Sprange QC, Mr. Ben Williams, Ms. Flora Jones (King & Spalding International LLP, London), Mr. Viren Mascarenhas (King & Spalding International LLP, New York).

**Respondent’s Counsel:** Ms. Gabriella Palmieri, Mr. Giacomo Aiello, Mr. Sergio Fiorentino, Mr. Paolo Grasso (of Avvocatura Generale dello Stato, Rome), Prof. Avv. Maria Chiara Malaguti (External Counsel to the Legal Service of the Ministry of Foreign Affairs, Rome).

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investment law. International dispute resolutions are his practice area of interest. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author. Mr Kalisz can be contacted at [a.kalisz100@gmail.com](mailto:a.kalisz100@gmail.com).

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## Digest:

### 1. Relevant Facts

The Claimants are Rockhopper Italia S.p.A., a company incorporated under the laws of the Italian Republic, Rockhopper Mediterranean Ltd., a company incorporated under the laws of the United Kingdom, and Rockhopper Exploration Plc, a company incorporated under the laws of the United Kingdom. The Claimants held key interests in the North Falkland Basin and the Greater Mediterranean region. The Respondent is the Italian Republic. (¶¶ 2, 3)

The Claimants invested in Ombrina Mare oil and gas field located off the Italian coast in the Adriatic Sea. The dispute arises from the alleged failure of Italy to fulfil its legislative and regulatory commitments concerning the investment, in particular the revocation of granted concessions. (¶ 5)

The Claimants seek lost profit as damages and are third-party funded in the arbitral proceedings.<sup>1</sup>

### 2. Procedural History

On 14 April 2017, the ICSID received the Request for Arbitration from the Claimant against Italy filed under the Energy Charter Treaty and the ICSID Convention. (¶¶ 1, 6) The Request for Arbitration was registered by the ICSID Secretary-General pursuant to Article 36(3) of the ICSID Convention on 19 May 2017. A Tribunal was constituted by the Parties whereas the Tribunal would consist of three arbitrators, one to be appointed by each Party, and the third and presiding arbitrator to be appointed by agreement of the two co-arbitrators. The Secretary-General notified the Parties on 26 September 2016 that the nominated arbitrators have all accepted appointments and a Tribunal has been constituted. (¶¶ 7-9)

On 28 March 2018 the Respondent submitted an Objection to Jurisdiction and a Request for Bifurcation of the proceedings. The Respondent's objection was that the ECT and the ICSID Convention could not provide jurisdiction between nationals of one EU Member State and another EU Member State. On 19 April 2018 the Respondent also communicated that the European Commission would be applying to intervene in the current proceedings and make submissions concerning the Judgment of the Court of Justice of the EU in the *Slovak Republic v. Achmea B.V.* (Case C-284/16) (the "Achmea case"). On 19 April 2018 the Tribunal informed the Parties to prioritise the Intra-EU Jurisdictional Objection. (¶¶ 13-17)

In the Rejoinder of the Claimant on the issue, the Award rendered in the case *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1) (the "Masdar Solar case") was brought to the Tribunal's attention. On 21 September 2018 the Tribunal invited the

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<sup>1</sup> Claimants' Press release on the Commencement of Arbitration. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8848.pdf>.

Parties to provide observations on the relevance of the *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12) (the “*Vattenfall case*”) and the aforementioned *Achmea* case. (¶¶ 26-32)

On 7 December 2018 the Tribunal granted European Commission’s application to intervene in the proceedings in writing. The Tribunal subjected the intervention to a written undertaking by the European Commission that any decision of the Tribunal on costs would be complied with. Due to the intervention and in the interest of procedural efficiency, the Tribunal rejected to bifurcate the proceedings. (¶ 38)

On 29 January 2019, the Respondent submitted a Request for Termination of the Proceedings together with the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (the “Declaration of the EU Member States”). By this communication, the Respondent requested the Tribunal to issue an award recognizing its lack of competence and terminating the proceedings. Alternatively, the Respondent requested a hearing on jurisdictional issues. (¶ 47)

The Oral Hearing took place in Paris from 4 to 8 February 2019. (¶ 55)

