

Article

# Reconciling International Climate Law and the Energy Charter Treaty through the Use of Integrative Interpretation in Arbitration

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**Abstract:** The conflicting objectives of the Energy Charter Treaty's (ECT) protection of fossil fuel investments and climate change mitigation can reveal themselves in investor state dispute settlement (ISDS). As neither the modernization nor the termination of the ECT is likely, ECT arbitration will continue to exist. This article, therefore, examines the reconciling potential of integrative interpretation in climate relevant ECT arbitrations. An integrative interpretation is not only prescribed by the international rules of treaty interpretation, but can also be found in the practice of international dispute settlement. However, international climate law has not yet been taken into account by a single ECT tribunal. Although some hurdles and uncertainties remain in practice, examples of extraneous treaty use, as well as the reasoning of the judgments of recent climate litigation, show that ECT ISDS has the potential to reconcile climate change and energy investment interests in the future.

**Keywords:** investment arbitration; Energy Charter Treaty; principle of systemic integration; international climate law



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## 1. Introduction

The Energy Charter Treaty (ECT)<sup>1</sup> and its role in relation to international climate goals has gained increasing attention in recent years (see [Tienhaara 2018](#); [Bos and Gupta 2019](#); [Cima 2021](#); [Climate Change Counsel 2022](#)). Given the known facts about the cause of climate change, one can argue that investments in fossil fuels and, more specifically, the long-term protection of such investments, especially new ones, are at odds with climate mitigation efforts. While there is general agreement among members of the International Energy Charter that the ECT does not reflect the “new realities of the energy sector” (Preamble of the International Energy Charter 2015)<sup>2</sup>, the ideas for remedy diverge. While some states and scholars have argued strongly for withdrawal from the ECT (among others, [Haut Conseil pour le Climat 2022](#); [Bernasconi-Osterwalder et al. 2021](#); [Federal Ministry for Economy and Climate Protection Germany 2022](#)), others have supported the amendment of the treaty (this was formerly the EU position, for instance). The main point of criticism is the fact that the ECT protects investments in fossil fuels and provides investors the opportunity to bring claims of alleged treaty breaches before tribunals. This could create situations in which states are sued before tribunals for implementing climate mitigation measures that negatively impact fossil fuel investments protected by the treaty. [Tienhaara \(2011, 2018\)](#) has argued that the mere possibility of investor state dispute settlement (ISDS) already deters states from implementing effective climate mitigation measures—in other words, it causes a “regulatory chill”. In addition, the suggested treaty reform would not prevent such ISDS ([Hinrichsen 2023](#)) and, in any case, recent withdrawals by some of the parties have made the modernization of the ECT unlikely. Likewise, withdrawing from the ECT would not immediately end the possibility of arbitration, due to the sunset clause in Art.

<sup>1</sup> Energy Charter Treaty, adopted 17 December 1994, entered into force 16 April 1998 2080 U.N.T.S. 100.

<sup>2</sup> International Energy Charter 2015.

47(3) of the ECT. A collective withdrawal combined with an inter se agreement would only be able to limit arbitration to conflicts that involve a party from a state that has not opted for withdrawal and the inter se agreement (Hinrichsen 2023). While the potential conflict between the ECT's investment protection and the international climate change regime has not yet materialized in many investment disputes, their number has risen significantly in the last few years and is expected to increase further with the adoption of stricter climate mitigation rules. It is, therefore, crucial to identify interpretations of treaty regimes that would allow states to comply with the ECT and the international climate regime at the same time. This article, therefore, examines to what extent the ECT and international climate change law can be reconciled in the extant dispute settlement system. In order to do so, this article draws on the relevant literature on treaty interpretation and application, and international dispute settlement decisions of various fora, which provide examples for the use of a systemic interpretation. This article shows how the ECT and international climate law could potentially be reconciled in the existing system by taking international climate law into account when interpreting ECT provisions during arbitration.

## 2. Methods and the Principle of Systemic Integration

This paper examines the reconciling potential of the principle of systemic integrations in ECT ISDS with regard to climate change. Starting from the common understanding and use of the principle in international disputes, its usage in arbitration cases and in ECT disputes is reviewed. The findings are presented in Section 3. The relevant cases were extracted through a literature review and from the United Nations Conference on Trade and Development (UNCTAD n.d.) investment dispute database (UNCTAD n.d., Investment Policy Hub). The relevant cases are those which demonstrate the application of the principle of systemic integration (Section 3.1), show the usage of international environmental law in arbitration (Section 3.2) or, as in one case, provide an example of the protection of a public good against the interest of an investor through the integration of extraneous law. In Section 3.3, the climate-relevant ECT cases are extracted. Cases concerning renewable energies are, however, excluded to restrict the breadth of the data.

The principle of systemic integration is codified in Art. 31(1)(c) of the Vienna Convention on the Law of Treaties<sup>3</sup> (VCLT): “any relevant rules of international law applicable in the relations between the parties” “shall be taken into account, together with the context” of the provision (McLachlan 2005; Sands 1998). Taking other relevant rules into account aims at minimizing conflictual interpretations, assuming that treaty creators intended no effect against other existing international laws (Simma 2011). The ILC Study Group emphasized Art. 31(3)(c) of the VCLT, requiring a “sense of coherence and meaningfulness” in the legal “reasoning by courts and tribunals”, which would make an integrative interpretation mandatory where relevant rules of international law exist (McGrady 2008; International Law Commission 2006). The risk of divergent treaty application is limited by the fact that extraneous treaties cannot be taken into account in a way that affects third parties' enjoyment of rights (McGrady 2008). The VCLT is broadly accepted as customary law and, thus, part of the body of international law (International Law Commission 2006; McLachlan 2005; McGrady 2008). Thus, this provision is applicable to the interpretation of all international treaties, including the ECT in ISDS. When identifying the possibly applicable international law that should be taken into account according to Art. 31(3)(c) of the VCLT, it should be noted that the VCLT applies to treaties between states only and, thus, refers to states when using the term “parties” in “any relevant rules of international law applicable in the relations between the parties.” International law cannot, therefore, be excluded from being taken into account on the basis that the disputing party, a private investor, is not subject to it directly. This understanding finds evidence in ISDS practice where tribunals regularly

<sup>3</sup> Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force on 27 January 1980, U.N.T.S. 1155 (p. 331).

refer to Art. 31 VCLT to interpret the ECT. In *MOL vs. Croatia*<sup>4</sup>, the tribunal did not reject as wrong the respondent's argument that international law between Hungary (as the home country of the investor) and Croatia was applicable according to Art. 31(3)(c) of the VCLT, and the principle has been referred to in other ISDS cases (see Section 3.1).

The applicable law for the settlement of an international dispute is usually defined in the treaty text or in the rules of the respective dispute settlement institution (Merrills and Brabandere 2022). Article 26(6) of the ECT requires the tribunals of the possible dispute settlement institutions of Art. 26(4) of the ECT to “decide the issues in dispute in accordance with this Treaty [the ECT] and applicable rules and principles of international law”, thus supporting the use of the principle of systemic integration.

