ICSID Case No. ARB/21/22

IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

AND

PURSUANT TO THE 1994 ENERGY CHARTER TREATY

BETWEEN:

(1) UNIPER SE

(2) UNIPER BENELUX HOLDING B.V.

(3) UNIPER BENELUX N.V.

Claimants

– and –

THE KINGDOM OF THE NETHERLANDS

Respondent

CLAIMANTS' MEMORIAL

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1. INTRODUCTION

1.1 Executive Summary

1. Uniper SE (the "**First Claimant**"), Uniper Benelux Holding B.V. (the "**Second Claimant**") and Uniper Benelux N.V. (the "**Third Claimant**", and together with the First Claimant and Second Claimant, the "**Claimants**" or "**Uniper**") hereby submit this Memorial in the ICSID arbitration proceedings between the Claimants and the Kingdom of the Netherlands (the "**Netherlands**" or the "**Respondent**") (together, the "**Parties**").

2. The case relates to the Claimants' investment in the Maasvlakte Power Plant 3 ("**MPP3**"), an ultra-modern, state-of-the-art pulverised coal-fired power plant located on the Maasvlakte site, near to the city of Rotterdam, the Netherlands.

3. MPP3 has a generation capacity of 1,070 MW, and with a name plate efficiency of approximately 46%, it is one of most efficient coal-fired power plants in the world. MPP3 began commercial operations in 2016 and has a useful lifetime of at least 40 years, i.e. until 2056 or beyond. [redacted] MPP3 meets the highest environmental standards for this type of facility (as existed at the time of the Claimants' investment and which continue to be in force today).

4. MPP3 was built by Uniper at the Respondent's encouragement and with its full support. Indeed, from the early 2000s, the Respondent actively encouraged investment in new coal-fired plants such as MPP3. This was because, at that time, the Netherlands' energy mix was heavily dependent on gas-fired power plants and, therefore, the supply of gas from politically unstable states such as Russia. This created serious security of supply concerns. In addition, electricity prices were much higher in the Netherlands than in neighbouring countries. In fact, there were strong calls from Dutch heavy industry to reduce these high energy prices, which were making the industry uncompetitive.

5. The Respondent wanted to remedy these issues. Its solution was to induce investment in coal-fired power stations. The Respondent repeatedly and publicly declared that investments in modern coal-fired power stations were welcome. The Respondent emphasised to investors such as the Claimants that it had a stable investment climate and that investment in new coal-fired power stations was consistent with the Netherlands' climate objectives. Indeed, the Respondent

[redacted]

made clear that carbon emissions were to be regulated through the European Union's ("**EU**") Emissions Trading Scheme (the "**EU ETS**").

6. The EU ETS was (and still is) the "cornerstone" of the EU's policy to reduce greenhouse gas emissions. Under this system, installations are required to buy and submit allowances according to the amount of CO_2 emissions produced in a given year. It is a "cap and trade" market based system that is designed to put a price on carbon. As the total number of emissions allowances reduce over time, emissions fall. Thus, market forces, together with a shrinking number of allowances, would incentivise power plants to reduce their emissions (for example, by increasing efficiency).

7. As the (then) Dutch Minister of Economic Affairs, Mr Laurens Jan Brinkhorst ("**Minister Brinkhorst**"), explained to parliament in 2004, technological developments had greatly improved the efficiency of coal-fired power plants and so whilst it "*sound*[ed] *paradoxical*", a new coal plant would "*also contribute to promoting renewable energy*", be "*in part also a potential biomass plant* ", and help "*capture the fluctuations in the supply of wind and solar energy, which can keep the electricity system in balance*".[2] In other words, the Respondent's stated policy was that modern, efficient coal-fired power plants were welcome and consistent with the Respondent's broader climate change goals.

8. As a result of the Respondent's encouragement, the Claimants began to explore the possibility of developing MPP3 in around late 2004. The investment in MPP3 responded to a specific need for new coal capacity in the Netherlands. The Claimants recognised that the contribution of sustainable energy sources was still insufficient to meet demand and that highly efficient modern coal-fired power stations would therefore play a necessary part of the energy mix in the long-term – and at least until 2050.

9. A new plant at the Maasvlakte site was an obvious opportunity for the Claimants to explore since the site offered many advantages, including the infrastructure of its existing coal site at Maasvlakte, its close proximity to a sea port that receives large coal vessels, and its close proximity to a high-voltage grid. [redacted]

[2] **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, pp. 1, 2.

[redacted]

10. Between 2004 and 2006, the issue of high energy prices for heavy industry was a particular concern, prompting the Respondent to ask domestic and foreign electricity providers (including Uniper) to present solutions. In around 2005, Minister Brinkhorst coordinated a group of heavy industry players, known as the "**Consortium**", and facilitated negotiations between them and the power sector, including Uniper. The Respondent fully understood that the Consortium's electricity needs would "*necessitate the construction of new, modern coal plants*",[4] as confirmed by Minister Brinkhorst to parliament in December 2005. The investment case for MPP3 and the Consortium negotiations therefore developed in tandem. As a result of the Respondent's efforts, a long-term "**Consortium Agreement**" was ultimately signed in late 2007 between Uniper and the consortium only, pursuant to which Uniper would deliver cheaper electricity to eight Consortium parties through the construction of MPP3.

11. It was not only the Claimants that were considering new coal investments at this time. A number of the Claimants' Dutch competitors had also been encouraged by the Respondent to invest in new coal. By the time the Claimants began their initial due diligence, several competitors had already initiated the necessary approval procedures. Three of those projects came to fruition: MPP3, RWE's Eemshaven power plant (commissioned in 2015 and which is also the subject of an ICSID arbitration), and Engie's Rotterdam power plant (also commissioned in 2015), together costing billions of euros.

12. The decision to invest in MPP3 was taken by Uniper in December 2006, in close consultation with the Respondent and in response to the Respondent's policy of encouraging such investment. That favourable policy continued throughout the construction phase of MPP3.

13. [redacted] In addition to the facilitation of the Consortium Agreement (in which it was known, from the outset, that the end-goal was a new coal-fired power plant), it is clear that the Respondent supported MPP3 through the permitting process (and indeed accelerated that process) and facilitated the expansion of the necessary grid infrastructure.

14. Permits were primarily the responsibility of the provinces, rather than the central Government. As one former board member of the Environmental Protection Agency of the Province of South Holland (the "**DCMR**") confirmed, there was considerable pressure by the Ministry of

[4] **C-0013**, Parliamentary documents 2005-2006, 30 300, XIII, No. 58, Letter from the Minister of Economic Affairs to the House of Representatives, 9 December 2005, p. 1 (emphasis added).

Economic Affairs to accelerate the permitting process for MPP3 since it was a "*project of national importance*".[5]

15. Similarly, the Respondent further supported MPP3 by facilitating the construction of additional grid infrastructure necessary for MPP3's power to reach the grid. The existing Dutch electricity grid suffered from congestion, and a high voltage grid connection was needed to allow MPP3 to have the necessary output to operate. It was through the involvement of the Dutch Ministry of Economic Affairs that the Claimants were able to secure from TenneT TSO B.V. ("**TenneT**"), the Dutch state-owned electricity transmission system (grid) operator, a commitment to expand the grid through a new 380kV high voltage connection.

16. [redacted] Uniper was reasonably expected that it would be able to operate MPP3 for at least 40 years, over which time it would recoup its investment cost, and earn a reasonable rate of return. [redacted]

17. From the outset, MPP3 was designed to mitigate its CO_2 emissions as far as possible. MPP3 was built on the basis of "clean coal" technology, and was highly efficient compared to older coal-fired power plants (MPP3 has an approximate net efficiency of 46%, compared to 38%). This increased efficiency means that less coal is required to generate the same amount of energy, ultimately resulting in lower emissions. But it took further steps to reduce emissions as well.

18. First, MPP3 was built to co-fire biomass, further reducing its CO_2 emissions.

19. Second, Uniper intended to "decouple heat" and provide district heating to local businesses and residents. Decoupling heat increases MPP3's efficiency rate substantially and offsets carbon emissions elsewhere. Ultimately, however, Uniper was never permitted to provide district heating due to pressure from NGOs who argued that such technologies "locked in" coal.

20. Third (and crucially), MPP3 was also built to be "CCS ready", meaning that as and when carbon capture and storage technology ("**CCS**") became feasible, the plant had the available space and connections in place to install that technology.

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[5] *See* **C-0198**, Hester van Santen, *How was it possible that the Netherlands continued to build coal plants for so long*, NRC, 31 January 2020, p. 6.

[redacted]

21. The Claimants went further than that, however. Beginning in 2009, Uniper co-originated one of the largest integrated CCS demonstration plants in the world on the Maasvlakte site and linked to MPP3 – the "**ROAD Project**" (*Rotterdam Opslag en Afvang Demonstratieproject*). Even prior to then, it took part in CCS development projects, including through the "**CATO Project**" (*CO2 Afvang, Transport en Opslag project*).

22. The ROAD Project was a trailblazing European project in which Uniper invested substantial sums of money and know-how. It was financially supported by the Respondent and the EU, as well as the Claimants' joint venture partner, Electrabel (later Engie). The EU and the Respondent's grants were provided in full recognition that MPP3 and the ROAD Project went hand-in-hand.

23. When a drop in the CO_2 price in around 2012 undermined the original business case for the ROAD Project, Uniper went to great lengths to explore ways to bridge the funding gap. The Respondent knew full well of the Claimants' extensive efforts in that regard as one of the stakeholders in the ROAD Project. After significant efforts, a new funding structure and cost savings were identified, which resulted in a re-mobilisation of the project late in 2016. However, in 2017, the Claimant had no choice but to disengage from the ROAD Project, as a direct result of the Respondent's expressed intention to phase out coal. Quite obviously, there was no justification for further development of CCS if MPP3 would be forced to shut down in any event.

24. What is clear, however, is that Uniper took every available step to build one of the most highly efficient coal plants in the world. Indeed, MPP3's environmental permit that was granted by the DCMR in October 2007 (the "**MPP3 Environmental Permit**") explicitly acknowledged that MPP3 had been designed to reduce CO_2 emissions through the highest possible efficiency, co-firing biomass, heat utilisation and CCS.

25. Unfortunately, having induced Uniper to invest in MPP3 in order to address its concerns regarding security of supply and high energy prices, the Respondent ultimately took steps to shut down MPP3 entirely. Between 2015 and 2017, a number of developments took place which preceded a significant change in the Respondent's policy towards coal-fired power plants. This included a ruling by the Dutch courts in June 2015 ordering the Respondent to reduce its annual greenhouse gas emissions, and efforts by certain politicians to seek to shut down even brand new coal plants such MPP3.

26. [redacted]

[redacted]

27. The Respondent's definitive plan to phase out coal-fired power plants was publicly announced in October 2017. The Respondent made clear that it would require even modern coal-fired power plants such as MPP3 – which had only been in operation for approximately 16 months – to shut down in 2030 without compensation. Notably, the then Minister of Economic Affairs and Climate Policy, Minister Eric Wiebes ("**Minister Wiebes**"), recognised that this represented a "*far-reaching decision as the government is interfering with the ownership rights of the owners of the coal plants*".[8]

28. The draft of the act to ban the production of electricity from coal (the "**draft Coal Ban Act**") was published for consultation in May 2018, with an accompanying Explanatory Memorandum. The draft legislation comprised just two pages. This was followed by a consultation process. The Claimants participated in the consultation, but their comments were ignored. The "**Coal Ban Act**" was passed in December 2019 and entered into force with immediate effect.

29. In essence, the Coal Ban Act requires MPP3 to shut down without payment of any financial compensation by no later than 1 January 2030. The Coal Ban Act envisages a ten-year transition period (the "**Transition Period**") which, according to the Respondent, constitutes in-kind compensation. The Respondent justified its failure to pay financial compensation by making two unsubstantiated (and incorrect) assumptions.

30. First, the Respondent assumed that during the Transition Period, the Claimants would be able to recover their more than [redacted] investment in MPP3. That is wrong. [redacted] The Respondent does not appear to have carried out any analysis to support its assumption, which appears to be arbitrary at best.

[redacted]

[8] **C-0030**, Parliamentary documents 2017-2018, 30 196, 32 813, No. 567, Letter from the Minister of Economic Affairs to the House of Representatives, 13 December 2017, p. 1.

[redacted]

31. Second, the Respondent assumed that, during the Transition Period, the Claimants could convert MPP3 to fire alternative fuels such as biomass. That is also wrong. Again, the Respondent never undertook any analysis to determine the feasibility of the conversion of Dutch coal-fired power stations such as MPP3. This conversion is not economically feasible for the Claimants. In fact, the Claimants commissioned an independent analysis by Frontier Economics, an energy consultancy (which the Respondent also instructed), who confirmed that a conversion to biomass would result in a negative net present value ("**NPV**") of over EUR 200 million.[10] Thus, "[f]*rom a commercial perspective, the power plant would rather be closed than converted into a biomass plant in 2030* […] *converting the plant to 100% biomass does not represent a viable option* […]".[11] Uniper informed the Ministry of Economic Affairs of this conclusion at the time. Yet, the Netherlands ignored this advice. It proceeded with the Coal Ban Act despite knowing that one of the key assumptions it relied on was demonstrably wrong.

32. The effect of the Coal Ban Act is to substantially deprive the Claimants of the value of their investment in MPP3. The Claimants' entitlement to continue operating MPP3 until 2030 (i.e. the Transition Period) does not provide adequate compensation for that substantial deprivation in value.