### 3. Position of the Respondent

#### 3.1. Applicability of the ECT to Intra-EU Disputes

Respondent submitted that the ECT considers the EU as a unified legal system based on an international treaty whose provisions, on the same matter as those covered by the ECT, prevail over the ECT itself. This submission relates to the interpretation of Article 26(6) of the ECT which provides for the legal basis of its disputes. The Respondent interprets the wording “dispute” as encompassing any dispute with no exception to disputes over jurisdiction, and “applicable rules (...) of international law” as including EU law. Respondent argues that intra-EU investment protection is governed by EU law and individual states cannot conclude agreements in breach of EU law. (¶¶ 59-61)

Respondent invokes Opinion 1/09 of the Court of Justice of the European Union (“CJEU”) of 8 March 2011 (“Opinion 1/09”) which is argued to prohibit the delegation of jurisdiction onto international courts which would otherwise rest with national courts of the EU Member States. Further, the Respondent argues that the Judgment in the *MOX Plant case* (Case C-459/03) (“*MOX Case*”) prevents the delegation of matters potentially involving EU law onto international arbitral tribunals. Due to the conflict between primacy of EU law with arbitration mechanisms, the offer to arbitrate by Italy included in Article 26 of the ECT has to be considered inapplicable to intra-EU disputes since the signing of the Treaty. (¶¶ 62-65)

The other provisions of the ECT are argued to point at the primacy of EU law. Article 1 treats the EU as a single and unified territory for the purposes of the ECT. Article 25 is argued to recognise the specificity of the relations among EU Member States and therefore recognising EU’s aim of trade liberalisation. The subject matter is hence the same as that of the ECT. Article 16 is referred to by the Respondent as a conflict rule. It states, “nothing in Part III or V of the ECT must be construed to derogate from any provision of the EU Treaties as for investment promotion and protection, or from any right to dispute resolution with respect thereto under the EU Treaties.” Respondent points that Italy and the United Kingdom entered into EU Treaties

prior to signing the ECT and those EU Treaties concern the subject matter of Parts III and V of the ECT. (¶¶ 66-69)

The Respondent argues that the context and purpose of the ECT supports the conclusion that the ECT is inapplicable to intra-EU disputes. Respondent argues that Article 26 intention was clear to afford EU law protection to non-EU investors as well. The Charter was intended to also encompass the energy sector of the Soviet Union and Eastern Europe and not the internal EU energy market. Finally on the point, a general practice of the EU, European Commission and EU Member States demonstrates an objection against the jurisdiction of arbitral tribunals over EU law. (¶¶ 71-74)

In any event, the Respondent argues that ECT certainly does not apply to intra-EU disputes after the Treaty of Lisbon, pursuant to which direct foreign investments were added to the common commercial policy which is an exclusive EU competence. Respondent relies on Article 30 of the Vienna Convention on the Law of treaties (“VCLT”) and on the ILC Report on Fragmentation of International Law. Further, Article 41 VCLT prohibits EU Member States from establishing a different regime among them because this would eliminate the right of Contracting Parties to grant access to international arbitration to their investors. Article 41 protects rights of those Contracting Parties that do not take part into the new agreement. Accordingly, the derogation of Article 26 of the ECT would only apply to intra-EU disputes and would not affect the rights of investors of third countries. (¶¶ 75-79)

### 3.2. *Relevance of the Achmea case*

Respondent submits that the *Achmea* case confirms that arbitration clauses on investment agreements covering intra-EU situations is not compatible with EU law since it would jeopardize the integrity of EU law. The fact that the EU is a Party to the ECT does not affect the bilateral nature of the offer to arbitrate. *Achmea* Judgment makes it clear that when the EU enters into an international agreement, it has to respect the autonomy of the EU and its legal order. (¶¶ 98-101)

Respondent argues that the *Achmea* Judgment also concerns enforcement of an award and may result in its non-recognition if the issue is not taken into account by the Tribunal. It is the Tribunal's duty to ensure the enforceability of the awards they render. (¶ 102)

