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

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**ABSTRACT:** *The Energy Charter Treaty (ECT) aims to protect energy investments, including fossil fuels, while international climate law seeks to mitigate climate change two objectives that can come into conflict in investor-state dispute settlement (ISDS). Given the unlikelihood of ECT modernization or termination in the near future, arbitration under the treaty will continue to shape the legal landscape of energy investments. This article explores the potential of integrative interpretation as a means to reconcile climate obligations with ECT protections in arbitration. Integrative interpretation is not only mandated by international treaty interpretation rules but is also reflected in the practice of international dispute settlement. However, despite this legal foundation, no ECT tribunal has yet incorporated international climate law into its decisions. While practical challenges and uncertainties persist, precedents from broader international dispute settlement and climate litigation suggest that ECT arbitration could evolve to balance investment protection with climate commitments. This article argues that fostering an integrative interpretative approach could enable ISDS to serve both investment stability and climate mitigation goals, contributing to a more coherent legal framework for energy transition.*

Perjanjian Piagam Energi (PPE) bertujuan untuk melindungi investasi energi, termasuk bahan bakar fosil, sementara hukum iklim internasional berupaya untuk mengurangi perubahan iklim, dua tujuan yang dapat bertentangan dalam penyelesaian sengketa investor-negara (PSIN). Mengingat kecilnya kemungkinan modernisasi atau penghentian PPE dalam waktu dekat, arbitrase berdasarkan perjanjian tersebut akan terus membentuk lanskap hukum investasi energi. Artikel ini mengeksplorasi potensi interpretasi integratif sebagai sarana untuk merekonsiliasi kewajiban iklim dengan perlindungan PPE dalam arbitrase. Interpretasi integratif tidak hanya diamanatkan oleh aturan interpretasi perjanjian internasional tetapi juga tercermin dalam praktik penyelesaian sengketa internasional. Namun, terlepas dari landasan hukum ini, belum ada pengadilan PPE yang memasukkan hukum iklim internasional ke dalam keputusannya. Sementara tantangan dan ketidakpastian praktis tetap ada, preseden dari penyelesaian sengketa internasional yang lebih luas dan litigasi iklim menunjukkan bahwa arbitrase PPE dapat berkembang untuk menyeimbangkan perlindungan investasi dengan komitmen iklim. Artikel ini berpendapat bahwa pengembangan pendekatan interpretatif integratif dapat memungkinkan PSIN untuk melayani stabilitas investasi dan tujuan mitigasi iklim, berkontribusi pada kerangka hukum yang lebih koheren untuk transisi energi.

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## I. INTRODUCTION

The Energy Charter Treaty (ECT) and its implications for international climate goals have become a subject of increasing scrutiny in recent years (Tienhaara 2018; Bos and Gupta 2019; Cima 2021; Climate Change Counsel 2022). Given the established causes of climate change, investments in fossil fuels—especially those benefiting from long-term protection—are often viewed as contradictory to climate mitigation efforts. While members of the International Energy Charter broadly agree that the ECT fails to reflect the "new realities of the energy sector" (Preamble of the International Energy Charter 2015), opinions on how to address this misalignment diverge. Some states and scholars advocate for withdrawal from the treaty (Haut Conseil pour le Climat 2022; Bernasconi-Osterwalder et al. 2021; Federal Ministry for Economy and Climate Protection Germany 2022), while others, including the EU in the past, have favored amending it.

A primary concern is the ECT's protection of fossil fuel investments, which enables investors to challenge states before arbitration tribunals for alleged treaty breaches. This mechanism creates the risk of states being sued for enacting climate policies that negatively impact such investments. Tienhaara (2011, 2018) has argued that the mere existence of investor-state dispute settlement (ISDS) provisions exerts a chilling effect on regulation, discouraging governments from implementing robust climate measures. Furthermore, proposed treaty reforms would not eliminate ISDS (Hinrichsen 2023), and recent withdrawals by some parties have significantly reduced the likelihood of meaningful modernization. Exiting the ECT does not provide an immediate remedy either, as its sunset clause (Article 47(3)) extends investment protections for years after withdrawal. A collective exit, combined with an inter se agreement, could limit arbitration to disputes involving states that remain bound by the treaty (Hinrichsen 2023).