33. The Claimants will demonstrate in this Memorial that the Netherlands has violated its obligations under the ECT and international law. In particular, the Respondent has breached Article 13(1) of the ECT by indirectly expropriating the Claimants' investment in MPP3. That expropriation was illegal as the Coal Ban Act was not tailored to its proffered purpose, nor was it accompanied by the payment of compensation that was prompt, adequate and effective compensation. The Respondent has also breached its obligations under Article 10(1) of the ECT by failing to accord, at all times, fair and equitable treatment ("**FET**") to the Claimants' investment; and Article 10(1) of the ECT by impairing, through unreasonable measures, the "*management, maintenance, use, enjoyment or disposal*" of the Claimants' investment.

34. These breaches entitle the Claimants to compensation for the substantial losses they have suffered, [redacted]

[10] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, pp. 16, 22.

[11] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, pp. 16, 22.

[redacted]

1.2 Overview of the Memorial

35. The remainder of this Memorial is structured as follows:

(a) Part 2 provides an overview of the parties involved in these proceedings;

(b) Part 3 sets out the relevant factual background;

(c) Part 4 deals with the jurisdiction of this Tribunal to hear the Claimants' claims;

(d) Part 5 sets out the applicable law and the legal merits of the Claimants' claims;

(e) Part 6 addresses reparation, including the Claimants' claim for damages;

(f) Part 7 sets out the Respondent's breach of Articles 26 and 41 of the ICSID Convention; and

(g) Part 8 details the Claimants' prayer for relief.

36. This Memorial is accompanied by the witness statement of [redacted]

37. In addition, this Memorial is accompanied by the following expert reports:

[redacted]

38. A consolidated index of supporting documentation is submitted with this Memorial. Where the Claimants have translated new parts of documents already on the record in these proceedings, those documents have been re-exhibited with this Memorial with all translated parts "stitched" together, and adopting the same exhibit or authority number. Page references in this Memorial

[redacted]

to exhibits and authorities are to the internal page reference rather than the pdf page reference unless otherwise stated.

39. Annex A to this Memorial is an updated list of decisions by ECT tribunals, ICSID annulment committees and non ECT tribunals that have dismissed the so-called "Intra-EU Objection" to jurisdiction.[14]

2. THE PARTIES

2.1 The Claimants

40. Uniper is a global energy company with over 11,000 employees.[15] It generates, trades and markets energy on a large scale. It also procures, stores, transports and supplies commodities such as natural gas, LNG and coal, as well as energy-related products. It is active in over 40 countries.[16] Uniper is committed to building an increasingly de-carbonised energy supply and in 2020 introduced its "*Empower Energy Evolution*" strategy with a target of making its power generation in Europe carbon-neutral by 2035.[17]

41. The First Claimant (Uniper SE)[18] is a public limited liability company incorporated in Germany. Its registered address is Holzstraße 6, 40221 Düsseldorf, Germany. It is registered in the Commercial Register of the Düsseldorf District Court under number HRB 77425,[19] and its shares are listed on the Frankfurt Stock Exchange.[20] Uniper SE indirectly and wholly owns and controls the Second and Third Claimants, through an entity known as Uniper Holding GmbH.[21]

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[14] *See* fn. 597 below.

[15] *See* **C-0211**, Uniper SE Website, About Us, Our Profile Factsheet (last accessed 26 April 2022); and **C-0214**, Uniper Energy Website, About Uniper, Our company brief, (last accessed 13 May 2022), https://www.uniper.energy/about-uniper/company-brief.

[16] *See* **C-0211**, Uniper SE Website, About Us, Our Profile Factsheet, (last accessed 26 April 2022); and **C-0214**, Uniper Energy Website, About Uniper, Our company brief, (last accessed 13 May 2022), https://www.uniper.energy/about-uniper/company-brief.

[17] *See* **C-0203**, Uniper Energy Website, Sustainability report: Empower energy evolution, https://www.uniper.energy/news/sustainability-report-empower-energy-evolution, 29 July 2020..

[18] Uniper SE was formerly known as "E.ON Kraftwerke GmbH". *See* **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, p. 8.

[19] **C-0052**, Uniper SE, Extract from the Commercial Register B of the Düsseldorf District Court, 16 March 2021.

[20] **C-0049**, 2020 Annual Report of Uniper SE, 3 March 2021, p. 14.

[21] **C-0049**, 2020 Annual Report of Uniper SE, 3 March 2021, pp. 149-150, 241-242. *See also* **C-0044**, 2019 Annual Report of Uniper Benelux Holding B.V., 6 April 2020, p. 19; and **C-0045**, 2019 Annual Report of Uniper Benelux N.V., 6 April 2020, p. 17.

Uniper Holding GmbH is a company incorporated in Germany.[22] Uniper SE is the parent company of the Uniper group of companies (the "**Uniper Group**").[23]

42. The Second Claimant (Uniper Benelux Holding B.V.) is a *besloten vennootschap met beperkte aansprakelijkheid* (or limited liability company) incorporated under the laws of the Netherlands. It is registered in the Dutch Commercial Register under number 27195689 and its registered address is Capelseweg 400, 3068AX Rotterdam, the Netherlands.[24] Uniper Benelux Holding B.V. directly and wholly owns the Third Claimant.[25]

43. The Third Claimant (Uniper Benelux N.V.) is a *naamloze vennootschap* (or public company) incorporated under the laws of the Netherlands. It is registered in the Dutch Commercial Register under number 27028140 and has its registered address at Capelseweg 400, 3068AX Rotterdam, the Netherlands.[26] The Third Claimant has always been the direct owner of MPP3, the power station at issue in this arbitration. Uniper carries out its activities in the Netherlands through the Third Claimant (among other operating companies).[27]

44. The E.ON group of Companies (the "**E.ON Group**", headed by E.ON SE having its registered office in Düsseldorf) came into existence in June 2000 as a result of the merger of two large industrial enterprises, VEBA AG and VIAG AG.[28] Since its inception, the E.ON Group has held a portfolio of activities in the Benelux region.

45. In late 2014, the E.ON Group announced a reorganisation of its business into two units – one engaged in the transmission and production of electricity through sustainable electricity generation (which continued under the name "E.ON"), and the other engaged, among other things, in the production of electricity through conventional fuels (which continued under the

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[22] **C-0049**, 2020 Annual Report of Uniper SE, 3 March 2021, p. 242.

[23] **C-0206**, 2021 Annual Report of Uniper SE, 22 February 2022, p. 17. *See also* **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, p. 24 ("*In the course of the separation of the Uniper Group, Uniper SE was made the ultimate parent company of the Uniper Group. Uniper SE is responsible for corporate management, which exerts functional control over the corporate functions in an integrated fashion*").

[24] **C-0050**, Uniper Benelux Holding B.V., Extract from the Commercial Register of the Netherlands Chamber of Commerce, 12 March 2021.

[25] **C-0051**, Uniper Benelux N.V., Extract from the Commercial Register of the Netherlands Chamber of Commerce, 12 March 2021.

[26] **C-0051**, Uniper Benelux N.V., Extract from the Commercial Register of the Netherlands Chamber of Commerce, 12 March 2021.

[27] *See e.g.*, **C-0044**, 2019 Annual Report of Uniper Benelux Holding B.V., 6 April 2020, p. 7.

[28] **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, p. 10.

name "Uniper").[29] The relevant details of that reorganisation, which took place over several years, are summarised below.

46. As a first step, the activities relating to conventional fuels were combined into a subsidiary of Uniper SE (which was previously known as E.ON Kraftwerke GmbH), Uniper Holding GmbH.[30] Thus, on 30 September 2015, Uniper Holding GmbH,[31] and therefore Uniper SE, indirectly, became the sole owner of the Second Claimant,[32] which in turn held the Third Claimant.[33] On 24 November 2015, Uniper Beteiligungs GmbH[34] acquired 53.35% of the shares in Uniper Holding GmbH, while the remainder of the shares in Uniper Holding GmbH (46.65%) continued to be held by Uniper SE.[35]

47. The reorganisation was concluded on 9 September 2016.[36] This resulted in a transfer of all shares in Uniper Beteiligungs GmbH from E.ON SE to Uniper SE and Uniper SE became the 100% owner of Uniper Beteiligungs GmbH. As a result, Uniper SE was, once again, the sole owner of Uniper Holding GmbH and, consequently of the Second and Third Claimants.[37] During the course of this reorganisation, Uniper SE and its Benelux business unit remained within the E.ON Group.

48. Where reference is made to Uniper or E.ON in this Memorial, this includes its legal predecessors or successors, as applicable.

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[29] **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, p. 7.

[30] **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, pp. 7-8, 90.

[31] Uniper Holding GmbH was (and still is) 100% owned by Uniper SE (formerly known as E.ON Kraftwerke GmbH). *See* **C-0144**, Uniper Holding GmbH, Shareholder List, Commercial Register of Hanover, 9 April 2015; and **C-0145**, Uniper Holding GmbH, Shareholder List, Commercial Register of Hanover, 7 October 2015.

[32] *See* **C-0050**, Uniper Benelux Holding B.V., Extract from the Commercial Register of the Netherlands Chamber of Commerce, 12 March 2021.

[33] *See* **C-0167**, 2016 Annual Report of Uniper, Financial Results, 7 March 2017, p. 5; and **C-0149**, 2015 Annual Report of Uniper Benelux N.V., 15 April 2016, p. 4.

[34] Uniper Beteiligungs GmbH was then known as Uniper GmbH.

[35] *See* **C-0053**, Uniper Holding GmbH, Extract from the Commercial Register B of the Düsseldorf District Court, 16 March 2021, Line 12; **C-0147**, Uniper Holding GmbH, Shareholder List, Commercial Register of Düsseldorf, 26 November 2015. *See also* **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, p. 8.

[36] **C-0168**, 2016 Annual Report, E.ON SE, 14 March 2017, (pdf) p. 103; and **C-0208**, E.ON SE, Commercial Register B of the District Court of Düsseldorf, 21 April 2022, line 18.

[37] *See* **C-0150**, E.ON SE and Uniper SE, Joint Spin-off Report, 18 April 2016, pp. 9-10.

2.2 The Respondent

49. The Respondent is the Kingdom of the Netherlands, comprising 12 provinces. The King and ministers and state secretaries together make up the Dutch Government.

50. The Dutch parliament (the "**Parliament**") closely monitors the Government and is responsible, with the Government, for making laws. Laws only come into force after they have been passed by Parliament. The Parliament is composed of a Lower House (*Tweede Kamer*), which is also known as the "House of Representatives", and the Upper House (*Eerste Kamer*), which is also known as the "Senate".

3. FACTUAL BACKGROUND

51. As briefly set out in the Executive Summary above, the Respondent's actions have resulted in several breaches of its obligations under the ECT, including the expropriation of the Claimants' investment in MPP3. In order to understand the nature of the Respondent's violations of the ECT, the Claimants set out below the following background facts:

(a) a brief overview of the MPP3 power plant (Section 3.1);

(b) the applicable legal framework for coal-fired power stations at the time of the Claimants' investment in MPP3 (Section 3.2);

(c) the steps taken by the Respondent to encourage and support the Claimants' investment in MPP3 (Section 3.3);

(d) Uniper's investment process in MPP3 (2004-2006) (Section 3.4);

(e) the steps taken by Uniper to limit CO_2 emissions from MPP3 in accordance with the Respondent's goals (Section 3.5);

(f) the continued steps taken by the Respondent to support Uniper's investment in MPP3 even after the design and construction process started (Section 3.6);

(g) the Respondent's significant change in policy towards coal-fired power stations and the steps it took to indirectly expropriate the Claimants' investment in MPP3 through the Coal Ban Act (Section 3.7); and

(h) the steps taken by the Respondent after the Coal Ban Act (Section 3.8).

3.1 Description of MPP3

52. As noted above, the power plant at issue in this arbitration is known as MPP3. MPP3 (pictured below) is an ultra-modern, state-of-the-art coal-fired power plant located at the Maasvlakte site in the deep-water Port of Rotterdam in the Dutch province of South Holland. With a maximum capacity of approximately 1,070 MW, it is among the world's largest coal-fired generating units. MPP3 produces up to 7% of the total electricity demand in the Netherlands,[39] and plays an important role in supplying the Netherlands with affordable and reliable power.

53. The Maasvlakte site (where MPP3 is located) is a particularly advantageous site for a coal-fired power station for a number of reasons. Indeed, the Maasvlakte site is considered one of the best sites for a coal-fired power station in Europe.[41]

54. First, the port location means that MPP3 can be cooled directly with seawater. [redacted]

[redacted]

[39] *See* **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006, p. 1.

[redacted]

[41] *See* **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006, p. 1; [redacted] As the DCMR Environmental Protection Agency of the Province of South Holland recognised in 2006, Rotterdam's attractiveness as a business location "*is partly due to the advantages of the port and industrial complex in terms of logistics and availability of cooling water*" (**C-0094**, Assessment Framework for New Power Plants in Rijnmond ("**DCMR Framework**"), 4 July 2006, p. 1).

[redacted]

55. Second, the Port of Rotterdam where MPP3 is located receives large coal and biomass vessels, delivering the fuel input for MPP3 effectively onsite [redacted]

56. Third, the Maasvlakte site offers "co-siting" opportunities for MPP3.[45] [redacted] co-siting allows some of the by-products of electricity production (such as heat and steam) to be used by the industrial plants also located at Maasvlakte, which then avoids the need for further CO_2 emissions to produce those products elsewhere [redacted]

57. [redacted]

[redacted]

[redacted]

[45] *See* **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006, p. 1; [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

58. In terms of technology, MPP3 uses "pulverised coal" – a proven technology that is safe, reliable and economic. "Pulverised coal" means coal that has been crushed into a fine dust in mills. This is then injected in the boiler with heated air through a number of burners. These particles burn in suspension and release heat, which is transferred into the steam cycle. This steam is converted into electricity using turbines and a generator. MPP3 also uses innovative, state-of-the-art flue gas cleaning technologies and equipment.