### 3.3. *Relevance of the Vattenfall case*

In the *Vattenfall* case, the tribunal misinterpreted Article 26 of the ECT by stating that its jurisdiction is not an ‘issue in dispute’ before it. Further, the Tribunal incorrectly used Article 26(6) of the ECT to interpret Article 42(1) of the ICSID Convention. The function of the clauses is not comparable – ICSID Convention cannot operate without application of other norms. Jurisdiction of ECT Tribunals is based solely on Article 26(6). (¶¶ 109-111)

Respondent submits that the *Vattenfall* tribunal should have rejected jurisdiction on the grounds of *forum non conveniens* and comity. Further, a disconnection clause is not necessary in matters concerning EU law like those covered by the ECT. (¶¶ 112-115)

### *3.4. The Effects of the Declaration of the EU Member States*

Respondent argues that the Declaration is a binding instrument emanating from sovereign states which can be viewed as a bundle of unilateral shared declarations as between 22 Member States. It is submitted that this amounts to those EU Member States recognising they were never bound by Article 26 of the ECT insofar as intra-EU disputes are concerned and that their investors were not protected by the ECT against other Contracting Parties. As a result, the relevance of the *Achmea* Judgment should no longer be questioned. That Declaration was unequivocal. (¶¶ 125-128)

Further, no other ECT Contracting Party objected to the Declaration. Minority of EU Member States merely signed another declaration stating that they await a clearer decision of the CJEU. Non-EU Contracting States showed no interest in the issue. Neither the language nor the multilateral nature of the ECT modify the qualities of the Declaration. The Declaration itself can be, however, used for interpretative purposes at the very least. (¶¶ 129-135)

### *3.5. Respondent's request for suspension of proceedings*

Respondent made the request to avoid a conflict of judgments by this Tribunal and the CJEU. Both this Tribunal and the CJEU will be considering EU law. Certainty of law should be preserved due to the presence of subsequent proceedings. (¶¶ 199-202)

## **4. Position of the Claimants**

### *4.1. Applicability of the ECT to Intra-EU Disputes*

Claimants submit that Article 26 of the ECT constitutes a valid offer to arbitrate on behalf of the Respondent. Respondent's current arguments are an attempt to retroactively withdraw that consent. Article 26 referring to rules and principles of international law does not refer to regional law of the EU. Claimants argue that whilst EU law is a type of international law, it is not one contemplated in the provision. Opinion 1/09 and the *MOX plant* case are distinguishable from the current case. The former relates to Unified Patent Litigation System that has exclusive jurisdiction to address patent actions under EU law. The *MOX plant* case require the interpretation and application of EU law. The current case is not based on EU law but on Articles 10 and 13 of the ECT. Article 46 ECT prohibits reservations to the ECT. (¶¶ 80-84)

The Claimants submit that the Respondent is incorrect in its interpretation of Articles 16 and 25 of the ECT. Article 16 applies where international agreements between same Contracting Parties and subject matter afford greater protection of investors and investments. It cannot be used to deny access to the ECT dispute resolution mechanism. The right to arbitrate is fundamental to the ECT. Article 25 does not recognise preferential treatment among EU Member States but only confirms that one party to an Economic Integration Agreement is not obliged to extend MFN treatment to a non-party of the EIA and says nothing about the treatment that EU Member States should afford investors of other EU Member States or about the dispute resolution mechanisms available to investors of EU Member States, or any Contracting Party to the ECT. Further, the EU Contracting Parties to the ECT did not intend to include a disconnection clause to the ECT, which they clearly frequently did at the time when entering into international treaties. (¶¶ 85-88)

Respondent's interpretation of the ECT's context and purpose as inaccurate and misleading. The ECT says nothing that would imply a prohibition on EU investors seeking redress in international arbitration against an EU Member State. The ECT refers to Europe as a geographical element and not as a separate EU regime. (¶¶ 89-91)