The principle of systemic integration is limited to conflicts of interpretation and cannot reconcile differences that go beyond the clarification of wording (Monti 2023; Simma 2011). Thus, the term “fair and equitable treatment” (Art. 10(1) of the ECT) can, in a certain situation for instance, be interpreted in a way that results in the rights under the ECT conflicting with other international treaty obligations, or in a way that allows for the ECT and the obligations under the other treaty in question to be simultaneously complied with by a state. In the case of a direct legal conflict with the ECT, the ECT's investment-advantaging conflict provision (Art. 16) applies. Since international climate change law and the ECT do not deal with the same subject matter, no such conflict exists (see *Electrabel vs. Hungary*<sup>5</sup> para. 4.174). Rather, following the general assumption against conflict in international law (International Law Commission 2006; Pauwelyn 2003), in cases of diverging objectives, the provisions are to be understood in the light of any other law that is relevant in regard to the respective matter (International Law Commission 2006; Pauwelyn 2003). They must be interpreted in an integrative manner.

This paper's approach of looking at previous international dispute settlements and investment cases is weakened by the fact that there is no precedence in international law. Future arbitration outcomes remain, to a certain extent, unpredictable. Furthermore, although the Mauritius Convention on Transparency<sup>6</sup> extends the UNCITRAL Rules on Transparency to all ISDS, there is no strict obligation to make ISDS documents public. Therefore, it is possible that relevant cases and documents are not part of the review. This, however, affects the paper's argument only to a minor degree, given the absence of precedence.

### 3. Findings: Integrative Treaty Interpretation in International Dispute Settlement

A review of past international dispute settlement cases shows that the principle of systemic integration has been applied by various international dispute settlement bodies (Section 3.1). Given its nature as a general principle of international law, it must indeed be applied by any institution or body interpreting international law. The principle has also been used in environmental-related arbitration disputes employing international environmental law (Section 3.2). However, few arbitration disputes relevant to climate mitigation from a fossil fuel phaseout perspective have been brought under the ECT, and none so far have induced arbitrators to interpret the ECT provisions in the light of international climate law—most of them having not yet been decided (Section 3.3). The findings of the dispute settlement reviews will be presented in more detail in the next sections.

#### 3.1. The Use of Non-Regime Law in International Dispute Settlement

Besides the application of Art. 31(3)(c) of the VCLT, the use of an integrative interpretation in international dispute settlement can be specifically called for by the applicable dispute settlement rules. According to Art. 38(1) of the International Court of Justice (ICJ)

<sup>4</sup> *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia* ICSID Case No. ARB/13/32, 5 July 2022.

<sup>5</sup> *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19 (25 November 2015).

<sup>6</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted 10 December 2014, entered into force 18 October 2017, U.N.T.S 3208.

Statute, the ICJ can apply all sources of law listed in the article, which includes practically all international law. World Trade Organization (WTO) panels must investigate the matter at hand “in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)” (Article 7.1 of the Dispute Settlement Understanding (DSU)). While it is unclear whether the mentioned agreements are exclusively WTO law, or can also be other international treaties (Young 2011), WTO bodies certainly have to apply the “customary rules of interpretation of public international law” (Art. 3(2) of the DSU), i.e., Art. 31 and 32 of the VCLT, and thus take the relevant international law into account (International Law Commission 2006). In various WTO cases, the panel as well as the Appellate Body (AB) have stated that non-WTO rules, such as relevant bilateral agreements, could be used to interpret ambiguous WTO provisions (see Table 1). Most famously, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>7</sup> found an application in the *US—Shrimp*<sup>8</sup> case, determining the protection status of sea turtles and inadequate protection measures in regard to WTO law (para. 7.58). In *EC—Biotech*, the panel emphasized that relevant, “informative” non-WTO law should be considered when interpreting WTO provisions, but found it neither necessary nor appropriate to take the provisions of the Convention on Biological Diversity and of the Biosafety Protocol into account (*EC—Biotech* paras. 7.92 and 7.95).

The mandate of the European Court of Human Rights (ECtHR) is to rule on issues concerning the interpretation and application of the European Convention on Human Rights (ECHR)<sup>9</sup> and its protocols (Art. 32 of the ECHR). In its decisions in *Golder vs. the United Kingdom*<sup>10</sup> (para. 29), *Loizidou vs. Turkey*<sup>11</sup> (para. 43–44), *Al-Adsani*<sup>12</sup> (para. 55–56), *Fogarty*<sup>13</sup> (para. 35), and *McElhinney*<sup>14</sup> (para. 36), the European Court of Human Rights took extraneous international law into account, explicitly referring to the principle of integrative interpretation in the VCLT. In this manner, the ECtHR integrated international law on state immunity and general international law into the interpretive process (see Table 1). It did so in inter-state disputes, such as in *Golder vs. UK*, as well as in the other cases in which an individual claimed rights against a state.

Meanwhile, the Iran United States Claims Tribunals (IUSCTs), which have jurisdiction over certain private and inter-state claims between the US and Iran and their respective nationals (Art. 2 of the Claims Settlement Declaration), took the 1930 Hague Convention on the conflict of nationality laws into account in *Nasser Esphahanian vs. Bank Tejarat*<sup>15</sup>, and considered the relevant rules of international law when determining its jurisdiction in cases concerning dual nationality (see Case No. A/18<sup>16</sup>, IRAN–U.S.).

The ad hoc tribunal of the Permanent Court of Arbitration (PCA) “shall apply the rules of law designated by the parties as applicable to the substance of the dispute” (Art. 35(1) PCA Arbitration Rules 2012). In the *OSPAR Convention* case (para. 84–85), as well as in the *MOX plant*<sup>17</sup> case, the PCA emphasized the importance of taking other relevant law into account. However, despite regarding the Convention for the Protection of the

<sup>7</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 March 1973, entered into force 1 July 1975, 14537 U.N.T.S. 993 (p. 243).

<sup>8</sup> United States—Import Prohibition of Certain Shrimp and Shrimp Products. Report of the Panel. WT/DS58/R 15 May 1998 [US-Shrimp Panel Report].

<sup>9</sup> European Convention on Human Rights as amended by Protocols Nos. 11 and 14, Council of Europe Treaty Series, No. 5.

<sup>10</sup> *Golder v. the United Kingdom*, 21 February 1975, European Court of Human Rights, Series A, No. 18.

<sup>11</sup> *Loizidou v. Turkey*, ECHR, Application no. 15318/89, 1996-VI (18 December 1996).

<sup>12</sup> *Al-Adsani v United Kingdom*, Application no 35763/97, 123 ILR 24 (2001).

<sup>13</sup> *Fogarty v United Kingdom* Application no 37112/97, 123 ILR 54 (2001).

<sup>14</sup> *McElhinney v Ireland* Application no 31253/96, 123 ILR 73 (2001).

<sup>15</sup> *Nasser Esphahanian v. Bank Tejarat, Iran–United States Claims Tribunal*, case No. 157, 29 March 1983, 2 IRAN–U.S. C.T.R., para. 23–28.

<sup>16</sup> Case No. A/18, 6 April 1984, 5 IRAN–U.S. C.T.R. DEC 32-A18-FT.

<sup>17</sup> *Ireland v. United Kingdom*, Permanent Court of Arbitration, order No. 3 of 24 June 2003, ILM, vol. 42 (2003), p. 1187.