Although conflicts between ECT investment protections and international climate obligations have yet to manifest in a significant number of disputes, arbitration cases related to this issue have risen sharply in recent years and are expected to increase further as climate policies tighten. Therefore, it is essential to explore legal interpretations that enable states to comply with both the ECT and international climate commitments. This article examines how the two legal frameworks can be reconciled within the existing dispute settlement system. By drawing on treaty interpretation principles, relevant case law, and arbitral decisions, it highlights how international climate law could be integrated into ECT arbitration proceedings to harmonize these regimes.

## II. METHOD

This study evaluates the potential of systemic integration in ECT-related ISDS cases concerning climate change. Beginning with an overview of the principle's role in international disputes, its application in arbitration and ECT-specific cases is assessed.

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Section 3 presents these findings based on a literature review and cases extracted from the United Nations Conference on Trade and Development (UNCTAD) investment dispute database. Relevant cases include those that demonstrate systemic integration, reference international environmental law in arbitration, or exemplify how extraneous legal frameworks have been used to protect public interests over investor claims. Climate-related ECT cases are identified in this work, with renewable energy disputes excluded to maintain focus.

The principle of systemic integration is codified in Article 31(1)(c) of the Vienna Convention on the Law of Treaties (VCLT), which mandates that "any relevant rules of international law applicable in the relations between the parties" be considered within the treaty's interpretative context (Sands 1998; McLachlan 2005; Umotong, 2020). This principle aims to minimize legal conflicts by assuming treaty drafters did not intend to create inconsistencies with existing international law (Simma 2011; Berebon¸2023a). The International Law Commission (ILC) has emphasized that Article 31(3)(c) requires tribunals to ensure coherence in legal reasoning, making an integrative approach essential when relevant international rules exist (McGrady 2008; International Law Commission 2006). However, systemic integration cannot override the rights of third parties (Essien, 1993; McGrady 2008), limiting its reach in certain disputes.

The VCLT is widely recognized as customary international law (International Law Commission 2006; McLachlan 2005; McGrady 2008), making it applicable to all treaty interpretations, including the ECT in ISDS cases. Although the VCLT applies primarily to treaties between states, its provisions are still relevant in investor-state disputes, as ISDS tribunals frequently invoke Article 31 in ECT interpretations. For instance, in MOL v. Croatia, the tribunal acknowledged but accepted Croatia's argument that international law between Hungary (the investor's home state) and Croatia was applicable under Article 31(3)(c) (Okon & Noah, 2004).

The applicable law in international dispute resolution is typically defined within the treaty text or the procedural rules of the dispute resolution body (Merrills and de Brabandere 2022). Article 26(6) of the ECT states that tribunals must resolve disputes "by this Treaty [the ECT] and applicable rules and principles of international law," reinforcing the principle of systemic integration. However, systemic integration is limited to resolving interpretative conflicts and does not address fundamental incompatibilities between treaties (Monti 2023; Umotong & Dennis, 2018; Simma 2011). For example, the ECT's "fair and equitable treatment" standard (Article 10(1)) may be interpreted in a manner that either creates a conflict with other international legal obligations or allows for compliance with both. In cases of direct legal conflict, the ECT's investment-favouring conflict clause (Article 16) applies. Since international climate law and the ECT regulate different subject matters, no direct legal conflict exists (Electrabel v. Hungary, para. 4.174). Instead, diverging treaty objectives should be interpreted integratively under international law's general presumption against conflict (Pauwelyn 2003; International Law Commission 2006; Ignatius, 2022).

Despite its potential, this study's approach is limited by the lack of legal precedent in international arbitration, making future rulings uncertain. Additionally, while the Mauritius Convention on Transparency extends UNCITRAL transparency rules to ISDS, it does not impose a strict obligation to disclose all arbitration documents. Consequently, some relevant cases may remain inaccessible. However, given the

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absence of binding precedent in ISDS, this limitation does not substantially undermine the study's findings.