59. MPP3 was designed and built to be a highly efficient plant that mitigates its carbon emissions as far as possible. In 2006 – the year the Claimants made their final investment decision ("**FID**") in MPP3 – the state agency responsible for issuing MPP3's environmental permit, the DCMR,[51] published a framework for new power stations (the "**DCMR Framework**").[52] The DCMR Framework explained that, when constructing new plants, the following factors "*must be an integral part of the consideration at company level*": (i) emissions limitation; (ii) energy-saving through maximising efficiency; (iii) heat utilisation; and (iv) the possibilities for capturing and storing CO_2.[53]

60. Uniper took the DCMR criteria into account. Indeed, all of the factors identified by the DCMR were included in the design and business plans for MPP3.

[51] The DCMR Environmental Protection Agency is the regional environmental agency of the local and regional authorities operating in Rijnmond, the larger 'Port of Rotterdam'-area in the Netherlands.

[52] **C-0094**, DCMR Framework, 4 July 2006.

[53] **C-0094**, DCMR Framework, 4 July 2006, p. 2.

Uniper intended to reduce CO_2 emissions from MPP3 in the following ways: (i) increased efficiency; (ii) co-firing biomass; (iii) implementation of CCS; and (iv) providing district heating. With these measures, MPP3's emissions would be comparable to a modern gas-fired power plant, or perhaps even lower■

61. First, the ultra-modern technology of MPP3 means that it has approximately 46% net efficiency.[56] This is considerably higher than older coal-fired power stations, which typically have a net efficiency of approximately 38%.■ This increased efficiency means that less coal is required to generate the same amount of energy, ultimately resulting in lower CO_2 emissions.

62.

63. Second, MPP3 was built to co-fire biomass, which further reduces CO_2 emissions.■

64. Third, MPP3 was built to be "CCS ready" meaning that as and when CCS becomes technologically and economically feasible, the plant had the available space and connections in place to install that technology.[61] As contemplated by the DCMR Framework, new power plants being developed at the time (including MPP3) were encouraged to "*be prepared as far as possible for CO_2 capture and storage*" and "[t]*he aspect of CO_2 capture readiness (including*

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[56] Thermal efficiency is the relationship between the total energy contained in the fuel, and the amount of energy used to perform useful work.

■

■

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■ *See also* Section 3.5(b) below.

[61] and **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 43. Coal-fired power plants were built "CCS-ready" because further research and development was required, and so this could not be prescribed as a Best Available Technology ("**BAT**") (*see* ¶ 71 below).

the space required for it) must be addressed in the [Environmental Permit] *and permit procedures*".[62]

65. Uniper did more than just design MPP3 to be "CCS ready", however. In fact, Uniper co-originated one of the largest CCS demonstration plants in the world on the Maasvlakte site (the ROAD Project), and invested substantial sums of money and know-how in this project. The Road Project was supported by the Dutch Government and the EU, as well as the Claimants' joint venture ("**JV**") partner, Electrabel (now Engie). [redacted] with the implementation of the ROAD Project, around 25% of MPP3's total CO_2 emissions would have been captured and stored[redacted] Unfortunately, the ROAD Project was discontinued in light of the Respondent's intention to ban the use of coal at MPP3. The Claimants' origination of the ROAD Project is discussed further at Section 3.5(a) below.

66. Finally, [redacted] The DCMR Framework emphasised the importance of district heating,[66] which is also referred to in MPP3's Environmental Permit.[67] Uniper's 2016 Annual Report explained that "[h]*eat supply is considered … as a big asset in achieving the national efficiency targets as derived from the Paris climate agreement like for instance CO_2 reduction*".[68] [redacted]

67. Thus, from the outset, Uniper designed MPP3 to operate in such a way that limits CO_2 emissions as far as economically and technologically possible. This intention was summarised

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62 **C-0094**, DCMR Framework, 4 July 2006, p. 2.

[redacted]

[redacted]

65 [redacted]. *See also* **C-0028**, Frontier Economics Report, *Research of Scenarios for Coal-fired Power Plants in the Netherlands*, A Report for the Ministry of Economic Affairs (MinEZ), 1 July 2016, p. 16, which recognised the contribution of district heating to lowering emissions: "*additional heat supply can constitute an abatement measure to reduce specific emissions of a power plant*".

66 **C-0094**, DCMR Framework, 4 July 2006, p. 2.

67 *See* **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 31, "*Energy and CO_2 emissions*".

68 **C-0169**, 2016 Annual Report of Uniper Benelux Holding B.V., 24 April 2017, p. 6.

[redacted]

in the MPP3 Environmental Impact Assessment ("**EIA**")[70] submitted to the Dutch authorities as part of the environmental permitting process in 2006: "*E.ON is able to make a substantial contribution to the reduction of CO_2-emissions with this new plant* [MPP3] *by achieving a high electrical* [efficiency], [co-]*firing biomass, being able to disconnect residual heat and possibly capturing CO_2 in the future*".[71]

3.2 The applicable legal framework

68. At the time of the Claimants' FID in December 2006, the Dutch electricity generation market had been liberalised. In 1998, the Dutch Electricity Act 1998 (*Elektriciteitswet 1998*)[72] was enacted, and the largest users of electricity became free to choose their supplier as of 1999, subsequently extended to all electricity consumers in 2004.[73]

69. This liberalisation meant that the market was, to a large extent, left to dictate which technology would be used for the building of new electricity generation capacity. As explained in a letter to the Lower House dated 3 September 2003 by Minister Brinkhorst, liberalisation meant that "*investment decisions in new capacity are no longer taken by the government on energy policy grounds, but rather on the basis of business-economic considerations by companies*".[74]

70. The Dutch Electricity Act 1998 also aimed to ensure that generation investments could be made at the lowest possible societal cost,[75] yet still in compliance with relevant environmental legislation.[76] That is, while the choice of technology for a new power plant was left to the investor, the construction and operation of coal-fired power plants (such as MPP3) were still subject to certain permits and emissions regulations. This included both the requirements set

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[70] The EIA identifies, describes and assesses the direct and indirect effects of a project. The results and the information gathered must be duly taken into account in the decision on the application.

[71] **C-0099**, MPP3 Environmental Impact Assessment, December 2006, Section 3.

[72] **C-0076**, Act of 2 July 1998, containing rules regarding the production, transport and supply of electricity (Electricity Act 1998), 2 July 1998. The Dutch Electricity Act 1998 entered into force on 1 August 1998 and transposed into national legislation the EU Directive 96/92/EC on the internal market for electricity, pursuant to which increasing shares of electricity markets had to be opened to competition. *See also* **C-0081**, International Energy Agency, *Energy Policies of IEA Countries, The Netherlands (2004)*, June 2004, p. 113.

[73] **C-0081**, International Energy Agency, *Energy Policies of IEA Countries, The Netherlands (2004)*, June 2004, p. 114.

[74] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, Annex 2, Section 2.1.1.

[75] **C-0080**, Parliamentary documents 2003–2004, 29 372, No. 3, Explanatory Memorandum regarding the Amendment of the Electricity Act 1998 and the Gas Act, 22 December 2003, p. 4.

[76] *See* **C-0075**, Parliamentary documents 1997–1998, 25 621, No. 3, Explanatory Memorandum regarding the Rules Relating to the Production, Transport and Supply of Electricity, 29 September 1997, p. 3. The Dutch Electricity Act 1998 was adopted to ensure that the construction of production installations would not be subject to additional permit requirements, although the existing legislation relating to spatial planning and environment would continue to apply.

out in MPP3's Environmental Permit (*milieu-vergunning*) as well as the regulation of CO_2 emissions pursuant to the EU ETS. In fact, Uniper reasonably anticipated that MPP3 would operate under the EU ETS throughout its entire useful life.■

(a) The environmental permit

71. As noted above, the state entity responsible for issuing the environmental permit to MPP3 was the DCMR.[78] The DCMR (and the Netherlands) has to comply with the obligations under the EU Industrial Emissions Directive 2010/75/EU (the "**IED**").[79] The IED ensures that environmental permits for power stations such as MPP3 are granted only when "best available techniques" ("**BATs**") are applied.[80] BATs are:

> "[…] the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole"[81] (emphasis added).

72. In other words, BATs ensure that appropriate preventative measures are taken by investors against pollution. For coal-fired power plants, the BATs are principally found in best available technique reference documents ("**BREFs**"). BREFs and the corresponding BAT-conclusions, which are legally binding on EU Member States, describe the current state-of-the-art for environmental protection levels and are subject to a continuous review and updating process. Accordingly, power plant operators have to continuously adapt to meet the new BAT standards and corresponding emission values.[82]

■ [redacted]

78 *See* **C-0120**, Environmental (General Provisions) Act, 6 November 2008, Article 2.4. More specifically, the competent Dutch authority was the Provincial Executive ("*Gedeputeerde Staten*") of the Province of South Holland. The DCMR acts on behalf of the Provincial Executive in the Rotterdam area.

79 **C-0024**, Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (Recast) [2010] OJ L 334/17 (the "**IED**"), 24 November 2010. The IED replaced the previous Council Directive 96/61/EC concerning integrated pollution prevention and control (the "**IPPC Directive**") (*see* **C-0074**, Council Directive 96/61/EC concerning integrated pollution prevention and control [1996] OJ Lovrem257/26, 24 September 1996).

80 **C-0024**, IED, 24 November 2010, Articles 5(1) and 11(b); **C-0074**, IPCC Directive, 24 September 1996, Articles 3(a) and 9(1).

81 **C-0024**, IED, 24 November 2010, Article 3(10). *See also* **C-0074**, IPPC Directive, 24 September 1996, Article 2(11) states that: "*'best available techniques' shall mean the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole*".

82 *See* **C-0024**, IED, 24 November 2010, Articles 3(11) and 13.

73. As part of the application process, Uniper was required to submit an EIA to the DCMR,[83] which explained (*inter alia*) the environmental impact of MPP3 and its compliance with BATs. This was submitted by Uniper on 22 December 2006.[84]

74. The following year, on 26 October 2007, the DCMR granted the MPP3 Environmental Permit.[85] The MPP3 Environmental Permit became irrevocable on 30 November 2011.[86] That permit has no end date and remains valid today.

75. To be clear, the MPP3 Environmental Permit did not regulate MPP3's CO2 emissions. Rather, the MPP3 Environmental Permit correctly explained that these were regulated at the EU level, and that no specific emissions requirements were prescribed as a matter of Dutch law:

> "The European Union introduced CO_2 emissions trading system on 1 January 2005 that enables large companies with significant CO_2 emissions to buy and sell CO_2 allowances. E.ON is one of the companies covered by the directive that enables CO_2 emissions trading. Since E.ON participates in CO_2 emission trad[ing], no regulations to improve energy efficiency or regulations to reduce energy consumption have to be included in the permit. Recently, this was also established in an amendment of the Environmental Management Act"[87] (emphasis added).

76. Along the same lines, the IED explicitly refrains from making any emission limits for CO_2 in order to protect the integrity of the EU ETS.[88]

77. That being said, the DCMR stated that "[w]*hen constructing new plants*" the reduction of CO_2 emissions through the highest possible efficiency, heat utilisation and CCS "*must be an integral part of the consideration at the company level*", as detailed in the DCMR Framework.[89]

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[83] **C-0002**, Environmental Management Act, 13 June 1979, Article 7.2, read together with Section C of the Annex to the Environmental Impact Assessment Decree. [redacted]

[84] *See* **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 1.

[85] **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 54.

[86] *See* **C-0134**, *The Stichting Natuur en Milieu and the Milieufederatie Zuid-Holland, The foundation Stichting Greenpeace Nederland and The Association of Concerned Citizens of Voorne v. The provincial executive of South Holland*, ECLI:NL:RVS:2011:BU6360, 30 November 2011. Although the Council of State upheld one of the grounds for appeal, it declared that the legal effects of the MPP3 Environmental Permit would remain in force.

[87] **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 31.

[88] **C-0024**, IED, 24 November 2010, Article 9(1).

[89] **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 31.

78. As noted above, Uniper took this on board fully. The MPP3 Environmental Permit explicitly acknowledged that MPP3 was designed taking the DCMR Framework into account in order to reduce CO_2 emissions as far as possible:

> "The new plant must use the modern powder carbon technology with ultra-critical steam pressures. The net energy [efficiency] is 46%. Thanks to the high [efficiency] and the use of biomass as a secondary raw material, the CO_2 emission will be limited as much as possible. The plant will be designed to be capture ready.
>
> E.ON will provide heat if the cost of E.ON is compensated by the payment for the heat provided. The government will encourage E.ON and other stakeholders to achieve the delivery of heat.
>
> […]
>
> Furthermore, EON itself is already active in research and strategy to make CO_2 capture and storage possible in the future".[90]

79. At all relevant times, Uniper has acted in accordance with the requirements of the MPP3 Environmental Permit.

(b) The EU Emissions Trading Scheme

80. As mentioned, CO_2 emissions are regulated at the European level, rather than at the national level.[91] This is through the EU ETS, which is the "*cornerstone*" of the EU's policy to combat climate change and reduce greenhouse gas emissions.[92]

81. The EU ETS works on the basis of a "cap and trade" mechanism. A cap is set on the total amount of CO_2 (and certain other greenhouse gases) that can be emitted by installations covered by the EU ETS. The cap is reduced over time so that total emissions fall. Within the cap, companies (such as the Third Claimant) receive or buy emission allowances, which they can trade with one another as needed. The limit on the total number of allowances available to be traded ensures that they have a market value. After each year, a company must surrender enough allowances to cover all its emissions, otherwise fines are imposed. If, however, a company reduces its total emissions over time, it can keep the spare allowances to cover its

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[90] **C-0021**, MPP3 Environmental Permit, 26 October 2007, pp. 31-32. It was noted that Uniper "*is also researching* [CCS] *in the Netherlands and abroad and is willing to contribute or participate in pilots and demonstration projects*" (p. 43).