Marine Environment of the North-East Atlantic (OSPAR Convention)<sup>18</sup> as being relevant to certain parts of the dispute in the *MOX plant* case, the PCA did not regard it as relevant for interpretation purposes nor consider it applicable to the dispute (para. 18). Moreover, in the dispute concerning the OSPAR Convention,<sup>19</sup> the tribunal stated that it “may apply, where appropriate, other extant international agreements insofar as they are admissible for purposes of interpretation under Article 31 of the Vienna Convention.” This did not, however, include “evolving international law and practice”, such as the Aarhus Convention<sup>20</sup>, which had been ratified by neither Ireland nor the United Kingdom at the time.

**Table 1.** The principle of systemic interpretation in international dispute settlement.

| Case  | Body             | Extraneous Law                                     | Use   |
|---|------------------|--|---|
| <i>US—Shrimp</i>                                  | WTO Panel        | CITES (Appendix 1), CMS, IUCN                      | Determination of the status of sea turtles and interpretation of their protection under CITES in regard to WTO law.               |
| <i>US—Shrimp</i>                                  | AB               | UNCLOS, CBD, CMS, Agenda 21                        | Interpretation of “unjustifiable discrimination”. Established the fact that sea turtles are exhaustible natural resources.        |
| <i>US—Shrimp (Art 21.5)</i>                       | WTO Panel        | Inter-American Convention                          | Benchmark as possible achievements in international environmental protection.   |
| <i>Chile—Price Band System</i>                    | WTO Panel        | MERCOSUR Economic Complementarity Agreement No. 35 | Decided that it was not relevant for the interpretation of the WTO Agreement.   |
| <i>Korea—Various Measures on Beef</i>             | WTO Panel        | Bilateral Agreements                               | Interpretation of WTO provisions.   |
| <i>EC—Banana III</i>                              | WTO Panel and AB | Non-WTO Provisions                                 | Interpretation of WTO provisions.   |
| <i>United States—FSC (Article 21.5—EC)</i>        | AB               | Regional Investment Treaties and BITs              | Interpretation of “foreign-source investment”.  |
| <i>Espahanian vs. Bank Tejarat</i>                | IUSCT            | International Law on Diplomatic Protection         | To define nationality requirements for claims before the tribunal.  |
| <i>Case No. A/18</i>                              | IUSCT            | International Law on Diplomatic Protection         | To define nationality requirements for claims before the tribunal.  |
| <i>Golder vs. the United Kingdom</i>              | ECHR             | General International Law                          | Interpretation of Art. 6 of the ECHR (right to a fair trial).   |
| <i>Al-Adsani Fogarty, and McElhinney</i>          | ECHR             | International Law on State Immunity                | Considering state immunity as a proportionate measure curtailing the right of access to the court (Art. 6 of the ECHR).           |
| <i>Berschader vs. Russia</i>                      | Tribunal         | International Law, BITs                            | Interpretation of the term of “investment”  |
| <i>European Media Ventures vs. Czech Republic</i> | Tribunal         | General International Law                          | Interpretation of the term “expropriation”  |
| <i>Tulip vs. Turkey</i>                           | Tribunal         | International Human Rights Law                     | Interpretation of the terms “fundamental rule of procedure  |
| <i>Sàrl vs. Uruguay</i>                           | Tribunal         | Customary International Law                        | Interpretation of the scope and content of the FET  |
| <i>Vattenfall vs. Germany</i>                     | Tribunal         | EU Law   | Possibility to be taken into account but not in a case where it is contradictory to the ordinary meaning of the investment treaty |

Article 31(3)(c) of the VCLT has also been applied to the interpretation of international investment treaties in ISDS. Shilow listed numerous cases in which tribunals referred to the integrative article (Shilow 2022). In *Berschader vs. Russia*<sup>21</sup>, the tribunal held that “[i]nsofar as the terms of the Treaty are unclear or require interpretation or supplementation, the

<sup>18</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic.

<sup>19</sup> Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, final award, 2 July 2003, UNRIIAA, vol. XXIII, pp. 59–151.

<sup>20</sup> Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, entered into force 30 October 2001, 37770 U.N.T.S. 2161 (p. 447).

<sup>21</sup> Vladimir Berschader and Moise Berschader v. Russia, Award, 21 April 2006.

Vienna Convention requires the Tribunal” (para. 95) to take into account the relevant rules of international law that are applicable to the relations between the parties. Tribunals have referred to Art. 31(3)(c) of the VCLT in order to interpret terms, such as “expropriation” (*European Media Ventures vs. Czech Republic*<sup>22</sup>, para. 47), “the fundamental rule of procedure” (*Tulip vs. Turkey*<sup>23</sup> para. 92), and “[t]he scope and content of FET” (*Sàrl vs. Uruguay*<sup>24</sup> para. 317), with reference to extraneous international law. Whether EU law can be considered international law and, thus, potentially taken into account on the basis of Art. 31(3)(c) of the VCLT, has been judged differently by tribunals. Nonetheless, tribunals have agreed that even if EU law could be considered in the interpretation, it could never have the impact of changing the ordinary meaning of an investment treaty. Thus, in *Vattenfall vs. Germany*<sup>25</sup> (para. 154), the tribunal did not exclude EU law from being taken into account in ISDS, but found the respective law invoked by the European community (the *Achmea* decision) contradictory to the very meaning of the investment treaty in question and, therefore, impossible to consider. In *Landesbank vs. Spain*<sup>26</sup>, on the other hand, the tribunal refused to take into account EU law as it “is only applicable between some of the Contracting Parties to the ECT” (para. 163). The same argument was used by the *Eskosol vs. Italy*<sup>27</sup> tribunal (para. 125).

These cases show that dispute resolution bodies generally do not interpret the norms of international law in a vacuum, independent from their legal environment ([Giannopoulos 2020](#)). Although these cases are based on different legal grounds, they support the use of non-regime law in international dispute settlement in general, also in ISDS where the obligations between the disputing parties, state and investor, are not reciprocal. Yet, since arbitrators have discretion, within the limits of treaty interpretation rules, they do not always decide to take extraneous laws into account, as will be seen in the following. Table 1 provides an overview of the disputes and the extraneous laws used.

### 3.2. The Use of International Environmental Law in Investment Arbitration

The principle of systemic integration also applies to the interpretation of investment provisions in arbitration disputes (see Section 2). Due to the nature of ISDS, often both national and international law are applicable ([Kjos 2013](#)). Most tribunals accept “party-autonomy”, meaning that the disputing parties can decide by agreement which law is applicable ([Kjos 2013](#)). In the absence of such party agreement, arbitrators decide on the applicable law—guided by dispute settlement agreement provisions that often contain broad formulations like “such rules of international law as may be applicable” (Article 42(1), second sentence of the ICSID Convention) ([Kjos 2013](#)).

The following review looks specifically at the use of international environmental law in arbitration. It covers international environmental law more comprehensively, and not solely climate law, since international climate law deals with the protection of the atmosphere from anthropogenic greenhouse gas (GHG) emissions that lead to global warming, and can be considered as a subfield of international environmental law ([Monti 2023](#)). To limit complexity, the use of environmental principles in arbitration is not included in the analysis, unless codified in an international environmental treaty.

Of 1257 known investment arbitration cases (as of June 2023), about 120 relate to the environment, but few have taken international environmental law into account ([UNCTAD n.d.](#), Investment Policy Hub; [Valencia 2023](#)). Of the available<sup>28</sup> arbitration cases with

<sup>22</sup> *European Media Ventures SA v. Czech Republic*, Partial Award on Liability, 8 July 2009.