## III. RESULT AND DISCUSSION

### Integrative Treaty Interpretation in International Dispute Settlement

A review of past international dispute settlement cases reveals that the principle of systemic integration has been widely applied across various dispute resolution bodies. As a general principle of international law, it must be employed by any institution or tribunal interpreting international legal instruments. This principle has also been utilized in environmental-related arbitration disputes involving international environmental law. However, despite its relevance, few arbitration cases concerning climate mitigation specifically from a fossil fuel phaseout perspective have been brought under the Energy Charter Treaty (ECT) (Okon, 2003). No arbitrator has interpreted ECT provisions in light of international climate law, and most of these cases remain undecided. The following sections explore these findings in detail.

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

Beyond the application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), integrative interpretation in dispute resolution can be mandated by specific dispute settlement rules. Under Article 38(1) of the International Court of Justice (ICJ) Statute, the ICJ is empowered to apply all recognized sources of international law. Similarly, World Trade Organization (WTO) panels must examine disputes "in the light of the relevant provisions" of the agreements cited by the disputing parties (Article 7.1 of the Dispute Settlement Understanding (DSU)). While it remains debatable whether this includes non-WTO treaties (Young 2011), WTO bodies are explicitly required to apply the "customary rules of interpretation of public international law" (Article 3(2) of the DSU), including Articles 31 and 32 of the VCLT. Various WTO cases, including US Shrimp and EC Biotech, illustrate how non-WTO agreements, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), have been used to interpret WTO provisions (International Law Commission 2006).

Similarly, the European Court of Human Rights (ECtHR) has incorporated extraneous international law into its European Convention on Human Rights (ECHR) interpretations. In cases such as Golder v. United Kingdom, Loizidou v. Turkey, and Al-Adsani, the ECtHR explicitly applied the principle of systemic integration to consider international legal norms on state immunity and other general international law principles (Umotong, 2021; Umotong¸2022).

The Iran United States Claims Tribunal (IUSCT) is willing to apply non-regime law. In Nasser Esphahanian v. Bank Tejarat, the tribunal referenced the 1930 Hague Convention on the conflict of nationality laws. Similarly, the Permanent Court of Arbitration (PCA), following Article 35(1) of its 2012 Arbitration Rules, has considered external legal instruments in cases such as the OSPAR Convention and MOX Plant. However, in the latter case, despite recognizing the relevance of the OSPAR Convention, the tribunal declined to apply it as a basis for treaty interpretation.

Investor-State Dispute Settlement (ISDS) tribunals have also invoked Article 31(3)(c) of the VCLT in investment arbitration. In Berschader v. Russia, the tribunal emphasized

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that "insofar as the terms of the treaty are unclear or require interpretation, the Vienna Convention requires the Tribunal" to consider relevant international law (Essien, 1992; Shilow 2022). Tribunals have relied on this approach to interpret terms such as "expropriation" (European Media Ventures v. Czech Republic), "fundamental rule of procedure" (Tulip v. Turkey), and the scope of fair and equitable treatment (FET) (Sàrl v. Uruguay). While EU law's status as international law remains contested, some ISDS tribunals have considered it relevant, though not dispositive, in investment treaty interpretation. For example, in Vattenfall v. Germany, the tribunal acknowledged EU law but deemed it inconsistent with the treaty's plain meaning. Conversely, in Landesbank v. Spain and Eskosol v. Italy, tribunals rejected the applicability of EU law because it only applied to certain ECT contracting parties.

These cases confirm that international dispute resolution bodies do not interpret legal norms in isolation but consider them within a broader legal framework (Okon, 2003; Giannopoulos, 2020). However, the extent to which extraneous legal norms are integrated remains subject to arbitrators' discretion, who operate within the boundaries set by treaty interpretation rules.

### *The Use of International Environmental Law in Investment Arbitration*

The principle of systemic integration also extends to interpreting investment treaties in arbitration (Section 2). Due to ISDS's hybrid nature, national and international law often play a role in disputes (Okon & Akpan, 2003; Kjos, 2013). Most tribunals recognize the principle of party autonomy, allowing disputing parties to designate the applicable law. In the absence of such agreements, arbitrators determine the governing law based on dispute settlement provisions, which often include broad formulations like "such rules of international law as may be applicable" (Article 42(1) of the ICSID Convention) (Kjos 2013).