[91] *See* **C-0024**, IED, Article 9(1), 24 November 2010 and **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 12 ("*Under the rules for the CO_2 emission trading, the emission of CO_2 and energy consumption of the plant are not a subject of the permit* […]").

[92] **C-0060**, European Commission, EU Emissions Trading Scheme (EU ETS), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets_en; and **C-0005**, Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32, 13 October 2003.

future needs or sell them to another company that is short of allowances.[93] Thus, companies covered by the EU ETS are incentivised to reduce emissions as much as possible in order to keep costs down.

82. The EU ETS was adopted in 2003 and launched in 2005, and comprises four phases:

(a) "Phase 1" (2005-2007) was a three-year pilot period. It only covered CO_2 emissions from power generators and energy-intensive industries, with almost all allowances given out for free.[94] Phase 1 prepared the EU ETS members for "Phase 2", at which point the EU ETS needed to function properly in order for the EU to comply with its obligations under the Kyoto Protocol.

(b) In "Phase 2" (2008-2012), the proportion of free allocations fell and the cap on allowances was reduced.[95] In the first two phases of the EU ETS, caps were set at a national level, as were reserves of free allowances for new entrants, i.e. companies entering the EU ETS at some point during an on-going trading period. In case such reserves were depleted, new entrants could still obtain emission allowances, albeit at a cost. During these two first phases, a surplus of emission allowances was available, causing the price of CO_2 emissions to drop[96] and triggering the EU to adopt certain strengthening measures.[97]

(c) In "Phase 3" (2013-2020), a single EU-wide cap on emissions was set centrally and auctioning became the default method for allocating allowances.[98] The energy sector was entirely excluded from free allocations. All operators of power plants within the scope of the EU ETS now had to purchase allowances by auction or on the market.

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93 **C-0060**, European Commission, EU Emissions Trading Scheme (EU ETS), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets_en, p. 2.

94 **C-0059**, European Commission, Phases 1 and 2 (2005-2012), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets/pre2013_en, pp. 2-3.

95 **C-0059**, European Commission, Phases 1 and 2 (2005-2012), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets/pre2013_en, pp. 3-4.

96 **C-0059**, European Commission, Phases 1 and 2 (2005-2012), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets/pre2013_en,, p. 4.

97 **C-0060**, European Commission, EU Emissions Trading Scheme (EU ETS), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets_en, pp. 6-7.

98 **C-0060**, European Commission, EU Emissions Trading Scheme (EU ETS), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets_en, pp. 5-6.

(d) In "Phase 4" (2021-2030), targets were updated in view of the EU's 2030 emissions reduction target and as part of the EU's contribution to the Paris Agreement.[99]

83. [redacted]

84. Another important objective of the EU ETS was to create a "level playing field" among all power stations. [redacted] Different types of power stations have different costs, efficiencies, and emit different levels of CO_2. [redacted] However, the EU ETS creates a "market price" for emissions and therefore ensures that each power station pays the same amount for each tonne of CO_2 emitted. [redacted] This level playing field is key to operation of the EU ETS as it creates incentives to lower emissions by all companies it covers. Whilst the cost of allowances is the same for all power stations, those with higher emissions face higher costs. Thus, the EU ETS force power stations to lower their emissions or else face costs that are so high that they may need to cease operating. More efficient power plants, however, may thrive. [redacted]

85. [redacted]

[99] **C-0060**, European Commission, EU Emissions Trading Scheme (EU ETS), (last accessed 19 April 2021), https://ec.europa.eu/clima/policies/ets_en, pp. 6-7; **C-0213**, European Comission, Revision for phase 4 (2021-2030), (last accessed 11 May 2022), https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/revision-phase-4-2021-2030_en,.

[redacted]

[redacted]

86. At the time of the Claimants' investment in MPP3, the Respondent emphasised that the EU ETS would remain the exclusive mechanism for the regulation of CO_2 emissions – and this was the Claimants' reasonable understanding too. For example, in June 2004, Minister Brinkhorst explained to the Lower House that "[…] *a new coal plant needs to comply with the strict, market-compliant and generic environmental policy* [-] [f]*or the CO_2 emissions, the emissions trading industry is the standard in this*".[109] Further, throughout the construction phase of MPP3, the Respondent continued to underscore the importance of the EU ETS because it is efficient and provided a level playing field.[110]

87. At the time of the Claimants' FID in December 2006, the EU ETS was in Phase 1, and whilst the details of Phase 2 were known, the details of Phase 3 had not yet been determined (in Phase 3, emission rights were no longer to be allocated at the national level, but rather at the European level, with a single European CO_2 cap). Thus, there was some uncertainty as to how Phase 3 of the EU ETS would operate in practice. [redacted]

[redacted]

[redacted]

[redacted]

109 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, Question 1, p. 1 (emphasis added). *See also* **C-0082**, Parliamentary documents 2003-2004, 29 023, No. 4, Letter from the Minister of Economic Affairs on Supply Security, 9 June 2004, p. 4.

110 For example, on 20 May 2010, the Minister of Finance stated in a letter to the Chairman of the Lower House, in the context of limiting the CO_2 emissions of new and existing coal plants in the Netherlands by means of fiscal measures that the EU ETS with a European CO_2 cap was *the* instrument to regulate and reduce CO_2 emissions in a cost-effective economic way: "*The aim of the ETS is to achieve emission reductions wherever possible at the lowest cost on a European scale. The private bill ignores this and forces both existing and new coal plants to take CO_2 reduction measures or the acceptance of substantially higher tax costs without it being clear that such measures are the most cost effective to reduce CO_2 emissions*" (emphasis added) (**C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, p. 2).

[redacted]

[redacted]

88. Minister Brinkhorst recognised this uncertainty around the time the Claimants began investigating their investment in MPP3:

> "The most important regulatory uncertainties that potential investors mention as being an obstacle to making decisions relate to CO_2-emissions trading, the expansion of interconnection capacity and my authority to set conditions to the offering of production capacity on the market:
>
> 1. With regard to CO_2-emissions trading, I expect that the adoption of the first allocation plan and the start of the first trading period as of 1 January 2005 will partly eliminate uncertainty (which, incidentally, is just as good in other EU member states). For the period after 2012, my commitment is to achieve a European CO_2-emissions ceiling and European allocation per sector, instead of national ceilings and national allocation".[113]

89. Yet, while there was some uncertainty around the operation of Phase 3 of the EU ETS, there was never any suggestion by the Respondent that coal would be phased out entirely by 2030.

[redacted]

90. At the Government level, Minister Brinkhorst's view was that, with the EU ETS in place, there was no inconsistency between new coal-fired power plants and the Netherlands' climate change objectives since the EU ETS ensured that CO_2 emissions would be kept at acceptable levels (and, indeed, that these levels would fall over time):

> "With a properly working system of CO_2 emissions trade [i.e. the EU ETS], a price will be put on CO_2-emissions. With the hard CO_2 emissions ceiling for companies that fall under emissions trading (namely 112 Mton/year for the years 2008- 2012), we are sure that we meet the climate objectives. From a CO_2 point of view, in that case I will have no more objections to new coal plants"[115] (emphasis added).

91. The Dutch Emissions Authority is responsible for monitoring compliance with the EU ETS within the Netherlands, and does so through the issuance of emissions allowances and by maintaining emissions accounts.[116] After an emissions permit has been acquired, permit holders

[redacted]

[113] **C-0082**, Parliamentary documents 2003-2004, 29 023, No. 4, Letter from the Minister of Economic Affairs on Supply Security, 9 June 2004, p. 6.

[redacted]

[115] **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, Question 2, pp. 1-2 (emphasis added).

[116] *See* **C-0002**, Environmental Management Act, 13 June 1979, Article 2.2.

can then participate in the EU ETS. MPP3 obtained its (original) emissions permit on 17 November 2011.[117]

3.3 The Netherlands actively encouraged investment in new coal-fired power plants such as MPP3 in the early 2000s

(a) The need for new coal-fired power plants in the Netherlands at the time of the Claimants' investment in MPP3

92. The Claimants' investment in MPP3 responded to a specific need for new coal capacity in the Netherlands. Indeed, investment in this form of technology was consistently and publicly encouraged by the Respondent for two key reasons. First, in the early 2000s, the Netherlands' energy mix was heavily dependent on gas-fired power plants and there was insufficient domestic capacity to generate all of the electricity that its consumers needed, which prompted security of supply concerns. Second, the heavy dependence on (expensive) gas-fired power stations meant that electricity prices were considerably higher than in neighbouring countries prompting strong calls from Dutch heavy industry in particular to find a solution to reduce them.[118]

93. Security of supply and the related high price of electricity became the main topic of the Government's Energy Report in 2002 (the "**2002 Energy Report**"),[119] which reported that 56% of the Netherlands' electricity was produced from gas-fired plants – compared to 15% in Germany, 1% in France and 23% in Belgium.[120] All three of these countries generated a much higher proportion of their electricity requirements from nuclear and coal and, as a result, benefited from considerably lower marginal costs. [redacted] Consequently, electricity prices in neighbouring countries were much lower than in the Netherlands, and Dutch industry was at a competitive disadvantage.

94. Moreover, the Netherlands was also dependent on importing electricity from neighbouring countries. The 2002 Energy Report explained that in order to decrease dependency on energy

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[117] **C-0133**, MPP3 Emissions Permit, 17 November 2011, (pdf) pp. 1-2. On 18 November 2016, the emissions activities of MPP3 were included in the emissions permit which had been granted to Maasvlakte 1 and 2 power plant ("**MPP 1 & 2**"), and MPP3's original emissions permit was withdrawn. *See* **C-0157**, Letter from Dutch Emissions Authority regarding amendment to the MPP3 Emissions Permit, 18 November 2016.

[118] *See* ¶ 151 below and [redacted] and **C-0199**, H. van Santen, *When the price of electricity weighed more heavily than climate change*, NRC, 1 February 2020.

[119] The Dutch Energy Reports are periodically published by the Minister to discuss the energy policy issues.

[120] **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, 4 March 2002, p. 32. [redacted]

[redacted]

imports, the Netherlands "*must use energy efficiently and make optimal use of their own energy sources*".[122] The Respondent stated that it was necessary to have "[a] *distribution of electricity production across different fuels, for example a mix of coal and gas*" since this "*reduces the economic vulnerability for price distortions of one particular fuel*".[123]

95. On 3 September 2003, Minister Brinkhorst wrote to the Lower House to explain the risks associated with the Netherlands over-reliance on gas-fired power stations, including:

> "[…] an increasing dependence on potentially politically unstable countries in the long term, a small diversification of the price risk and, partly as a result of this, an increase in the electricity price when oil prices are high. This leads to higher production costs for the electricity production companies and a negative effect on the overall competitiveness of the Dutch business community".[124]

96. As regards the "*potentially unstable countries*", the letter noted that "*an adequate relationship between the* [EU] *and Russia in particular is important*".[125] Concerns in that regard have proven to be correct, which is precisely why the Respondent was encouraging the construction of coal-fired power plants at that time in order to reduce dependence on Russian gas. [redacted]

97. Minister Brinkhorst also pointed to security of supply issues elsewhere in the EU, as well as Canada and the United States[127] – which begged the question of what measures the Netherlands should take to mitigate against such risks in the future. The Respondent indicated that, in the period after 2007, there would be an increasing shortage of domestic means of electricity production compared to domestic demand unless new investments in production capacity were made.[128] [redacted]

[122] **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, 4 March 2002, p. 2.

[123] **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, 4 March 2002, p. 13.

[124] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 11.

[125] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 10.

[redacted]

[127] *See* **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 1. For example, in 2001, an electricity crisis unfolded in California, where the lights had literally gone out because generation capacity could no longer keep up with increased demand for electricity (*see* **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, p. 2).

[128] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 22.

[redacted]

[redacted]

98. It was therefore important to the Respondent for there to be new production capacity. Minister Brinkhorst considered that investment in new coal-fired power stations was the obvious solution, stating in September 2003 that:

> "Building units other than gas-fired units can contribute to limiting the risks associated with the current mainly gas-fired production park. One of the obvious options is to invest in renewable energy, but also coal plants […] If entrepreneurs in the Netherlands wish to invest in coal plants, they should not be faced with unintended obstacles […] it is essential that market players invest in a timely and sustained manner in sufficient production capacity that can be deployed in the event of exceptionally high demand or in the event of the failure of other production units […] " [131] (emphasis added).

99. [redacted]

100. As a result of the Respondent's concerns about security of supply and high energy prices, it began to actively encourage investment in new coal-fired power plants in the early 2000s.

[redacted]

[131] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, pp. 11, 13, 22 (emphasis added).

[redacted]

(b) The Respondent's statements encouraging new coal-fired power plants in the early 2000s

101. In the early 2000s, the Respondent made numerous public statements which: (i) emphasised that coal investments were welcome – indeed encouraged – in the Netherlands; (ii) recognised that a stable investment climate is crucial to incentivising investments (and so should be provided to investors); and (iii) stressed that the regulation of CO_2 emissions was to be exclusively through the EU ETS.