<sup>23</sup> *Tulip Real Estate and Development Netherlands B.V. v. Turkey*, Decision on Annulment, 30 December 2015.

<sup>24</sup> *Philip Morris Brand Sàrl v. Uruguay*, Award, 8 July 2016.

<sup>25</sup> *Vattenfall v. Germany*, Decision on the Achmea Issue, 31 August 2018.

<sup>26</sup> *Landesbank v. Spain*, Decision on Jurisdiction, 25 February 2019.

<sup>27</sup> *Eskosol v. Italy*, Decision on Termination and Preliminary Objection, 7 May 2019.

<sup>28</sup> The endeavor to include all relevant investment arbitration awards in the analysis is limited by the fact that not all investment arbitration cases are public. Cases are, thus, not included when either their documents are classified, or their existence is confidential. Moreover, it is possible that relevant cases or case documents may

environmental relevance gathered by Valencia (2023), listed by Viñuales (2012b)<sup>29</sup>, and extracted from the UNCTAD database through a keyword search, most of the cases only referred to national environmental law in order to define whether a treaty breach had occurred. International environmental law was considered in eight awards. Those cases were scrutinized in more detail by this author. Although the *Urbaser*<sup>30</sup> case integrated human rights rather than international environmental or climate law, it is also included in this analysis. With its progressive integration of human rights law, it is a key example of how the principle of systemic integration can help to integrate laws that protect a public good or interest against investors. In this case, the tribunal found that investors, while having no positive obligations to provide for the enjoyment of human rights, can be obliged to abstain from human rights violations (*Urbaser* paras. 1209, 1210). This might become relevant for cases in which international environmental law or climate change protection is intertwined with the enjoyment of human rights. The investment dispute cases identified in which international environmental law was taken into account are *SPP vs. Egypt*,<sup>31</sup> *S.D. Myers vs. Canada*<sup>32</sup> (partial award), *Chemtura vs. Canada*,<sup>33</sup> *David Aven vs. Costa Rica*,<sup>34</sup> *Parkerings-Compagniet AS vs. Republic of Lithuania*,<sup>35</sup> *Maffezini*,<sup>36</sup> *Eco Oro*,<sup>37</sup> and *Allard vs. Barbados*. The international environmental treaties in these cases were taken into account as relevant laws or contexts to the legal dispute. Explicit reference to Art. 31(1)(c) of the VCLT was, however, only made in *Urbaser* (para. 1204), *David Aven vs. Costa Rica* (para. 411), and *Allard vs. Barbados* (para. 178). Table 2 shows the international environmental law that was taken into account in each of the cases and the legal effect it had. The integration of international environmental law into these arbitration cases strengthened the states' position, but did not always have an impact on the outcome of the dispute. For example, while the reference to domestic and international environmental law in *Chemtura vs. Canada* led to the dismissal of the investor's claims, in *Eco Oro* the reference to the Ramsar Convention's definition of wetlands helped to establish the existence of an environmental exception, but did not shield Colombia from paying damages. *Allard vs. Barbados* shows that international environmental obligations are not sufficient to raise legitimate expectations. The tribunal confirmed, however, that they might reinforce the legitimacy of expectations raised through representations made by the host state (para. 208), and that the other international environmental obligations of a host state might be relevant to the application of the standards of the investment treaty (para. 244).

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have been missed while screening the cases for the use of international environmental treaties. This might affect the results of the analysis to a certain extent but most likely not significantly.

<sup>29</sup> Viñuales lists 39 cases of ISDS that (1) either arose from investors operating in environmental markets, (2) and/or where their environmental impact or impact on certain minorities was an explicit part of the dispute, (3) and/or where the application of domestic or international environmental law is explicitly at stake.

<sup>30</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa vs. The Argentine Republic* ICSID Case No. ARB/07/26, 8 December 2016.

<sup>31</sup> *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 April 1988), Award (20 May 1992).

<sup>32</sup> *S.D. Myers Inc. vs. Canada*, NAFTA Arbitration (UNCITRAL Rules), Partial Award (13 November 2000).

<sup>33</sup> *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award (2 August 2010).

<sup>34</sup> *David Aven et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/15/3 (18 September 2018)).

<sup>35</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007).

<sup>36</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 (13 November 2000).

<sup>37</sup> *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021).

**Table 2.** Arbitration cases in which international environmental law was taken into account.

| Case   | Extraneous Law   | Use of Intentional Environmental Law   | Legal Implications/Reconciliation Effect  |
|--|--|--|---|
| <i>SPP vs. Egypt</i><br>paras. 150–54  | UNESCO as “relevant law”   | Determination of protection status.  | Legality of a project; host state had to compensate investor.   |
| <i>S.D. Myers vs. Canada (partial award)</i><br>paras. 201–13                | Transboundary Agreement on Hazardous Waste between the US and Canada, Basel Convention, NAAEC Art. 31 of the VCLT  | Requiring a least-inconsistent regulatory alternative.   | International environmental law does not prohibit trade in waste if it is for a cost-effective and environmentally sound management.  |
| <i>Chemtura vs. Canada</i><br>para. 138–39                                   | Stockholm Convention, 1998 Persistent Organic Pollutants (POPs) Protocol <sup>38</sup> to the Convention on Long-Range Transboundary Air Pollution (LRTAP) <sup>39</sup> , Aarhus Convention as relevant broader context | Lindane is dangerous and internationally designated for elimination; the review process of the Canadian Ministry was mandated by the MEA.  | Recognition of Canada’s international environmental obligations and dismissal of the claim.   |
| <i>Urbaser</i><br>paras. 1191, 1196–99, 1200–2                               | Universal Declaration of Human Rights <sup>40</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights, Art. 31(3) of the VCLT  | Investors have an obligation to abstain from HR violations by, e.g., deliberately impeding access to water; this obligation derives from the contractual agreement under which they make their investment and legitimate expectations are framed by the legal framework of the host country, including its basic human rights. | Investors may not harm human rights (the counterclaim failed for other reasons) and measures implementing constitutional rights cannot violate the FET standard.  |
| <i>David Aven vs. Costa Rica</i><br>Paras. 417, 418, 482                     | Ramsar Convention, CBD Art. 31(3)(c) of the VCLT   | Definition of wetlands.  | The investment area in dispute was protected.   |
| <i>Parkerings-Compagniet AS vs. Republic of Lithuania</i><br>paras. 391, 392 | UNESCO   | Interpretation of “alike”.   | Impact on antiquities and environmental protection in an UNESCO city are reasonable discrimination criteria.  |
| <i>Maffezini</i><br>paras. 70, 71  | Espoo Convention   | EIA as basic requirement for environmental protection.   | The host state cannot be held responsible for the investor’s decision regarding the EIA.  |
| <i>Eco Oro</i><br>paras. 677, 804–20, 829                                    | Ramsar Convention, CBD Art. 31 of the VCLT   | Obligation to protect wetlands.  | Establishing the fact but no legal effect.  |
| <i>Allard vs. Barbados</i><br>paras. 178, 208                                | CBD and Ramsar Convention, Art. 31 (3)(c) of the VCLT  | Protection of the Graeme Hall Swamp.   | Whether the international obligations confirmed or reinforced the legitimacy of the claimant’s expectations remains unclear (since no representations for the rise of legitimate expectations were found, there is no such analysis). |

<sup>38</sup> Protocol on Persistent Organic Pollutants, Aarhus (Denmark), (adopted 24 June 1998, in force 23 October 2003) available at: [http://www.unece.org/env/lrtap/pops\\_h1.html](http://www.unece.org/env/lrtap/pops_h1.html) (accessed on 20 October 2023).