EU law and ECT do not share the same subject matter and hence Article 30 of the VCLT cannot apply to it. In addition, the signing of the Lisbon treaty is irrelevant – Article 30(3) and 30(4)(a) of the VCLT confirm that earlier treaties (here the ECT) apply unless they are found incompatible with the later treaty (here the Lisbon treaty). In any case, Article 30 would be limited by Article 41 of the VCLT which concerns amendments to multilateral treaties. Signing of the Lisbon Treaty does not amount to an amendment of the ECT. Article 16 of the ECT further confirms the predominance of ECT's provisions on investment protection and dispute resolutions over prior or subsequent agreements that are less favourable. The Respondent failed to show why EU dispute resolution would afford a stronger level of protection. EU law lacks investment protection standards which exist in the ECT – fair and equitable treatment or full protection of security. Further, under EU law investors would not have a direct claim against a State in breach. (¶¶ 92-97)

#### 4.2. *Relevance of the Achmea case*

The Claimants argue that the *Achmea* Judgment is neither relevant in the context of the current case, not persuasive in its reasoning. *Achmea* involved intra-EU BITs while the ECT involves both the EU and EU Member States as separate Parties. The case also turned on the interpretation of BIT wording which is absent from the ECT governing law clause. The ECT does not specifically require the Tribunal to apply EU law. Further, impact of the *Achmea* case on enforcement of awards is highly uncertain. The case is recent. Tribunal should not engage in speculation about the enforcement of awards. In any case, enforcement outside the EU is still possible. (¶¶ 103-108)

#### 4.3. *Relevance of the Vattenfall case*

Claimants submit that the *Vattenfal* Decision confirms their argument. The Tribunal there distinguished between intra-EU BITs and the ECT. That is because the ECT is a mixed agreement between both EU Member States and the EU itself and third parties. Also, the wording of Article 26 of the ECT is different from Article 8 of the Dutch-Slovak BIT. The Tribunal further acknowledged that the ECT is more favourable to investors than EU law. EU law and the ECT was deemed also not to address the same subject matter. (¶¶ 116-119)

In addition, the case emphasized that the *Achmea* Judgment does not apply under Article 26(6) ECT and Article 42(1) ICSID Convention. Article 42(1) of the ICSID Convention only concerns the merits of a dispute. Mere reference in Article 1(3) ECT that “EU Member States have transferred some competence over certain matters” to the EU does not result in the non-application of the ECT between EU Member States. (¶¶ 120-122)

*Vattenfall* tribunal found that EU treaties are international law, but it makes no difference to the outcome of the current case – EU law is not within the scope of rules of international law applicable in the relations between the parties under Article 31(3)(c) of the VCLT. *Forum non conveniens* and comity objections would not apply to the current case because investment tribunals are the only available forum for the Claimants to bring their claim. (¶¶ 123, 124)

#### 4.4. *The Effects of the Declaration of the EU Member States*

The Claimants submit that, at its highest, the Declaration has interpretative purposes. As such, it cannot modify existing legal obligations. Even if it could, no such intention can be derived from the Declaration – it contains no such wording and does not purport to terminate the ECT. It does not amount to a rule or principle of international law. (¶¶ 136-139)

Even if the Respondent was correct, the Declaration would have no impact on the Tribunal's jurisdiction under the ECT. The Declaration is non-retroactive and was not approved by all Signatories to the ECT. Further, it is not specific enough to create an obligation. The Respondent also withdrew from the ECT in January 2016 and cannot hence participate in ECT's interpretation. Finally, the Declarations were not made by an authority vested with power to do so but by diplomats. (¶ 140)

#### 4.5. *Respondent's request for suspension of proceedings*

Claimants submit that the Respondent's request should be denied. It was raised unjustifiably late and has no legal merit. The exercise of the power to suspend proceedings would come into conflict with Tribunal's express duty to determine its own jurisdiction. Further, the reasons provided by the Respondent are not compelling enough to justify the suspension. Once parties have consented in writing to submit their dispute to ICSID arbitration, they are precluded from pursuing any other remedy until and unless the Tribunal explicitly refuses to take jurisdiction. An ongoing CJEU case and the current arbitration have nothing in common. (¶¶ 203-209)

### 5. **Tribunal's analysis**

The Tribunal recalled the *Bluesun* arbitration in which it was stated that EU law is both national and international law. Further, no other Tribunal has upheld the objection to intra-EU BITs with regards to the ECT. The *Bluesun* reasoning is being strictly followed. Specifically, Respondent's interpretative argument concerning the disconnection clause does not stand to scrutiny when the ECT is interpreted, pursuant to the VCLT. Further, subsequent EU law cannot supersede the earlier ECT. (¶¶ 141-151)