102. In October 2001, in response to a request from the Government to provide advice on the security of Dutch and European energy supply over the long term, the Dutch General Energy Council issued advice.[134] The General Energy Council recommended that the Government should make optimal use of domestic energy sources, describing coal as a "*cheap, widely available and well spread fossil source*".[135] Further, "[w]*hen environmental concerns can be removed from use, the importance of supply security is strongly served*".[136] The measures recommended by the General Energy Council included encouraging "*clean coal technolog*[y]".[137]

103. Shortly thereafter, the Government's 2002 Energy Report made clear that market participants have a "*major role*" to play in addressing the concerns around security of supply.[138] But "[…] *energy policy can only succeed if the investment climate is attractive enough for them*".[139] In this regard, "[p]*ermit procedures can be shorter and clearer, environmental regulations clearer, government policy more consistent* […] [i]*mproving the investment climate is one of the most important tasks that the government sees for itself*".[140]

104. Further, referring to the advice of the General Energy Council, the 2002 Energy Report confirmed that: "[a] *limitation of the freedom of choice of electricity producers with regard to*

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134 *See* **C-0077**, General Energy Council, *Care for tomorrow's energy, advice to the Minister of Economic Affairs*, 25 October 2001, p. 1. The General Energy Council or AER (*Algemene Energieraad*) was tasked with advising the Dutch government on energy policy matters between 1 December 1985 and 31 July 2014. Its advice focused on the relationship between energy policy, and societal developments and other policy areas.

135 **C-0077**, General Energy Council, *Care for tomorrow's energy, advice to the Minister of Economic Affairs*, 25 October 2001, p. 42.

136 **C-0077**, General Energy Council, *Care for tomorrow's energy, advice to the Minister of Economic Affairs*, 25 October 2001, p. 42.

137 **C-0077**, General Energy Council, *Care for tomorrow's energy, advice to the Minister of Economic Affairs*, 25 October 2001, p. 10.

138 **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, 4 March 2002, p. 4.

139 **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, 4 March 2002, p. 4.

140 **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, 4 March 2002, p. 4.

the use of coal, from the perspective of reduction of the CO_2 emissions, is […] *at odds with the importance of supply security and is therefore undesirable* […]".[141]

105. In other words, the Respondent recognised the importance of a stable investment climate for investors, and understood that there was a balance to be struck between the Netherlands' climate objectives and the importance of guaranteeing security of supply. It therefore made it repeatedly clear that investment in modern coal-fired power stations was welcomed and encouraged.

106. The following year, Minister Brinkhorst acknowledged in his September 2003 letter that investments in power plants (such as coal) have a long useful life, which in turn underscores the importance of a stable investment environment. In particular, he noted that:

(a) "*Investments in power plants usually have a duration of thirty years or more*".[142]

(b) "*The government must be stable and reliable and must ensure a proper investment climate and regulatory framework, so that market parties are indeed truly able to make good investment decisions*".[143]

(c) "*A primary condition for businesses is that surety is offered for a longer period in respect of the environmental regulatory framework and the preconditions therein*".[144]

107. In June 2004, Minister Brinkhorst again emphasised the need for a "*favourable investment climate*" in order to address security of supply issues:

> "The investor perspective: clear and consistent regulation
>
> Given the lifespan of the current production facilities, the rising electricity demand and the supply and demand developments elsewhere in Europe, a lot of investment in production capacity will be required in the coming years. This requires a good investment climate […] Market parties indicate that they see investment opportunities in the Netherlands, partly due to the relatively favourable business climate. I want to ensure that these opportunities can actually be exploited. In my opinion, given its favourable investment climate and the expected effects of CO_2 emission trading, the Netherlands has the potential to become an exporter of electricity in the long term. My

[141] **C-0078**, Parliamentary documents 2001-02, 28 241, No. 2, 2002 Energy Report, p. 13.

[142] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 1.

[143] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 2.

[144] **C-0004**, Parliamentary documents 2002-2003, 29 023, No. 1, Letter from the Minister of Economic Affairs to the House of Representatives, 3 September 2003, p. 11.

> role is mainly to ensure minimum regulatory uncertainty. Clarity and consistency are important and I am committed to that […]"[145] (emphasis added).

108. The next day, the Director General ("**DG**") of the Ministry of Economic Affairs, Mr Lankhorst, announced with more specificity at the annual meeting of the "VEMW" (an interest group for companies and institutions that use heat, electricity, gas and water) the Respondent's "*need*" for new coal-fired power plants in order to prevent an electricity shortage and to achieve the lower prices that Dutch heavy industry had been calling for:

> "It is of great important that there are not only power stations that run on gas in the Netherlands. There are good possibilities and there is also a need to build coal plants. The Netherlands has eight locations where these can be built, which provide a total space for of 6,000 MW of coal generation" (emphasis added).[146]

109. He added that the Netherlands is an exporter of gas and even oil products so "[w]*hy can't the same not apply to electricity?*"[147] Indeed, the Netherlands is "*ideally positioned*" for the construction of a coal-fired power station: "[t]*here are ports where coal can be delivered, there is the availability of cooling water and the distance to the customer is short*".[148] He also "*nip*[ed] *th*[e] *misconception in the bud*" that the Ministry is distancing itself from sustainable energy. In his view, whilst renewable energy might be available in 20 years' time, "*we* [still] *now have to do something* […] *it is important that a base load is built*".[149]

110. On the same day, Mr Jannes Verwer (then-director of E.ON Benelux), publicly commented that the Respondent's support for new coal-fired power plants represented a positive development; indeed, "[w]*hy would we transport coal arriving at the Maasvlakte to Germany first?*" (only for it then to be exported back to the Netherlands) – "[t]*his is a nice opening of* [the Ministry

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[145] **C-0082**, Parliamentary documents 2003-2004, 29 023, No. 4, Letter from the Minister of Economic Affairs on Supply Security, 9 June 2004, p. 2.

[146] **C-0083**, Energeia Editorial Staff, *Lankhorst: the Netherlands ideally positioned for the construction of a coal plant*, Energeia, 10 June 2004, p. 1. *See also* **C-0007**, R. Op Het Velt, *Brinkhorst Advocates for Construction of a New Coal Plant*, Financieel Dagblad, 10 June 2004, p. 1.

[147] **C-0083**, Energeia Editorial Staff, *Lankhorst: the Netherlands ideally positioned for the construction of a coal plant*, Energeia, 10 June 2004, p. 1.

[148] **C-0083**, Energeia Editorial Staff, *Lankhorst: the Netherlands ideally positioned for the construction of a coal plant*, Energeia, 10 June 2004, p. 1.

[149] **C-0083**, Energeia Editorial Staff, *Lankhorst: the Netherlands ideally positioned for the construction of a coal plant*, Energeia, 10 June 2004, p. 1.

of Economic Affairs]".[150] Mr Verwer announced that the Netherlands was being considered as an investment location by E.ON.[151]

111. Following the Government announcement, questions were then submitted by Members of the Lower House to Minister Brinkhorst on the rationale for constructing new coal plants.[152] Responding to a question about whether there was room for new coal-fired power stations in the Netherlands, Minister Brinkhorst unequivocally confirmed the Government's support for such investments:

> "I am positive towards the construction of a new coal plant. This fits within the energy policy […] With regard to energy policy, construction of a new coal plant contributes to supply security: more new capacity will be available and older (less efficient) plants are mainly used […] during peaks in demand. For the long term, it is also good not to have a one-sided gas-fired production park. In addition, construction of a new coal plant would contribute to economic efficiency: a greater supply of relatively low-cost electricity. This is beneficial for consumers and the competitiveness of the Dutch industry"[153] (emphasis added).

112. Minister Brinkhorst further confirmed that a new, modern coal-fired power station fit within the Respondent's environmental policy: "*after all* […] *a new coal plant needs to comply with strict-market compliant* [...] *environmental policy. For the CO_2 emissions, the emissions trading industry is the standard in this*".[154]

113. Minister Brinkhorst also stressed that there existed no contradiction between new (modern) coal plants and the transition towards renewable energy. This was because of the level playing field created by the EU ETS which incentivised a reduction in CO_2 emissions:

> "Coal plants produce an important share of electricity in Europe and in the Netherlands and I am confident that coal will also continue to play an important role in our energy supply in the medium term. With a properly working system of CO_2 emissions trade, a price will be put on CO_2 emissions. With the hard CO_2 emissions ceiling for companies that fall under emissions trading (namely 112 Mton/year for the years 2008-

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150 **C-0007**, R. Op Het Velt, *Brinkhorst Advocates for Construction of a New Coal Plant*, Financieel Dagblad, 10 June 2004, p. 1.

151 **C-0007**, R. Op Het Velt, *Brinkhorst Advocates for Construction of a New Coal Plant*, Financieel Dagblad, 10 June 2004, p. 1: "*As an investor at European level, we make a decision. The Netherlands is also considered as a location*".

152 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004.

153 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, p. 1.

154 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, p. 1.

2012), we are sure that we meet the climate objectives. From a CO_2 point of view, I will have no more objections towards new coal plants" (emphasis added).[155]

114. Minister Brinkhorst further acknowledged that technological developments had greatly improved the efficiency of coal plants in recent years and so whilst it "*sound*[ed] *paradoxical*", a new coal plant "*c*[ould] *also contribute to promoting renewable energy*",[156] being "*in part also a* […] *potential biomass plant*",[157] and helping to "*capture the fluctuations in the supply of wind and solar energy, which can keep the electricity system in balance*".[158] Again, the Respondent fully supported and encouraged investment in a modern coal-fired power station.

115. In 2005, around the time the Claimants began to closely investigate an investment in MPP3, the Government issued the 2005 Energy Report, "*Now for later*", which specifically focused on the problems of security of supply.[159] Again, this acknowledged that sustainable energy supply "*is still some way off*"[160] and, as a consequence, coal "*deserves new attention*".[161] The Cabinet was of the view that expanding coal capacity is "*realistic*" and "*in consultation with the energy companies* [it would] *map out the framework conditions for investments* […] *and, where possible, eliminate barriers for investments*".[162] In other words, the Respondent wished to make the investment climate for coal-fired power stations as attractive as possible in order to encourage the investment it needed and wanted.

116. Consistent with Minister Brinkhorst's previous statements, the Respondent was also under no illusions that a new coal investment represented a decades-long commitment; indeed, "[a] *coal plant that is built right now has an life until around 2050*".[163] The 2005 Energy Report

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155 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, p. 1.

156 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, p. 1.

157 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, p. 1.

158 **C-0008**, Parliamentary documents 2003-2004, 1857, Questions by the House of Representatives with the replies by the Government, 15 June 2004, p. 2.

159 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, (pdf) p. 5.

160 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, (pdf) p. 5.

161 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, p. 10. *See also* p. 32 (which explains that the use of coal has an environmental impact but nevertheless is "[d]*ue to the large stocks and the geographical distribution, the use of coal for electricity production is in principle very attractive for the supply security*").

162 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, p. 50. Further, "[p]*artly because of the presence of the Rotterdam port, our country has a very favourable investment climate*" (p. 50).

163 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, p. 33 (emphasis added).

anticipated that, around that time, a plant would no longer be allowed to emit CO_2 and that investors should take this into account.[164] But only a tightening on emissions trading at the EU level was contemplated[165] – there was no suggestion that the Respondent might impose a mandatory ban on electricity generation from coal as early as 2030.

117. The 2005 Energy Report anticipated that, in the future, it would be possible to capture and store the CO_2 emissions from coal plants – and that investment in a demonstration project was an important first step.[166] As discussed later in this Memorial, the Claimants invested in a ground-breaking CCS project at the Maasvlakte site beginning in 2009 – and even prior to that took part in CCS research activities such as the CATO Project.[167] Thus, consistent with the 2005 Energy Report, the Claimants were committed to the development of mechanisms to reduce CO_2 emissions as far as possible through CCS technology.

118. The Respondent's favourable stance towards new coal-fired power stations was then affirmed throughout 2006 – the year of the Claimants' FID. For example, in April 2006, Minister Brinkhorst confirmed that he was aware of investment plans and that he stood behind his commitment that "*a state-of-the-art and ultra-environmentally-friendly cool plant will be constructed*", for example on the Maasvlakte.[168] He clarified that only plants designed according to the most recent environmental insights and technologies would be built (which would be detailed in the EIA)[169] and added that the "*best incentive*" for attracting investment in a modern coal plant was to conduct "*a long-term energy and environmental policy* […] [a]*s a result, the investor has an indication of the emissions requirements it will need to meet in the longer term*".[170]

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164 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, p. 32.

165 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, p. 32 ("[…] *it can still not be guaranteed that the* [European] *emission requirements will not be tightened after that*").

166 **C-0010**, Minister of Economic Affairs, *Now for later, Energy Report 2005*, 8 July 2005, p. 10. *See also* p. 50: "[o]*ver time, a link between the use of coal and CO_2 capture and storage will almost certainly be unavoidable*".

167 The CATO Project was part of a Dutch national research project led by the TNO (the Netherlands Organisation for Applied Scientific Research). *See* [redacted] and ¶¶ 144(a)185 and 185 below.

168 **C-0091**, Parliamentary documents 2005-2006, No. 1224, Questions from the Lower House and Replies from the Minister of Economic Affairs, 10 April 2006, p. 1.

169 **C-0091**, Parliamentary documents 2005-2006, No. 1224, Questions from the Lower House and Replies from the Minister of Economic Affairs, 10 April 2006, p. 1.