<sup>39</sup> Convention on Long-Range Transboundary Air Pollution, Geneva (Switzerland), (adopted 13 November 1979, in force 16 March 1983) available at: [http://www.unece.org/env/lrtap/lrtap\\_h1.html](http://www.unece.org/env/lrtap/lrtap_h1.html) (accessed on 4 October 2023).

<sup>40</sup> Universal Declaration of Human Rights 1948 <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (accessed on 12 September 2023).

Some other cases provide examples of tribunals abstaining from taking international environmental law into account. In *Bayview Irrigation District vs. United Mexican States*<sup>41</sup> (para. 121), the tribunal rejected the relevance of a bilateral international water treaty to a dispute under the North American Free Trade Agreement (NAFTA).<sup>42</sup> Not taking the relevant international environmental law into account in *Vattenfall vs. Germany (I)*<sup>43</sup> resulted in a settlement that allowed lenient water protection measures from a coal-fired power plant in Hamburg. Later, a German administrative court found the measures to be in breach of the non-deterioration obligation of the European Water Framework Directive (OVG Hamburg 1 E 26/18 Urteil vom 01.09.2020). As the legally required stricter regulation would have negated the profitability of the power plant, Vattenfall closed the power plant as part of Germany's subsidized coal phaseout scheme ([Bundesnetzagentur 2020](#)), and no further arbitration process was initiated. The NAFTA tribunals in *Grand River Enterprises vs. US*<sup>44</sup> (paras. 71, 176) and *Methanex vs. USA*<sup>45</sup> (part II para. 5) highlighted their limited jurisdiction and refused to take international environmental law into account despite the environmental relevance of the cases. The majority of investment treaties, including the ECT, are silent about environmental issues or the applicability of environmental norms, which reinforces the tendency of arbitral tribunals to strictly delimit their jurisdiction ([Martini 2017](#); [Viñuales 2012a](#)).

### 3.3. International Climate Change Law in ECT Arbitration

As mentioned above, Art. 26 (6) of the ECT stipulates that tribunals shall decide in accordance with the ECT and “applicable rules and principles of international law”. This provision already allows for applicable extraneous international law to be taken into account ([de Brabandere 2019](#)). The principle of systemic integration (Art. 31(3)(c) of the VCLT) reinforces this integrative interpretation approach and specifies that in order to be applicable, the respective international laws must be “both relevant and ‘applicable in relation between the parties’” ([International Law Commission 2006](#)). Given their usually high membership, most international climate laws fulfil this criterion.

#### 3.3.1. Relevant International Climate Change Law

While there is a clear link between energy investments in fossil fuels and climate change, the relevance of international climate law to an ECT dispute concerning investments in fossil fuel is less obvious. First, a dispute needs to be about the reduction in fossil fuel production or the exploration of fossil fuel resources needs to be relevant to climate change. This would, for instance, be the case if a state decided to shut down in the near future power plants that produce electricity from coal to reduce GHG emissions, leading the investor to initiate an ISDS due to a significant devaluation of their project in the host country. Whether international climate law is relevant to the dispute has to be determined in a second step by looking at the specific national measure that impairs the investment, and the corresponding obligations under international climate law—in other words, whether the measure reducing fossil fuel production is derived from international law.

International climate law does not address investments in fossil fuels and avoids mentioning the production of fossil fuels. The United Nations Framework Convention on Climate Change (UNFCCC),<sup>46</sup> the basis of the international climate regime, contains a general obligation of Annex 1 parties to implement mitigation policies, but without

<sup>41</sup> Bayview Irrigation District v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007).

<sup>42</sup> North American Free Trade Agreement, signed by Canada, Mexico, and the United States 1992, entered into force 1 January 1994.

<sup>43</sup> Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) ICSID Case No. ARB/09/6, (11 March 2011).

<sup>44</sup> Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, NAFTA Arbitration (UNCITRAL Rules), Award (12 January 2011).

<sup>45</sup> Methanex Corporation v. United States of America, NAFTA (UNCITRAL), Award (3 August 2005).

<sup>46</sup> United Nations Framework Convention on Climate Change adopted 9 May 1992, entered into force 21 March 1994, 30822 U.N.S.T., 1771 (p. 107).

providing detailed requirements (Art. 4(2)(a) of the UNFCCC). The instruments and more specific commitments were left to be decided on during regular conferences of the parties (COP), established by Art. 7 of the UNFCCC. At COP 21, the parties adopted the Paris Agreement (PA)<sup>47</sup>, establishing the objective of keeping the “global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C” (Art. 2(1)(a) of the PA). The parties also specified the UNFCCC obligations by introducing substantive individual obligations of conduct and due diligence (Art. 4(2), second sentence of the Paris Agreement), in order to implement measures to reach the self-imposed goals of their Nationally Determined Contributions (NDCs) which states are required to adopt (Art. 4(2), first sentence) (Mayer 2022). However, even if these obligations are individually binding, as Mayer (2022) argues, they do not obligate states to specific outcomes, such as decreasing fossil fuel production (Ibid.).

Besides international agreements, international climate law obligations can also arise from individual commitments through unilateral declarations, such as NDCs (Mayer 2022). However, a study revealed that only very few countries introduced measures and policies for the reduction in fossil fuel production in their NDCs or long-term low greenhouse emissions development strategies (LT-LEDS). Among the ECT members, only Denmark, France, Slovakia, and North Macedonia announced policy measures with which to limit their fossil fuel production (Jones et al. 2021).

In 2021, the Glasgow Pact introduced, for the first time, language on fossil fuels in the international climate regime through agreement on the “phasedown of unabated coal power” (UNFCCC 2022). At COP28, fossil fuels as a whole entered into international climate law, with the Global Stocktake Decision listing “[t]ransitioning away from fossil fuels in energy systems” (UNFCCC 2023) as a way to contribute to global mitigation efforts. Despite these recent developments towards addressing fossil fuel obligations at the international level, the broadness of general mitigation obligations, and the rareness of concrete individual international obligations regarding fossil fuel production weaken the climate law argument in investment arbitration. In the case of an NDC that does not mention fossil fuel production reduction, tribunals would only be able to take the broad mitigation obligations into account. Despite the lack of specific international duties regarding fossil fuel production, national measures aiming at emissions reduction through the phasedown/out of fossil fuel production could arguably be considered as implementing the existing broad international obligations. Due to this origin in international law, these national rules could be taken into account by international dispute settlement bodies (Viñuales 2012b). A more progressive understanding of international climate law could be oriented toward the physical and technical constraints with which the achievement of international climate goals is interlinked. From a scientific perspective, it is clear that a reduction in fossil fuel production is necessary to reach the internationally agreed temperature goal. Without phasing down the production and use of fossil fuels, effective GHG emissions reductions will not be achieved (IPCC 2022, AR6 SPM WG III, C3 f). The 2021 Production Gap Report highlighted the importance of divestment from hydrocarbons, showing that the GHG emissions from planned fossil fuel production will exceed the 1.5 °C and 2 °C global warming scenarios by 110% and 45%, respectively, in 2030 (SEI et al. 2021).