A review of 1257 known investment arbitration cases as of June 2023 indicates that approximately 120 cases relate to environmental issues. However, only a tiny fraction have considered international ecological law (UNCTAD, Investment Policy Hub; Valencia 2023). Among the arbitration cases that have done so, eight stand out: SPP v. Egypt, S.D. Myers v. Canada, Chemtura v. Canada, David Aven v. Costa Rica, Parkerings-Compagniet AS v. the Republic of Lithuania, Maffezini, Eco Oro, and Allard v. Barbados. These cases incorporated international environmental law to varying degrees, often reinforcing state regulatory powers but not necessarily altering case outcomes (Berebon, 2023).

In Urbaser, although the tribunal primarily engaged with human rights law, the case is significant for illustrating how systemic integration can introduce public interest considerations into ISDS. The tribunal found that while investors are not subject to positive human rights obligations, they must refrain from violations (Urbaser paras. 1209–1210). This reasoning could extend to cases where environmental law and human rights law intersect (Berebon, 2023).

However, some tribunals have been reluctant to integrate international environmental law. In Bayview Irrigation District v. Mexico, the tribunal dismissed the relevance of a bilateral water treaty in a NAFTA dispute. Similarly, in Vattenfall v. Germany (I), the omission of environmental law considerations led to a settlement that permitted weak water protection measures. The prevailing silence of investment treaties including the ECT on environmental norms has contributed to arbitral tribunals' hesitancy to engage with international environmental law (Martini 2017; Viñuales 2012a).

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### *International Climate Change Law in ECT Arbitration*

Article 26(6) of the ECT mandates that tribunals decide cases "by the ECT and applicable rules and principles of international law." This provision allows for the integration of external legal frameworks (de Brabandere 2019). The principle of systemic integration (Article 31(3)(c) VCLT) further reinforces this approach, specifying that applicable international law must be relevant and binding between the parties (International Law Commission 2006).

While the link between fossil fuel investments and climate change is well-established, the applicability of international climate law in ECT disputes remains uncertain. The UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement impose general mitigation obligations but do not explicitly address fossil fuel investments (Mayer 2022). Some states have voluntarily committed to fossil fuel phaseouts in their Nationally Determined Contributions (NDCs). However, only a few ECT members such as Denmark and France have adopted explicit measures (Jones et al. 2021; Berebon, 2022).

Although climate science underscores the necessity of reducing fossil fuel production (IPCC 2022), the legal argument for integrating international climate law into investment arbitration remains weak. The lack of precise obligations on fossil fuel phaseouts means that tribunals must rely on broad mitigation duties when considering state measures. Nevertheless, as climate law evolves, its role in investment arbitration may become more pronounced.

### Climate-Relevant Ect Disputes

For international climate law to be considered in an Energy Charter Treaty (ECT) dispute, it must be directly relevant to the specific investment case. Simma (2011) noted that extraneous rules must have a concrete connection to the investment treaty in question. The fact that an ECT dispute involves fossil fuel production does not automatically render it climate-relevant. A publication by Climate Change Counsel (2022) reviewing ECT cases found that climate change had not been raised in any arbitration award and did not appear to have been argued by host states. A review of past ECT disputes involving fossil fuel investments determined that only one case, Rockhopper vs. Italy, could be considered climate-relevant (Hinrichsen 2023).

Decided in August 2022, Rockhopper vs. Italy concerned an Italian government measure preventing Rockhopper from continuing oil exploration in Italian territorial waters. The Italian Senate cited Italy's UNFCCC commitments as a justification for revoking legal exceptions that had permitted ongoing exploration projects (Rockhopper vs. Italy, para. 109). The tribunal did not engage with these obligations despite its relevance to international climate law. It dismissed arguments regarding Italy's climate commitments as matters of domestic politics (para. 198). After finding Italy breached the ECT's expropriation clause, the tribunal refrained from addressing the fair and equitable treatment (FET) standard, which could have opened the door for integrating international environmental and climate law (Berebon, 2023).