170 **C-0091**, Parliamentary documents 2005-2006, No. 1224, Questions from the Lower House and Replies from the Minister of Economic Affairs, 10 April 2006, p. 1.

119. On 26 June 2006, Minister Brinkhorst sent a letter to the Lower House with respect to his "*CO_2 Allocation Plan*" under the EU ETS.[171] This plan aimed to reduce the (free) allocation of CO_2 emission allowances to (existing) power plant producers by 15% and to use one-third of the reduced allowances to support heavy industry.[172] However, Minister Brinkhorst explained, this reduction of 15% would not apply to new power plants such as MPP3, "[i]*n this way, the investment climate for new power plants will not be affected, which is also important for the future of the energy-intensive industry in the Netherlands*".[173] This again confirmed the Respondent's support for new coal investment.

120. In a report dated 8 August 2006, the Deputy Prime Minister, Minister Brinkhorst and Secretary of State for Housing, Special Planning and the Environment ("**VROM**"), Mr Pieter Van Geel, together reiterated that an investment in a modern coal-fired power station was encouraged.[174] The report stated that such investments had to be as efficient as possible, though there was no mandatory requirement for CO_2-reducing features such as CCS at that time:

> "A new coal plant would be a welcome expansion of Dutch capacity to generate electricity. Moreover, a coal plant increases the stability of the energy prices and contributes to the modernisation of the coal plants in Europe. After all, coal plants with a low [efficiency] will have to close their gates first in the future. Of course, it is a precondition that such a plant is as efficient as possible and produces as little CO_2 emissions as possible. However, for technical, economic and policy reasons, it is undesirable to make underground CO_2-storage compulsory at this time"[175] (emphasis added).

121. In addition, as coal plants would be built using the latest technology, environmental requirements "*therefore do not have to drive the choice of technology*".[176] This means that there

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[171] **C-0093**, Parliamentary documents 2005-2006, 29 023, No. 28, Letter from the Minister of Economic Affairs regarding Security of Energy Supply, 26 June 2006.

[172] **C-0093**, Parliamentary documents 2005-2006, 29 023, No. 28, Letter from the Minister of Economic Affairs regarding Security of Energy Supply, 26 June 2006.

[173] **C-0093**, Parliamentary documents 2005-2006, 29 023, No. 28, Letter from the Minister of Economic Affairs regarding Security of Energy Supply, 26 June 2006.

[174] *See* **C-0095**, Parliamentary documents 2005-2006, 28 240-28 982, No. 50, Report of a General Meeting in relation to the Climate Policy Evaluation Memorandum and Liberalisation of Energy Markets, 8 August 2006, p. 13.

[175] **C-0095**, Parliamentary documents 2005-2006, 28 240-28 982, No. 50, Report of a General Meeting in relation to the Climate Policy Evaluation Memorandum and Liberalisation of Energy Markets, 8 August 2006, p. 13. Likewise, the Secretary of State confirmed: "[c]urrently, *there is no adequately tested technology available for underground storage of CO_2. Therefore, the government cannot oblige a coalplan to do so. However, it can be considered whether it is possible to prepare the plant station to be built as much as possible for underground storage*" (p. 16).

[176] **C-0095**, Parliamentary documents 2005-2006, 28 240-28 982, No. 50, Report of a General Meeting in relation to the Climate Policy Evaluation Memorandum and Liberalisation of Energy Markets, 8 August 2006, p. 14.

"*is no reason to make the decision to invest in a new coal plant into a government case*".[177] The Secretary of State added:

> "Coal plants must comply with the applicable environmental requirements. These requirements will most likely be tightened in the future […] the government will not take any technically discriminatory measures to exclude certain technologies in advance. This is because such measures are not legally sustainable. Moreover, the proposals made so far use such modern technology that it is not to be expected that these (tightened) environmental requirements will lead to problems"[178] (emphasis added).

122. The Respondent thus repeatedly and publicly declared the need for investment in new coal-fired power plants between 2004 and 2006, which the Claimants responded to by investing in MPP3. As a former Minister of VROM summarises:

> "Let's be honest. If you would now ask those companies, if tomorrow, they would make a decision for [a] coal plant again, the answer would be no. That is very simple. But at the time, the situation was very different. Gas prices went *sky high*, the Dutch energy-intensive industry complained that it could no longer afford it. The Minister of Economic Affairs, Laurens Jan Brinkhorst, had to travel the entire country to offer comfort. He then asked the energy companies for help. Brinkhorst did not want to respond to the energy-intensive industry by reducing the gas price.
>
> He asked the sector two things: to bring the energy mix in line with the European one (meaning, more coal) and ensure sufficient interconnection abroad. The sector responded to this and started to make plans. It invested many billions of dollars in this. It is not fitting then for a reliable government to subsequently withdraw those promises in a later Cabinet".[179]

123. The Respondent's rationale was, to reiterate, simple: new coal capacity would address the concerns regarding security of supply and high energy prices. At the same time, the Respondent's climate goals would still be achieved through the operation of the EU ETS. In addition, new coal plants were required to meet the highest environmental standards (which MPP3 did and still does) and there was an expectation that new plants would endeavour to limit their carbon emissions as much as possible through various mechanisms (which MPP3 also did).

124. [redacted]

[177] **C-0095**, Parliamentary documents 2005-2006, 28 240-28 982, No. 50, Report of a General Meeting in relation to the Climate Policy Evaluation Memorandum and Liberalisation of Energy Markets, 8 August 2006, p. 14.

[178] **C-0095**, Parliamentary documents 2005-2006, 28 240-28 982, No. 50, Report of a General Meeting in relation to the Climate Policy Evaluation Memorandum and Liberalisation of Energy Markets, 8 August 2006, p. 16.

[179] **C-0138**, N. Koper, *Addicted to Energy, Why the Netherlands is not able to become clean, economical and sustainable* (2012), November 2012, pp. 130-131.

[180] [redacted]

(c) Support for a new coal-fired power station was communicated to the sector through EnergieNed meetings

125. The Respondent's support and encouragement for investments in new coal-fired power stations was also communicated directly to investors – including the Claimants – in meetings between "EnergieNed" (now "Energie-Nederland")[181] and the Respondent's representatives. [redacted]

126. On 26 May 2005, State Secretary Van Geel had described clean coal plants as "*a real option for the future*";[182] in fact, these would play an "*essential role*" during the transition towards a sustainable energy system.[183] Mr Richard De Lange, the EnergieNed Chairman, was quoted as saying that "[f]*or coal, there is a good long-term perspective*".[184] Further, it is possible to reduce CO_2 emissions in coal combustion "*by improving efficiency, co-firing biomass or, in the long term, removing* CO_2".[185]

127. [redacted]

128. It was therefore emphasised by the DGs of the Ministries of Economic Affairs and VROM to EnergieNed members – [redacted] – that new investment in coal was welcome and, moreover, that the Respondent would help to facilitate that investment. Indeed, it did so directly – through its role in the Consortium Agreement negotiations (Section 3.4(c)) and by supporting and accelerating MPP3's permits (Section 3.4(d)).

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[181] In 2007, multiple members left EnergieNed and incorporated "*Nederlandse Vereniging voor Marktwerking in Energie*" ("**VME**"). On 1 September 2010, VME and EnergieNed merged into "Energie-Nederland". Energie-Nederland is a trade association for all parties that produce, supply and trade electricity, gas and heat in the Netherlands (*see* **C-0209,** EnergieNed Webpage, The Members of EnergieNed, (last accessed 26 April 2022), https://www.energie-nederland.nl/leden/.

[182] **C-0085**, Trouw Editorial Staff, *Van Geel sees future for 'clean coal'*, Trouw, 26 May 2005, p. 1.

[183] **C-0085**, Trouw Editorial Staff, *Van Geel sees future for 'clean coal'*, Trouw, 26 May 2005, p. 1.

[184] **C-0085**, Trouw Editorial Staff, *Van Geel sees future for 'clean coal'*, Trouw, 26 May 2005, p. 1.

[185] **C-0085**, Trouw Editorial Staff, *Van Geel sees future for 'clean coal'*, Trouw, 26 May 2005, p. 1.

[redacted]

[redacted]

129. As a result of the Respondent's encouragement of new coal-fired power stations, the Claimants began to explore the possibility of developing MPP3 in the Netherlands in around late 2004.[redacted]

130. [redacted]

131. [redacted]

132. It was not only the Claimants that were considering investing in modern coal-fired power stations in the Netherlands at this time in response to the Respondent's encouragement. A number of Uniper's competitors were doing the same, such as Electrabel (now Engie) and RWE – including at the Maasvlakte site specifically.[redacted]

[redacted]

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139. [redacted]

140. [redacted]

141. [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
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- [redacted]
- [redacted]
- [redacted]
- [redacted]

142. The Claimants' potential investment in MPP3 was publicly announced by way of a press release on 3 March 2006 (the "**Press Release**").[220] The Press Release highlighted that MPP3 "[would] *be built on the basis of clean coal technology, in order to meet all* [EU] *IPPC emission requirements*"[221] and would be highly efficient compared with current Dutch coal-fired power stations (enabling a significant reduction of CO_2 emissions per kWh).[222]

143.

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220 **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006.

221 **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006, (pdf) p. 2.

222 **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006, (pdf) p. 2.

[redacted]

145. [redacted]

146. As is clear from the above, the Claimants' investment was made with Respondent's full support and encouragement. This is not surprising in light of the Respondent's policy of supporting and encouraging investment in modern coal-fired power stations at the time. As set out above, the Respondent had serious concerns about both security of supply and high energy prices and thus saw the construction of modern coal-fired power stations as the obvious solution. [redacted]

[redacted]

147. [redacted]

148. [redacted]

[redacted]

149. [redacted]

(c) The Respondent facilitated a Consortium Agreement

150. [redacted]

151. As noted above, in the early 2000s, Dutch heavy industry was desperate for the Respondent to address high electricity prices.[246] Indeed, Dutch heavy industry was threatening to move elsewhere, which would have had a significant economic impact, including the potential loss of approximately 5,000 jobs, if energy prices remained uncompetitively high.[247]

152. The Balkenende II Government (which took office in May 2003) made it a priority to address the issue and new coal capacity was an obvious solution. [redacted] As one newspaper recounts, at this time, "*the tone was* […] *set*".[249] Mr Lankhorst, DG of the Ministry of Economic Affairs, is reported as stating that there was "*a kind of invitation*" from the Respondent to build

[redacted]

246 *See* **C-0199**, H. van Santen, *When the price of electricity weighed more heavily than climate change*, NRC, 1 February 2020, (pdf) p. 2 ("*perhaps most importantly: heavy industry complained about high electricity prices. The major 'energy guzzlers' were 5 to 25 percent more expensive than in the neighbouring countries*").

247 **C-0017**, Parliamentary documents 2005-2006, 30 300 XIII, No. 65, Report of a General Consultation in the House of Representatives, 25 January 2006, pp. 4-5.

[redacted]

249 **C-0199**, H. van Santen, *When the price of electricity weighed more heavily than climate change*, NRC, 1 February 2020, (pdf) p. 2.

new coal plants; "[t]*he energy companies came to visit the ministry* […] [E.ON] *came all the way from Munich for a one-hour conversation*".[250]

153. Beginning around 2005, the Respondent sought to facilitate discussions between heavy industry and the power sector to produce long-term contracts that would in turn incentivise investment in new power stations and thus help lower electricity prices. [redacted]

154. On 7 October 2005, Minister Brinkhorst reported to the Lower House that he had contacted representatives of the energy-intensive industry to ask whether they were willing "*to join forces*", and also discussed with domestic and foreign electricity producers whether they could "*come to a workable solution for the energy-intensive industry*".[252] Minister Brinkhorst "*detect*[ed] *a clear positive approach to come to a solution*".[253]

155. The Respondent further reported that on 4 October 2005, the Chairman of the VNO-NCW (the national employers' federation), had indicated that nine of its members were willing to commit to a consortium of companies who would purchase electricity together – "*a clear signal that they are prepared to invest permanently in the Netherlands*".[254] The Minister explained that he would "*continue to keep* [him]*self informed of this and if further intervention on* [his] *side is deemed to be desirable,* [he] *will not* [be] *hesitant to do so*".[255]

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[250] **C-0199**, H. van Santen, *When the price of electricity weighed more heavily than climate change*, NRC, 1 February 2020, (pdf) p. 2. *See also* Mr Lankhorst's comments in **C-0083**, Energeia Editorial Staff, *Lankhorst: the Netherlands ideally positioned for the construction of a coal plant*, Energeia, 10 June 2004, p. 1. Further, according to a Ministry of Economic Affairs spokesman, Mr Jan van Diepen, no energy company has yet come forward to "*take over*" the construction of the power station (p. 2).

[redacted]

[252] **C-0011**, Parliamentary documents 2005-2006, 30 300 XIII, No. 8, Letter from Minister of Economic Affairs to the House of Representatives, 7 October 2005, p. 1.

[253] **C-0011**, Parliamentary documents 2005-2006, 30 300 XIII, No. 8, Letter from Minister of Economic Affairs to the House of Representatives, 7 October 2005, p. 1.

[254] **C-0011**, Parliamentary documents 2005-2006, 30 300 XIII, No. 8, Letter from Minister of Economic Affairs to the House of Representatives, 7 October 2005, p. 1.