The above shows that despite the lack of precise obligations on state parties to reduce the production of fossil fuels on their territory, the international climate regime requires member states to take mitigation measures. When a state decides to fulfil this obligation by phasing out fossil fuels (which is necessary from a scientific perspective), international climate law, e.g., in the form of general obligations or of NDCs, would be relevant to an investment dispute arising from that phaseout measure.

<sup>47</sup> Paris Agreement, adopted 12 December 2015, entered into force 4 November 2016, 54113 U.N.S.T. 3156 (p. 79).

### 3.3.2. Climate-Relevant ECT Disputes

In order to be allowed to be taken into account, international climate law must be relevant to the specific investment dispute. As Simma put it, the extraneous rules “must be placed in a particular relationship with the investment treaty concerned” (2011). The mere fact that an ECT dispute involves an investment in fossil fuel production does not necessarily mean that it is climate relevant. A [Climate Change Counsel \(2022\)](#) publication on ECT cases showed that climate change had not been discussed in any award to date, and appeared not to have been raised by host states either. A review of concluded ECT disputes that involved fossil fuel investments showed that all but one could not even be considered climate relevant ([Hinrichsen 2023](#)). The exception is the *Rockhopper vs. Italy*<sup>48</sup> case, decided in August 2022; the disputed measure adopted by the Italian government prevented Rockhopper from continuing their oil exploration project in Italian territorial seas. Despite its relevance to international climate law—the Italian Senate used Italy’s international commitment under the UNFCCC as an argument for the revocation of the legal exception for ongoing exploration projects (*Rockhopper vs. Italy*, para. 109)—the tribunal did not take international climate obligations into account and dismissed the civil engagements against the drilling project, which also raised the issue of international climate commitments as domestic politics (para. 198). After finding Italy in breach of the ECT’s expropriation clause, the tribunal did not proceed to decide on the allegations concerning the fair and equitable treatment (FET) standard, the interpretation of which might have provided space for the integration of international environmental/climate law.

The FET standard stipulates that

“[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.” (Art. 10(1) of the ECT, first and second sentence)

The standard is not a promise to an investment or an exploitation concession or similar, but a guarantee that foreign investors will be treated with a certain standard of fairness and equality ([De Nanteuil 2020](#)). However, both ‘fair’ and ‘equitable’ are vague and relational terms, so that the understanding of the FET standard varies ([Klager 2016](#)), including among ECT tribunals ([Hinrichsen 2023](#)). The main elements of the standard identified by scholars are that states must act in good faith; in a coherent, non-arbitrary, non-discriminatory, transparent, and reasonably foreseeable manner; and that they must guarantee procedural fairness as well as access to justice ([Levashova 2019](#); [De Nanteuil 2020](#)). For an investor to claim a breach of their legitimate expectations, a state must first have implicitly or explicitly raised reasonable expectations by its acts ([De Nanteuil 2020](#)), the investor must have provably relied on these expectations and, lastly, the reliance on the expectation must have been legitimate ([Viñuales 2012a](#)). Other factors that could influence whether the FET standard was breached are the behavior of the investor (for instance, whether they performed their due diligence or not) and the frequency/intensity of the violating measure. Despite these specifications, [Monti and Matteo \(2023\)](#) found the grounds on which ECT tribunals had previously based the existence of legitimate expectations wide ranging. While in *MTD vs. Chile*<sup>49</sup> (paras. 51, 52, 188) the investor’s business plan was sufficient to create a legitimate expectation, in *LG&E vs. Argentina*<sup>50</sup> (para. 133) a specific right granted by the host state created legitimate expectations. In other cases, arbitrators were not even able to identify a common understanding of what legitimate expectations means in a certain

<sup>48</sup> Rockhopper Exploration PLC, Rockhopper Italia S.P.A. and Rockhopper Mediterranean LTD V. Italian Republic, Final Award. ICSID Case No. ARB/17/14 (24 August 2022).

<sup>49</sup> MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7 (25 May 2004).

<sup>50</sup> LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006).

situation (see *Mamidoil vs. Albania*<sup>51</sup> dissenting opinion). According to Pierre-Marie Dupuy, in the *Rockhopper vs. Italy* case,

*“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.”* (Opinion of Pierre-Marie Dupuy on *Rockhopper vs. Italy*)

Dupuy interpreted the FET standard by taking into account the environmental concerns that are expressed in the changing laws, local protests, and investors leaving the area. In addition, the fact that Rockhopper had an exploration permit would not have given rise to a legitimate expectation of receiving an exploitation permit, according to Dupuy. While Dupuy integrated environmental concerns into the interpretation of the ECT FET standard, he did not discuss the climate relevance of the case.

The remaining decided or discontinued fossil fuel-related arbitration disputes under the ECT did not aim at reducing the negative impacts of fossil fuels on the climate and, thus, were not climate relevant. However, international climate law is arguably relevant to some of the pending ECT cases that deal with disputes concerning the phasedown of fossil fuels. The cases *Uniper vs. Netherlands*<sup>52</sup> and *RWE vs. Netherlands*<sup>53</sup> were initiated as a consequence of the national emissions reduction measures which the Dutch government was obliged to adopt due to the court ruling *Urgenda vs. Netherlands*.<sup>54</sup> Through ECT arbitration, Uniper and RWE requested compensation for their stranded investments, in the form of coal-fired power plants, that were to be closed down by 2030 at the latest. The *Uniper* case was discontinued as a condition of German subsidies, and the *RWE* case was discontinued in January 2024.<sup>55</sup> In addition, *Ascent vs. Slovenia*<sup>56</sup>—a dispute about the legality of an environmental impact assessment requirement and the eventual prohibition of fracking in Slovenia—has climate relevance due to the GHG emissions associated with hydraulic stimulation. *Towra vs. Slovenia*<sup>57</sup> concerns an alleged expropriatory and discriminatory treatment of the claimant’s investment in the coal mining company Premogovnik Velenje. Since the case was initiated immediately following Slovenia’s announcement of its national coal phaseout plan by 2030, it can be assumed that the case has climate law relevance (Maček 2022). The climate relevant ECT cases are listed in Table 3.

<sup>51</sup> *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, (30 March 2015).

<sup>52</sup> *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands*, ICSID Case No. ARB/21/22, discontinued 6 January 2023.

<sup>53</sup> *RWE AG and RWE Eemshaven Holding II B.V. v. Netherlands*, ICSID Case No. ARB/21/4, discontinued 12 January 2024.

<sup>54</sup> ECLI:NL:RBDHA:2015:7196, *Urgenda Foundation v. The State of Netherlands*, Rechtbank Den Haag, Judgment of 24 June 2015.

<sup>55</sup> ICSID Case No. ARB/21/4, the order of the tribunal took note of the discontinuance of the proceeding and a decision on costs, 12 January 2024.

<sup>56</sup> *Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia*, ICSID Case No. ARB/22/21, pending.

<sup>57</sup> *Towra SA-SPF v. Republic of Slovenia*, ICSID Case No. ARB/22/33, pending.