As outlined in Article 10(1) of the ECT, the FET standard ensures stable, fair, and transparent conditions for foreign investors but does not guarantee investment or resource exploitation rights (De Nanteuil 2020). However, the interpretation of "fair" and "equitable" remains inconsistent across ECT tribunals (Klager 2016; Hinrichsen 2023). The standard requires host states to act in good faith, transparently, and

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predictably while ensuring procedural fairness and access to justice (Levashova 2019; De Nanteuil 2020). Claims of breached legitimate expectations require proof that the host state created reasonable expectations, that the investor relied on them, and that such reliance was legitimate (Viñuales 2012a). Other factors, such as the investor's due diligence and the intensity of the alleged violation, also play a role in determining whether the FET standard was breached.

ECT tribunals have adopted varying interpretations of legitimate expectations. In MTD vs Chile, the investor's business plan was deemed sufficient to establish legitimate expectations (paras. 51, 52, 188), whereas, in LG&E vs Argentina, a specific right granted by the host state was required (para. 133). Some cases, such as Mamidoil vs. Albania, resulted in arbitrators failing to understand what constitutes legitimate expectations (see dissenting opinion).

In Rockhopper vs. Italy, Pierre-Marie Dupuy argued that Rockhopper could not have reasonably expected a positive response to its application for an operating permit. His interpretation incorporated environmental concerns such as evolving regulations, local protests, and investors withdrawing from the area. However, he did not explicitly address the case's climate relevance.

Most concluded fossil fuel-related ECT disputes did not seek to reduce fossil fuel impacts on the climate and, therefore, were not climate-relevant. However, some pending cases involve disputes concerning fossil fuel phaseouts, making international climate law potentially relevant. Notable cases include:

1. Uniper vs Netherlands and RWE vs. Netherlands: These cases arose from Dutch emissions reduction measures mandated by the Urgenda vs. Netherlands ruling. Uniper and RWE sought compensation for stranded investments in coal power plants set to close by 2030. The Uniper case was discontinued due to German subsidies, and the RWE case was discontinued in January 2024.
2. Ascent vs. Slovenia: This case concerns environmental impact assessment requirements and the prohibition of fracking in Slovenia, relevant to greenhouse gas (GHG) emissions.
3. Towra vs. Slovenia: The dispute involves alleged expropriation and discrimination related to investments in the Premogovnik Velenje coal mine. The case was filed shortly after Slovenia's national coal phaseout plan announcement, suggesting climate law relevance (Maček 2022).

## Reconciliation in Ect Arbitration

The review of international dispute settlement cases confirms systemic integration in legal interpretation. However, climate change law has not been directly applied in any ECT award. This does not necessarily undermine the potential for reconciliation, as climate law has been relevant in only a handful of recent cases, many of which were either pending or discontinued without an award. Only in Rockhopper vs. Italy did arbitrators actively disregard the climate implications of the case. In his opinion on Rockhopper, Dupuy incorporated environmental law considerations but did not explicitly engage with international climate law. This may have been influenced by Italy's failure to emphasize its climate obligations in its defence. ECT tribunals must interpret treaty provisions in light of applicable international law (Art. 26(6) of the ECT). Considering extraneous international rules is well established in international

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dispute resolution. While there is no explicit international obligation to phase out fossil fuels, national phaseout laws adopted to implement general international commitments should be regarded as relevant at the international level (Viñuales 2012b).

Under this premise, tribunals could evaluate whether measures allegedly violating investor rights under the ECT were necessary and proportionate in light of the state's climate commitments. This approach would align with previous tribunal reasoning, such as in S.D. Myers vs. Canada, where proportionality was considered in evaluating regulatory measures. Integrating climate law into treaty interpretation would not require tribunals to define specific mitigation obligations beyond their mandate but could facilitate a harmonized reading of investment protection and climate commitments.

However, the broad nature of climate mitigation provisions and arbitrator discretion create room for tribunals to avoid considering international climate law (Viñuales 2012b). This also raises the risk of inconsistent interpretations of climate mitigation obligations. Even if the tribunal in Rockhopper vs. Italy had considered international climate law, it is unclear whether the outcome would have changed. Would an investment tribunal have deemed Italy's oil and gas exploration ban in its territorial waters a necessary and proportionate climate mitigation measure?