[255] **C-0011**, Parliamentary documents 2005-2006, 30 300 XIII, No. 8, Letter from Minister of Economic Affairs to the House of Representatives, 7 October 2005, p. 2. *See also* **C-0087**, Parliamentary documents 2005-2006, 30 300 XIII, No. 42, Letter from the Minister of Economic Affairs on Consortium Negotiations, 31 October 2005, p. 1 ("*In the near future, I will continue to follow the case closely. To this end, my civil servants maintain close contact with Mr van Duyne and other parties involved, and I am constantly informed about the developments*").

156. According to a letter from Minister Brinkhorst on 31 October 2005, discussions for a long-term power purchase agreement started on 17 October 2005.[256] The Consortium was led by [redacted] at the request of Minister Brinkhorst.[257] Minister Brinkhorst also "*established that* [individual electricity producers] […] *are considering the possibilities of negotiating with the consortium*".[258] In other words, the Minister brought the demand for electricity and potential new supply together. By the end of November 2005, the negotiations had led to "*concrete offers*".[259]

157. At this time, the Consortium was of considerable interest to the Claimants. [redacted]

158. The Respondent clearly understood the link between the Consortium negotiations (that it had initiated) and a new coal-fired power station. When Minister Brinkhorst updated the Lower House on the progress of exploratory meetings on 9 December 2005, he noted that "[i]*n almost all discussions with potential providers, it has become clear that the requested delivery will necessitate the construction of new, modern coal plants*".[262] Further, although he was "*not*

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256 *See* **C-0087**, Parliamentary documents 2005-2006, 30 300 XIII, No. 42, Letter from the Minister of Economic Affairs on Consortium Negotiations, 31 October 2005, p. 1.

257 [redacted] *See also* **C-0087**, Parliamentary documents 2005-2006, 30 300 XIII, No. 42, Letter from the Minister of Economic Affairs on Consortium Negotiations, 31 October 2005, p. 1; and **C-0098,** Memorandum from the Director General of Energy to the Minister regarding telephone contact with Mr van Duyne, 24 November 2006, p. 1 (Mr van Duyne stepped down from this role in November 2006 and was replaced by Mr Jan Dopper, a director of DSM, a bio-science company).

258 **C-0087**, Parliamentary documents 2005-2006, 30 300 XIII, No. 42, Letter from the Minister of Economic Affairs on Consortium Negotiations, 31 October 2005, p. 1.

259 **C-0013**, Parliamentary documents 2005-2006, 30 300, XIII, No. 58, Letter from the Minister of Economic Affairs to the House of Representatives, 9 December 2005, p. 1.

[redacted]

[redacted]

262 **C-0013**, Parliamentary documents 2005-2006, 30 300, XIII, No. 58, Letter from the Minister of Economic Affairs to the House of Representatives, 9 December 2005, p. 1 (emphasis added).

directly involved in these commercial negotiations",[263] he "*maintain*[s] *daily contac*[t] *with Mr van Duyne*" and "[i]*n that light,* […] *indicated that I* [Mr Brinkhorst] *will do all that I can to facilitate these negotiations and the associated construction of new production capacity to the best of my ability*".[264]

159. The following month, in a report dated 25 January 2006, the then-Minister of Finance, Mr Gerrit Zalm, confirmed that "*a modern coal-fired plant fits with the possible outcome of the negotiations the consortium is conducting*"[265] – adding that it is "*important that Mr van Duyne and the consortium can continue the negotiations uninterrupted because such a multi-billion contract cannot be concluded from one day to the next*".[266] Such a plant would contribute to a diversification of the fuel mix in the Netherlands and while there continues to be a drive for more sustainable energy "*this cannot fully meet the needs of the energy-intensive industry in particular*".[267]

160. Then, in a further update from Minister Brinkhorst on 3 February 2006, he emphasised that "[i]*nsofar as it is within my capabilities, I support the consortium by facilitating the negotiations to the maximum extent*".[268] He added, "[a]*s is well known, I am positive about a new coal plant* […]".[269]

161. Later that year, the then-Minister of Economic Affairs, Mr Joop Wijn, wrote to the Lower House to provide a progress update noting his "*commit*[ment] *to maintaining this industry* […] *because I believe it is important for our country to have a diversified economy, including the employment opportunities that come along with it*".[270] "*That is why*", Minister Wijn explained,

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263 **C-0013**, Parliamentary documents 2005-2006, 30 300, XIII, No. 58, Letter from the Minister of Economic Affairs to the House of Representatives, 9 December 2005, p. 1.

264 **C-0013**, Parliamentary documents 2005-2006, 30 300, XIII, No. 58, Letter from the Minister of Economic Affairs to the House of Representatives, 9 December 2005, p. 2 (emphasis added).

265 **C-0017**, Parliamentary documents 2005-2006, 30 300 XIII, No. 65, Report of a General Consultation in the House of Representatives, 25 January 2006, p. 5. Further, "*a new plant needs to be added* […] *this is likely to become a modern coal plant*" (p. 5).

266 **C-0017**, Parliamentary documents 2005-2006, 30 300 XIII, No. 65, Report of a General Consultation in the House of Representatives, 25 January 2006, p. 5.

267 **C-0017**, Parliamentary documents 2005-2006, 30 300 XIII, No. 65, Report of a General Consultation in the House of Representatives, 25 January 2006, p. 7.

268 **C-0089**, Parliamentary documents 2005–2006, 30 300 XIII, No. 70, Letter from the Minister of Economic Affairs on consortium negotiations, 3 February 2006, p. 1.

269 **C-0089**, Parliamentary documents 2005–2006, 30 300 XIII, No. 70, Letter from the Minister of Economic Affairs on consortium negotiations, 3 February 2006, p. 1.

270 **C-0096**, Parliamentary documents 2006–2007, 28 240, No. 61, Letter from the Minister of Economic Affairs on consortium negotiations, 17 October 2006, p. 1.

"*I am willing to assist the consortium*".[271] The Respondent's critical role in advancing the Consortium Agreement was clear.

162. Further:

(a) In a Ministry of Economic Affairs Memorandum from March 2007, it was explained that "[f]*or the long-term, a new coal plant is the basis for the electricity contract* […]".[272] Whilst "[the Ministry] *does not play any role in th*[e] *commercial process* […] [the Ministry] *did develop a* '*flanking policy* […]'".[273]

(b) In a Ministry of Economic Affairs Memorandum to the Secretary of State in June 2007,[274] the Minister is recorded as having "*researched in various ways to what extent domestic and foreign providers of electricity are prepared to come to a solution that is effective for the energy-intensive industry*", and that it was understood that "*the future benefit of supply from a new coal plant should be brought forward to bridge the transition period until the new coal plant is in operation*".[275]

(c) The Consortium also requested certain support from the Respondent, due to the uncertainty as regards the allocation of CO_2 allowances post-2012. The Memorandum records the Minister's expression of willingness to participate in the Consortium to "*stand up for long-term investment security and a level playing field within the internal market with regard to the European trade in CO_2 emission allowances*".[276]

(d) In a joint internal memorandum of the Ministries of Economic Affairs, VROM and Finance, the Respondent set out its "*Cabinet policy for new coal plants*", which confirmed unequivocally its full support for the construction of new, modern coal-fired power stations:

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[271] **C-0096**, Parliamentary documents 2006–2007, 28 240, No. 61, Letter from the Minister of Economic Affairs on consortium Negotiations, 17 October 2006, p. 1. *See also* **C-0097**, Energeia Editorial Team, *Essent and E.ON are still negotiating with Consortium to build a Coal-fired Power Station*, Energeia, 19 October 2006.

[272] **C-0103**, Memorandum to the Minister regarding the state of affairs of large energy consumers, 1 March 2007, p. 2 (emphasis in original).

[273] **C-0103**, Memorandum to the Minister regarding the state of affairs of large energy consumers, 1 March 2007, p. 2 (emphasis in original).

[274] **C-0107**, Ministry of Economic Affairs Memorandum to the Secretary of State regarding the background and state of affairs for the large consumers dossier, 29 June 2007.

[275] **C-0107**, Ministry of Economic Affairs Memorandum to the Secretary of State regarding the background and state of affairs for the large consumers dossier, 29 June 2007, p. 2.

[276] **C-0107**, Ministry of Economic Affairs Memorandum to the Secretary of State regarding the background and state of affairs for the large consumers dossier, 29 June 2007, p. 3.

> "The power contracts of the consortium relate to electricity from new coal plants [redacted]. This gives the companies access to electricity at a stable and (for the Netherlands) low price. With the introduction of the new cabinet, a discussion arose about the desirability of new coal capacity in the Netherlands. The Cabinet considers the construction of new coal plants to be subject to conditions (see the upcoming Clean & Efficient work programme) compatible with the ambitions in the climate policy and the consortium's contracts can therefore be concluded from this perspective. Partly because of this attitude of the Cabinet, the consortium can now conclude the contract it so desired"[277] (emphasis added).

163. Ultimately, the Respondent's efforts were realised. [redacted] A Press Release from the Consortium on 21 December 2007 explained that:

> "The Consortium of energy-intensive companies has concluded an agreement with electricity producer E.ON to enter into long-term contracts, whereby E.ON will supply electricity in a manner that is in line with the market. The aim of the Consortium [wa]s to find a solution for companies that are seriously threatened in their international competitive position by the high cost of electricity in the Netherlands.
>
> Since October 2005, the Consortium has been researching and developing the possibility to conclude supply contracts for electricity. In cooperation with the Ministry of Economic Affairs and through [the facilitation] of first Dr. J.F. van Duyne and then J.G. Dopper (BEng) has worked on this. The Consortium is an important part of the industry located in the Netherlands and as such is of great importance to the economy, export and employment".[279]

164. [redacted]

[277] **C-0109**, Ministries of Economic Affairs, VROM and Finance Memorandum, 7 September 2007, p. 9. *See also* **C-0110**, Letter from the Minister of Economic Affairs to the Consortium, 18 September 2007, p. 3 ("[w]*ith the choice of coal contracts, you have opted for a stable low electricity price comparable to similar contracts abroad. The Cabinet recently concluded that the construction of new coal plants is subject to conditions compatible with the climate policy to be conducted. This setup makes it possible to conclude the contracts you want. With this, the government also contributes to improving the level playing field*").

[redacted]

[279] **C-0114**, Memorandum from the Ministry of Economic Affairs to the Minister regarding Large Consumers, appending the Consortium Agreement Press Release, 21 December 2007, p. 4.

[redacted]

(d) The Respondent supported and accelerated MPP3's permits

165. The Respondent supported the permitting process of coal-fired power plants – and even sought to accelerate the process. This intention had been made clear by Minister Brinkhorst as early as February 2006:

> "As is well known, I am positive about a new coal plant due to the diversification of the Dutch production park. I realise that this should come soon and in this context, I will make agreements about the permit procedures in consultation with all the authorities, government, province and municipality involved" (emphasis added).[281]

166. [redacted]

167. [redacted]

168. In an interview with a Dutch newspaper in 2020, Mr de Hoog himself confirmed that whilst the Cabinet had no direct influence on permitting (since permits were primarily the responsibility of the provinces), there was nevertheless "*a lot of pressure from the ministry to arrange this*

[281] **C-0089**, Parliamentary documents 2005–2006, 30 300 XIII, No. 70, Letter from the Minister of Economic Affairs on consortium negotiations, 3 February 2006, p. 1.

[redacted]

quickly and expeditiously" at the province level.[285] Mr de Hoog recalled: "*I went to the ministries regularly. I was told that you have to get on board with that permit. It is a project of national importance, they said*".[286]

169. The Respondent also demonstrated its support for MPP3 by defending the legal challenges pursued against the permits issued to MPP3. Several NGOs launched administrative appeals against many of these permits. This involved appeals against, *inter alia*, the Environmental Permit, the Nature Protection Act Permit, the Main Building Permit, the Exemption Zoning Plan and the Water Management Act Permit. During the court proceedings, the Dutch authorities (who were the defendants in those proceedings) defended the validity of the permits, thus expressing their support for the MPP3 plant.[287] In the end, all challenges were unsuccessful (the challenges were either dismissed or required certain revisions to the permits which were ultimately granted).[288]

170. Of particular note is the challenge that was made by various NGOs to the MPP3 Environmental Permit shortly after it was granted by the DCMR in October 2007.[289] In 2009, the Council of State submitted several preliminary questions in relation to these appeals to the European Court of Justice.[290] [redacted]

[redacted]

[redacted]

[redacted]

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285 **C-0198**, Hester van Santen, *How was it possible that the Netherlands continued to build coal plants for so long*, NRC, 31 January 2020, p. 6.

286 **C-0198**, Hester van Santen, *How was it possible that the Netherlands continued to build coal plants for so long*, NRC, 31 January 2020, p. 6.

287 *See, e.g.*, **C-0121**, *The Stichting Natuur en Milieu and the foundation Stichting Zuid-Holland Milieufederatie, The foundation Stichting Greenpeace Nederland and The Association of Concerned Citizens of Voorne v. The provincial executive of South Holland*, ECLI:NL:RVS:2009:BI2680, 29 April 2009 and **C-0134**, *The Stichting Natuur en Milieu and the Milieufederatie Zuid-Holland, The foundation Stichting Greenpeace Nederland and The Association of Concerned Citizens of Voorne v. The provincial executive of South Holland*, ECLI:NL:RVS:2011:BU6360, 30 November 2011 (in relation to the MPP3 Environment Permit).