**Table 3.** Overview of climate-relevant ECT cases. Source: extracted from UNCTAD Investment Policy Hub.

| Year of Initiation | Short Case Name        | Arbitral Rules | Summary  | Outcome of Original Proceedings |
|--------------------|------------------------|----------------|--|---------------------------------|
| 2017               | Rockhopper vs. Italy   | ICSID          | Claims arising out of a decision in February 2016 by the Ministry of Economic Development not to award the claimants a production concession covering the Ombrina Mare field, located within 12 miles of the coast of Italy, following the government's re-introduction of a general ban on oil and gas exploration and production activity within a 12-mile limit of the coastline. | Decided in favor of investor    |
| 2021               | Uniper vs. Netherlands | ICSID          | Ownership of a coal-fired power plant, Maasvlakte 3, by Uniper Benelux N.V. Claims arising out of a 2019 law prohibiting the use of coal for electricity production, which requires the shutdown of the claimants' coal-fired power plant at the end of a 10-year transitional period on 1 January 2030.   | Discontinued                    |
| 2021               | RWE vs. Netherlands    | ICSID          | Shareholdings of 100% in a coal-fired power plant in Eemshaven, held by RWE Eemshaven Holding II BV, and related permits. Claims arising out of a 2019 law prohibiting the use of coal for electricity production, which requires the shutdown of the claimants' coal-fired power plant at the end of a 10-year transitional period on 1 January 2030.                               | Discontinued                    |
| 2022               | Ascent vs. Slovenia    | ICSID          | Claims arising out of the government's 2022 mining law amendment banning the use of hydraulic stimulation for the exploration and exploitation of hydrocarbons, as well as an earlier decision requiring the claimant's joint venture to conduct an environmental impact assessment for the use of low-volume hydraulic stimulation in the Petišovci gas field.                      | Pending                         |
| 2022               | Towra vs. Slovenia     | ICSID          | Claims arising out of the government's alleged expropriatory and discriminatory treatment of the claimant's investment in the coal mining company Premogovnik Velenje, which was under the management of the state-owned Holding Slovenske Elektrarne (HSE).   | Pending                         |

#### 4. Reconciliation in ECT Arbitration

This review of international dispute settlement cases confirms the use of the principle of systemic integration. Nonetheless, climate change law has never been used directly in an ECT award. This does not necessarily refute the reconciliation potential of systemic integration, as this review also shows that climate law was only relevant in a few recent cases. Among these cases, some are pending, while others were discontinued without an award from a tribunal. Only in one case, *Rockhopper vs. Italy*, did the arbitrators deliberately disregard the climate relevance of an ECT dispute. It is unclear why Dupuy only raised environmental law concerns in his opinion to the case, but not international climate law. One could assume that his reluctance was influenced by the fact that Italy did not bring its international climate obligations forward prominently in its defense.

As seen above, ECT tribunals have a mandate to use integrative interpretation (Art. 26(6) of the ECT) that is confirmed by a praxis of taking relevant extraneous international rules into consideration in international dispute settlement. Despite the lack of concrete

international fossil fuel phaseout obligations, national phaseout laws implementing general international commitments should be considered relevant at the international level (Viñuales 2012b). Under this premise, tribunals could assess whether measures that allegedly violate an investor's right under the ECT were necessary and proportionate in light of the state's climate commitments, or whether another measure could have fulfilled its mitigation obligations equally well, while being less intrusive regarding the investor's rights under the ECT (see *S.D. Myers vs. Canada*). By interpreting the provision of the ECT in the light of international climate law, tribunals could come to decisions in which there is no discord between the climate and ECT obligations of the host state. Importantly, this does not require the deduction of exact climate mitigation obligations, which would fall outside the competencies of an ECT tribunal.

Of course, the broadness of climate mitigation provisions combined with the arbitrator's discretion offer a means to avoid taking international climate change law into account (cf., Viñuales 2012b), and creates the risk of an inconsistent understanding of international climate mitigation obligations emerging. For instance, even if the tribunal in *Rockhopper vs. Italy* had taken international climate law into account, it is uncertain whether the award would have been different. Would an investment tribunal have found the total prohibition of oil and gas exploration in the 12-mile zone a necessary and proportionate measure by which to fulfil Italy's international climate mitigation obligations? Without deducing very specific mitigation obligations for a state, taking general international climate mitigation obligations into account might already influence a situation-specific interpretation of terms, like the FET standard. However, to reduce arbitrators' discretion in this regard, and to assure that climate law is taken into account in ISDS where relevant, parties to the UNFCCC would need to agree to more precise mitigation commitments. Clearly formulated mitigation obligations that prescribe the phasedown/out of fossil fuel production would make the pertinence of international climate law to the climate-relevant cases (as defined above) undeniable, and its consideration more likely. This is necessary as there is no compulsory judicial system that could interpret the international climate change regime and develop more concrete mitigation obligations from the extant ones (Viñuales 2012b, p. 31). The agreed upon "transition away from fossil fuels" of COP28 is a step in this direction (UNFCCC 2023).

Due to its need for interpretation and its context dependency, the FET standard, including the concept of "legitimate expectation", is especially suited to reconciling investments and climate mitigation interests (see, cf., Dupuy's Opinion in the *Rockhopper vs. Italy* award), as it allows for the balancing of both interests in the assessment of "legitimate expectations". Whether the FET standard is breached depends largely on whether the legitimate expectations of the investor were disappointed. International climate law that obliges states to significant long-term emissions reduction might influence legitimate expectations about fossil fuel investment. The more precise the obligations for fossil fuel production reduction, the stronger the impact on the expectations of investors in regard to fossil fuel production investment. That is because legitimate expectations are based, among other things, on the legal framework, which includes international and national climate law (cf., Urbaser para 624, De Nanteuil (2020)), and even more broadly in "the global context". For instance, the fact that science supports the necessity to phasedown the production and consumption of coal, oil, and natural gas to reach internationally agreed upon climate mitigation goals (SEI et al. 2021; International Energy Agency Report 2021), could be taken into account as part of the global context (see De Nanteuil 2020) when assessing the legitimate expectations of an investor. However, it goes without saying that representations made by the host state towards the investor (such as granting exploitation permits) form part of the legal context of the legitimate expectations as well.

Taking international climate law into account could impact what an investor could have legitimately expected in regard to their planned or extant fossil fuel investments and, thus, whether a certain state measure is considered to breach the FET standard. Could an investor legitimately "expect" that no fossil fuel phasedown measures would be taken in the

mid-to-long term given that the host state is party to international climate agreements? The Hague District Court followed this train of thought in their decision rendered in November 2022.<sup>58</sup> The court decided that the Dutch's coal phaseout was foreseeable, and that no compensation was to be paid to either Uniper or RWE for their coal-fired power plants (ECLI:NL:RBDHA:2022:12628, para 5.16.37; IISD 2022). According to the court, the investor

*“had to take into account that, as far as CO<sub>2</sub> emissions were concerned, the ETS [emission trading system] would not be the ‘exclusive regulatory framework’ for the entire lifetime of that power plant. The investor knew or should have known that, in addition, there was a risk that supplementary restrictive measures would be taken by the government regarding the use of the Eemshaven power plant, if it did not succeed in reducing the CO<sub>2</sub> emissions of that power plant very substantially.”* (ECLI:NL:RBDHA:2022:12628, para 5.16.37.)