Nevertheless, integrating international climate law into investment arbitration could influence the interpretation of key treaty provisions, particularly the FET standard. The investor's legitimate expectations depend on the legal framework, including international and national climate law (Urbaser para. 624; De Nanteuil 2020). The increasing recognition that phasing down coal, oil, and natural gas is necessary to meet global climate goals (SEI et al. 2021; International Energy Agency 2021) could shape how tribunals assess the reasonableness of investor expectations. For example, the Hague District Court ruled in November 2022 that the Dutch coal phaseout was foreseeable, meaning no compensation was owed to Uniper or RWE (ECLI:NL: RBDHA:2022:12628, para. 5.16.37; IISD 2022). The court determined that investors should have anticipated additional regulatory measures beyond the EU's Emissions Trading System:

"The investor knew or should have known that, in addition, there was a risk that the government would take supplementary restrictive measures regarding the use of the Eemshaven power plant if it did not substantially reduce the CO2 emissions of that power plant." (ECLI:NL:RBDHA:2022:12628, para. 5.16.37.)

Although this reasoning was based on EU human rights law rather than ECT provisions, it illustrates how foreseeability can be integrated into legal rationale. Similar logic could be applied in ECT disputes to assess whether an investor's expectations were legitimate in the context of international climate commitments. Beyond FET interpretation, climate law could also enter investment disputes through public policy exceptions (Kjos 2013). These include norms essential to state interests, general legal principles such as pacta sunt servanda, and the duty to respect international obligations. Since climate change poses an existential threat to many societies, climate mitigation measures could be classified as essential state interests. However, proving an immediate national emergency tied to emissions reductions remains challenging.

Ultimately, the potential for reconciliation depends on the specifics of each case. Investors with long-term fossil fuel permits may be protected under the ECT, leaving little room for climate-based defences. However, in cases where states enact evolving climate regulations without explicit guarantees to investors, reconciliation remains

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possible through a contextual interpretation of legitimate expectations. While host states bear the responsibility for climate mitigation, international investment law is beginning to explore the role of corporate responsibility (Urbaser; Aven et al. vs. Costa Rica). For now, however, integrating climate law into ECT arbitration remains primarily a function of state obligations rather than investor responsibilities.

## IV. CONCLUSION

This article demonstrates that the investment protection provisions of the Energy Charter Treaty (ECT) and international climate law, particularly climate mitigation obligations, can be reconciled within investor-state dispute settlement (ISDS). However, the extent to which global climate law is integrated into ECT arbitration ultimately depends on each case's specifics and arbitrators' discretion. While states can argue for the relevance of climate obligations in ECT disputes, the absence of a binding interpretative framework means that arbitrators may disregard such obligations if they deem them outside their jurisdiction. Nevertheless, treaty interpretation principles and international dispute settlement practices suggest that arbitrators should consider climate law when relevant.

Two key developments could strengthen the integration of climate law in ECT arbitrations. First, more explicit and stringent climate mitigation commitments—particularly those specifying fossil fuel phaseout targets—would help clarify the legal landscape, shaping investor expectations and limiting protection for fossil fuel investments. Second, host states must actively foreground their international climate obligations in ISDS proceedings, ensuring these commitments are recognized in investment disputes. However, this approach does not absolve host states from the responsibility of aligning their domestic energy and investment policies with their international climate commitments. A coherent and forward-looking regulatory strategy is essential to balancing investment stability with climate imperatives.

At first glance, integrating climate law into ECT arbitration may favor climate interests over investor protections, but it serves a reconciliatory function in a broader sense. A systemic approach incorporating climate law enhances the long-term legitimacy of the ECT, allowing member states to fulfil both their investment treaty obligations and climate commitments. However, this reconciliation is only feasible if states refrain from making investment promises contradicting their climate obligations, which could otherwise generate claims under the ECT. While treaty reform or withdrawal have been considered solutions, a more immediate and practical approach is fostering interpretative practices that accommodate both investment protections and climate objectives.

Future research should explore how arbitrators can be better equipped to integrate climate law into investment disputes, such as through expert consultations or procedural mechanisms that enhance systemic interpretation. A deeper analysis of how systemic integration can function within ISDS could provide valuable insights into the evolving relationship between international investment law, energy transition policies, and global climate governance.

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