The Tribunal reiterated that in the *Achmea* Judgment, the court highlighted that tribunals constituted pursuant to the BIT in that case would have to rule on matters concerning EU law. In particular, provisions on fundamental freedoms including freedom of establishment and free movement of capital. (¶¶ 152-161)

The reasoning of *Achmea*, however, stems entirely from the circumstances of the BIT under consideration, whose treaty language transgressed EU law. And is not based on any other BIT or a wider ISDS enquiry, particularly not the ECT. It must be deemed that the CJEU did so intentionally. Secondly, it is not clear why the examination of arbitral awards by German courts in *Achmea* would be insufficient to ensure the full effectiveness of EU law. The CJEU has not elaborated on the point. In any case, the reasoning would not be applicable to the ECT arbitrations. Finally, the CJEU in the case never indicated that the Slovak Republic or the Kingdom of Netherlands are barred from offering to enter into arbitration agreements. The Court also made no comments as to the authority of UNCITRAL tribunals to rule according to general principles of international law. (¶¶ 162-171)

The Tribunal hence agrees with the *Vattenfall* tribunal in restricting the application of the *Achmea* Judgment to the *Achmea* BIT and its non-application to the ECT. Article 26 of the ECT should not be regarded as regarding intra-EU relations. In the current case, the Tribunal resolves the alleged breaches pursuant to principles of public international law. Interpretation of EU law does not arise for consideration. EU law is a branch of public international law to a particular extent – it forms *lex specialis* the application of which is restricted to those cases which fall into its particular scope. Quoting the *Bluesun* case, there is no room for incompatibility between the ECT and EU law for the purpose of this type of cases. (¶¶ 172-175)

Turning to the Declaration, it was not signed by the representatives of all the EU Member States. It cannot hence be considered to reflect the common view of all EU Member States and for the same reasons it cannot be considered within the EU legal order. It is not even an EU legal instrument but at best a statement of intention. So far, the CJEU has also not relied upon the Declaration in particular in interpreting ECT arbitrations. The Decision purports to convey a position and not have a legal effect. (¶¶ 176-187)

It also specifies that intra-EU BITs should be terminated by bilateral treaties. The ECT is not a bilateral investment treaty and, secondly, an intention to terminate signals that at the moment the treaty is still in place. Further, the Declaration acknowledges that more needs to be done at the municipal level to ensure protection of investors. The ninth action of the Declaration mentions that further additional steps would be considered with regard to the ECT but does not go further than that. In sum, no collective declaration of interpretation can be ascertained from the Declaration. (¶¶ 188-194)

Even if the Declaration was deemed a collective declaration of interpretation under general international law, it could be viewed as a reservation to the ECT or an attempt to modify ECT Article 25. Such exercise would breach Article 36 of the ECT which forbids reservations to the treaty. A disconnection clause cannot be imported to the ECT by means of a Declaration. (¶¶ 195-196)

To conclude, the Tribunal finds that none of the objections raised by the Respondent, whether the intra-EU position prior to *Achmea*, the *Achmea* Judgment properly construed in the wider circumstances of public international law, or the Declaration, either individually or collectively to have the effect of nullifying (whether at the time, or retrospectively) the offer to arbitrate on the part of the Respondent as of the date of the Request for Arbitration and consequently do not affect the jurisdiction of the Arbitral Tribunal. (¶ 197)

Concerning the Respondent's request for suspension of proceedings, the Tribunal rejected it. The Respondent has not produced convincing evidence that the ongoing CJEU case and the current arbitration would lead to conflicting decisions. Further, the request was filed unjustifiably late. (¶ 210)

## 6. Decision

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

- (1) The Respondent's Intra-EU Jurisdictional Objection is hereby denied;
- (2) The Tribunal will address separately in its Award the remaining jurisdictional and/or merits issues in this case;

- (3) The Respondent's Request for Suspension is hereby denied; and
- (4) Decisions regarding costs are deferred until a later time in these proceedings. ¶  
197)