While this is not the reasoning of a tribunal interpreting “legitimate expectations” under the ECT, the notion of “knew or should [reasonably] have known” applies as well to the interpretation of the FET standard and the assessment of what was legitimately to be expected in the context of investment arbitration (Levashova 2023). By taking the international climate obligations of the host state to reduce CO<sub>2</sub> emissions into account, these judgements are examples of an integration of extraneous laws. The court specifically took national mitigation measures deriving from international climate law into account, in a dispute where an investor claimed compensation for the negative impact of those climate mitigation measures. A comparison of the court's findings and ECT arbitrations must, however, be treated cautiously due to the differing dispute settlement institutions and legal bases involved. The court applied the foreseeability test to decide on the alleged expropriations rather than a breach of the FET standard, and based its judgments on Art. 1 of the First Protocol of the ECHR, as well as Art. 17 of the EU Charter of Fundamental Rights<sup>59</sup>—not the ECT provisions. However, the court's reasoning shows a pathway for the integration of international climate law through the FET standard. In this manner, the investor's interests and rights that are protected by the ECT can be balanced with the state's international climate mitigation obligations and its public's interest in climate protection. This demonstrates the potential for a balancing process when defining the legitimate expectations in a specific dispute, which might include, inter alia, an assessment of the transparency of a host state's announcement and implementation of mitigation measures, promises made by the state to the investor, the investor's due diligence, the current state of scientific knowledge, and developments concerning international commitments.

While the integrative interpretation of the FET standard was developed as a means by which to reconcile the ECT with the international climate regime, there are further ways to reconcile these two regimes. Climate change laws could possibly also find their way into investment disputes through provisions that are of overriding importance, such as public policy exceptions (Kjos 2013). These could be (1) norms that are essential for the political, social, and economic interests of a state; (2) moral legal principles (e.g., *pacta sunt servanda*, good faith); and (3) the duty to respect international obligations (e.g., UN Resolutions, ILA New Delhi Resolution in Kjos 2013). Climate law could be considered essential for the political, social, and economic interests of a state, as the consequences of (unmitigated) climate change threaten the livelihood of many societies. A difficulty here might be the establishment of an emergency or essential national interest in climate mitigation measures, since the harmful consequences of climate change—droughts, floods, etc.—regularly occur at a different time and place than the emissions.

The proposed reconciliation focuses on the host state's obligations, suggesting that investment protection and climate mitigation action can be fulfilled at the same time.

<sup>58</sup> ECLI:NL:RBDHA:2022:12628, ECLI:NL:RBDHA:2022:12635, and ECLI:NL:RBDHA:2022:12653, ECLI:NL:RBDHA:2022:12635, Rechtbank Den Haag, 30 November 2022.

<sup>59</sup> Charter of Fundamental Rights of the European Union, 2012/C 326/02, EN26.10.2012 Official Journal of the European Union C 326/391.

Whether and to what extent this is possible depends, however, on the specific disputed situation. Issued permits for and explicit guarantees or promises by host states about long-term investments in fossil fuel production are covered by the ECT's protection, and no interpretation can reconcile these with a state's possible climate mitigation obligations. However, if such clear promises are lacking, and the constantly evolving climate law incites the host state to limit fossil fuel projects on its territory, reconciliation might be possible. Much depends on whether the investor had legitimate expectations, and hence a right, regarding their investment, or whether they should have seen that fossil fuels are not a reliable long-term investment. Although the assessment of the investor's expectations in such a case would involve looking at the investor's understanding/perception of climate obligations, investors themselves are not (yet) normally regarded as bearing climate obligations. Within ISDS, it is only the host state that might have international obligations for climate mitigation. As private parties, investors are not subjects of international law and cannot, thus, be held responsible internationally. This exclusion from obligation presents a barrier to the use of international environmental law in investment disputes (Kjos 2013; Valencia 2023). However, cases such as *Urbaser* and *David Aven et al. vs. Costa Rica* (para. 699–702) can be understood as attempts to widen the responsibility of internationally operating investors. Nonetheless, to date, corporate responsibility at the international level is limited to the obligation to not intentionally violate human rights (*Urbaser* para. 1206), and an implicit obligation to not thwart environmental protection measures that are consistent with the international investment agreement (*Aven et al. vs. Costa Rica* para. 732). Therefore, the integration of environmental law into investment arbitrations remains more likely through the host state, which bears not only investment protection obligations, but also international environmental commitments, namely, international mitigation obligations.

## 5. Conclusions

This article shows that the ECT investment protection provisions and the international climate regime, more precisely climate mitigation obligations, can be reconciled in ISDS. However, due to the structure of ISDS and the broad nature of international mitigation obligations, the integration of international climate law into ECT arbitration depends, ultimately, on the specific situation and the arbitrators. States can present (strong) arguments for the integration of climate obligations into the interpretation of the ECT's provisions in the context of a specific dispute, but then have to rely on the arbitrator to take international climate obligations into account. Without a strong integration argument, it is more likely that arbitrators disregard international climate law as outside their jurisdiction. This article shows that according to the rules of treaty interpretation and the practice of international dispute settlement, arbitrators should take climate law into account where it is relevant.

Two approaches could facilitate the integration of international climate change law into the relevant ECT ISDS. First of all, stronger climate change mitigation obligations, containing explicit goals for the reduction in fossil fuel production, would (importantly) limit the protection that investors could expect for their fossil fuel investments. Secondly, given that the disputing parties have a say in which law is considered to be applicable and relevant in an ISDS, it is advisable that the host states emphasize their international climate mitigation commitments during the dispute process. Notably, an integrative interpretation does not exempt the governments of the host states from their responsibility to develop their climate mitigation laws in a manner compatible with international climate mitigation obligations and other international commitments. In the case of the ECT, this requires foresightedness in energy policy and law. Host states' representations towards investors should be part of a comprehensive long-term strategy, simultaneously allowing for the provision of stable investment conditions and the fulfilment of international climate obligations.

At first glance, taking climate law into account when interpreting the ECT appears to solely benefit climate interests in the disputed investment and cannot be titled "reconciliation". However, from a broader perspective, the integrative approach can improve/secure the long-term acceptance of the ECT, and allow member states to fulfil their ECT obligations

and their climate law commitments simultaneously. A prerequisite for this is that states do not make any promises that are at odds with their climate obligations, which would give rise to obligations with respect to their investors under the ECT. The reconciliatory potential of an integrative interpretation cannot rectify inconsistent state decisions. Applying a solution within the existing framework would make the modernization and the withdrawal (which are considered unlikely and ineffective, in any case) dispensable in the efforts to limit the perceived threat of the ECT to climate mitigation measures.

Future research could elaborate on how arbitrators could be best supported to practice an integrative interpretation, for instance, through the consultation of relevant experts (Pauwelyn 2003; *Perenco vs. Ecuador*<sup>60</sup>). How could the reconciling potential of systemic integration unfold in ISDS? What synergies could be identified in international investment in energy and climate transition?

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<sup>60</sup> *Perenco Ecuador Limited vs. Republic of Ecuador (Petroecuador) ICSID Case No. ARB/08/6 (Decision on the Environmental Counterclaim, 11 August 2015) (Award, 27 September 2019).*

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