288 *See e.g.*, **C-0134**, *The Stichting Natuur en Milieu and the Milieufederatie Zuid-Holland, The foundation Stichting Greenpeace Nederland and The Association of Concerned Citizens of Voorne v. The provincial executive of South Holland*, ECLI:NL:RVS:2011:BU6360, 30 November 2011; **C-0129**, *The foundation Stichting Greenpeace Nederland v. The Municipal Executive of Rotterdam*, ECLI:NL:RVS:2011:BQ3437, 4 May 2011(the appeal against the building permit exemption); and **C-0130**, *The foundation Stichting Greenpeace Nederland v. The provincial executive of Zeeland*, ECLI:NL:RVS:2011:BQ3435, 4 May 2011 (the appeal against the permit under the Nature Conservation Act).

289 Including Stichting Natuur en Milieu, Stichting Zuid Hollandse Milieufederatie, Greenpeace Netherlands and the Vereniging van Verontruste Burgers Voorne.

290 *See* **C-0121**, *The Stichting Natuur en Milieu and the foundation Stichting Zuid-Holland Milieufederatie, The foundation Stichting Greenpeace Nederland and The Association of Concerned Citizens of Voorne v. The provincial executive of South Holland*, ECLI:NL:RVS:2009:BI2680, 29 April 2009.

[redacted]

(e) The Respondent accelerated the construction of necessary grid infrastructure

171. As well as facilitating the Consortium Agreement and supporting and accelerating the permitting process for MPP3, the Respondent also facilitated the construction of additional grid infrastructure necessary for MPP3's power to reach the grid.

172. [redacted]

173. [redacted]

174. [redacted]

[redacted]

175. [redacted]

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176. In sum, the Claimants' investment decision in MPP3 was made based on the support for new coal fired-power plants by the Respondent. This was demonstrated through public statements, the direct facilitation of a Consortium Agreement, the acceleration of the permitting process and involvement in ensuring the necessary grid infrastructure would be in place.

177. On 4 April 2008, the Municipality of Rotterdam granted MPP3 a construction permit,[303] and excavation of the plant-site began shortly thereafter. The official announcement of the start of construction was made around a year later, when the concrete foundations of MPP3 were poured. [redacted] MPP3 officially opened in April 2016[redacted]

3.5 MPP3 was designed to limit CO_2 emissions in accordance with the Respondent's goals

178. From the outset of their investment in the MPP3, the Claimants understood the importance of mitigating its environmental impact, particularly with regard to CO_2 emissions. In the DCMR Framework, guidelines were issued for the construction of new plants that envisaged emissions limitation as an "*integral part of the consideration at company level*".[307]

[redacted]

303 **C-0022**, MPP3 Planning and Construction Permit, 4 April 2008.

[redacted]

307 **C-0094**, DCMR Framework, 4 July 2006, p. 2.

179. Aside from being highly efficient, as noted above, MPP3 was designed to incorporate three critical features. MPP3 was built to: (i) be CCS ready (sub-section (a)); (ii) co-combust biomass (sub-section (b)); and (iii) provide district heating (sub-section (c)) – each of which is discussed below.

180. [redacted]

181. In 2007, the then-Minister of VROM, Ms Jacqueline Cramer ("**Minister Cramer**"), observed that "[t]*he* […] *ingredients* [-] *emissions trading with a European ceiling for the plants, significant use of biomass and application of CCS* [-], [make] *the construction of new coal plants ultimately acceptable in the light of the Cabinet's climate ambitions*".[310] MPP3 of course had those "*ingredients*".

182. [redacted] In 2016, a report by Frontier Economics assumed that the relatively new and efficient coal plants in the Netherlands (such as MPP3)

[redacted]

[redacted]

[310] **C-0106**, Parliamentary documents 2006-2007, Appendix 2001, Questions from the Lower House with Replies from the Minister of Housing, Spatial Planning and Environment**,** 28 June 2007, p. 4236.

[redacted]

[redacted]

would reduce emissions to the average of highly efficient gas-fired power stations by 2025.[313] Frontier Economics assumed 350 gCO2/kWh and cited the operators of Dutch coal plants, who described plans involving various combinations of biomass co-firing, efficient use of excess steam for industrial purposes and residential heating, and CCS.[314] [redacted]

[redacted]

(a) MPP3 was built to be "CCS ready"

183. At the time of the Claimants' investment in MPP3, CCS was (and, indeed, still is) considered to be an important CO_2 emissions mitigation technology, significantly reducing CO_2 emissions at their source and thus preventing them from being released into the atmosphere. It involves a three-step process: (i) the separation and capture of CO_2; (ii) the compression and transportation of CO_2 through pipelines to a suitable and safe storage site; and (iii) the permanent storage of CO_2 at that site.

184. The installation of CCS at the MPP3 site was, as mentioned, anticipated by the Claimants from the start of the MPP3 project[redacted] The DCMR Framework encouraged new plants to be prepared CCS ready. For this to be achieved, it was important that there was the space to host the CCS facility and that the plant had the necessary design features, such that the plant could be retrofitted with a full-scale carbon capture plant as and when the technology became available.[redacted] Uniper took these steps and, in fact, MPP3 was certified according to the "TÜV NORD Climate Change Standard TN-CC 006", which contains specific retrofitting requirements.[redacted]

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313 [redacted] **C-0028**, *Research of Scenarios for Coal-fired Power Plants in the Netherlands*, A Report for the Ministry of Economic Affairs (MinEZ), 1 July 2016, p. 30.

314 [redacted] **C-0028**, Frontier Economics, *Research of Scenarios for Coal-fired Power Plants in the Netherlands*, A Report for the Ministry of Economic Affairs (MinEZ) 1 July 2016, p. 31.

[redacted]

185. In around 2005, the Respondent decided that more support was needed to boost research into CCS, and initiated discussions with the private sector. Uniper did just that. As early as 2006, the Claimants were involved in the testing of CCS on a small scale through the CATO Project. [redacted] Construction started in December 2007, and the project opened on 3 April 2008. It was inaugurated at MPP2 by Minister Cramer "*with many international politicians and journalists in attendance* […] [h]*elping to boost support for CATO 2 and CCS in general*".[322]

186. In around 2007, the "*Rotterdam Climate Initiative*" ("**RCI**") was launched by the City of Rotterdam, the Rotterdam Port Authority ("**RPA**") and the DCMR to achieve a reduction of approximately 50% of CO_2 emissions in Rotterdam in 2025 compared to 1990 levels. In 2008, the RCI produced a roadmap for CO_2 capture, which anticipated demonstration projects by 2015.

187. The RCI began working with a core group of interested potential participants, and planned to develop a CO_2 transport network from the Rotterdam harbour to offshore depleted gas fields. [redacted]

[redacted]

322 **C-0142**, ROAD Project Presentation, *CATO and ROAD, A Symbiotic Relationship*, 19 June 2014, p. 5.

[redacted]

[redacted]

188. The following year, the Respondent concluded agreements with operators of new coal plants (including Uniper) (the "**2008 Energy Covenant**"), pursuant to which the energy sector agreed to reduce CO_2 emissions further from 2015, and "*the start of* [CCS] *demonstration projects is a necessary step for this*".[329] The Covenant stated that the energy sector "*will ensure that its affiliated companies carry out two large demonstration projects as part of the EU flagship programme for CCS. The energy sector will have proposals ready for this in 2011*".[330] In Annex 2 to the Covenant, the Claimants expressed their willingness to invest in CCS:

> "E.ON Benelux is a so-called 'focus country' within the E.ON group for the development of CO_2 capture. To this end, great commitments are made, as part of a broader programme for developing key technologies for the future […] As a leading partner, E.ON is very actively involved in the so-called [CATO] programmes. Within these programmes, work is being done to develop technologies in the field of CO_2 capture and storage that can be applied on the scale of a power plant. The technological development of CCS should eventually lead to the installation of a large-scale demo project for the capture and storage of CO_2 from the E.ON plant on the Maasvlakte around 2015. The new coal/biomass plant that is currently under construction on the Maasvlakte will therefore be delivered 'capture ready'"[331] (emphasis added).

189. Thereafter, the Claimants originated the development of a demonstration project, which subsequently (through a JV) became one of the largest integrated CCS demonstration projects in the world: the ROAD Project. The first phase of the ground-breaking project began in 2009[redacted] The aim was to demonstrate the technical and economic feasibility of a large-scale CCS chain to reduce CO_2 emissions.[redacted] Initially, it was planned that the captured CO_2 from

[redacted]

329 **R-0008,** 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Article 2.2.5.

330 **R-0008,** 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Article 7.4.3.

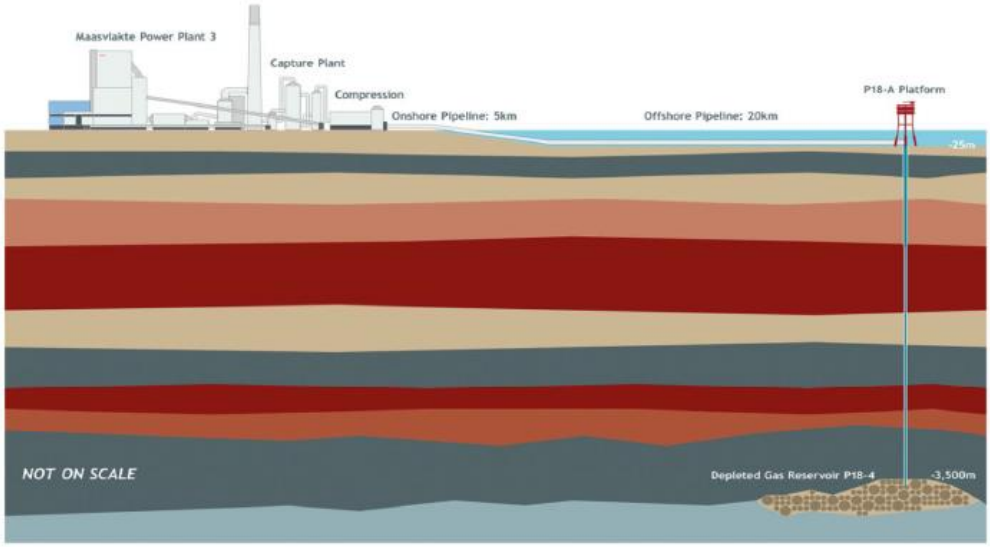
331 **R-0008,** 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 2, (pdf) p. 42.

[redacted]

[redacted]

MPP3 would be transported through a pipeline to an offshore platform on the North Sea, where it would be injected into a depleted gas field, [redacted] as depicted below:[335]

Figure 2.1 Schematic overview of the ROAD Project using storage in P18-4



190. [redacted]

191. On 23 June 2009, the then-Ministers of Economic Affairs (Minister Van der Hoeven) and VROM (Minister Cramer) wrote to the Lower House detailing which CCS activities and decisions would be taken, and anticipated the realisation of two large-scale storage projects in

[redacted]

335 **C-0177**, ROAD Project Close-Out Report CO_2 Storage (4), February 2018, pp. 8, 10. *See also* **C-0174**, ROAD Project Close-Out Report Overview (1), February 2018, p. 2.

[redacted]

2015.[339] The Ministers recognised, however, that before CCS can be applied profitably by companies, the costs of the technology will have to be reduced further:

> "The Netherlands wants 'the polluter pays' principle to apply to CCS as soon as possible. But in the demonstration phase, where CCS is not yet cost-effective, financial support from the government (Brussels/Netherlands) is indispensable for the realisation of demonstration projects".[340]

192. The necessary financial support was forthcoming. The European Commission sought to fund six CCS demonstration projects through the European Energy Programme for Recovery ("**EEPR**"), and the ROAD Project had been shortlisted for that purpose.[341] In addition, the Dutch Government explained that "*on the basis of sound and detailed business cases*" it would "*seriously consider*" a contribution to some of the demonstration projects, "*provided that the companies also come up with substantial financial commitments*".[342]

193. [redacted]

194. Indeed, it was only with both national and EU political support and financial assistance that it was possible for the JV to invest substantial funds in the CCS demonstration project. [redacted]

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339 **C-0122**, Parliamentary documents 2008–2009, 31 510, No. 36, Letter from the Ministers of Economic Affairs and Housing, Spatial Planning and the Environment, regarding CCS, 23 June 2009, p. 4.

340 **C-0122**, Parliamentary documents 2008–2009, 31 510, No. 36, Letter from the Ministers of Economic Affairs and Housing, Spatial Planning and the Environment, regarding CCS, 23 June 2009, pp. 7-8.

341 **C-0122**, Parliamentary documents 2008–2009, 31 510, No. 36, Letter from the Ministers of Economic Affairs and Housing, Spatial Planning and the Environment, regarding CCS, 23 June 2009, p. 8; [redacted]

342 **C-0122**, Parliamentary documents 2008–2009, 31 510, No. 36, Letter from the Ministers of Economic Affairs and Housing, Spatial Planning and the Environment, regarding the 2008 Energy Report, 23 June 2009, p. 10.

[redacted]

[redacted]

195. Thus, on 13 April 2010, Maasvlakte CCS Project C.V. submitted a proposal to qualify for a grant under the EEPR (the "**EEPR Application**"). [redacted]

196. The EEPR Application was successful. Out of a long list of 18 projects, MPP3 was ranked second out of six successful projects [redacted] The Respondent meanwhile agreed to contribute EUR 150 million, confirmed by the Ministry of Economic Affairs on 12 May 2010.[353] [redacted]

197. [redacted] The project was developed based on using the P18-4 gas-field operated by

[redacted]

[353] **C-0127**, Letter from the Minister of Economic Affairs regarding granting MPP3 a subsidy for the ROAD Project, 12 May 2010.

[redacted]

TAQA as the CO_2 storage location, which required a pipeline approximately 25 km from MPP3, about 5 km onshore and 20 km off-shore.[356] These plans were well advanced. [redacted]

198. [redacted] Unfortunately, however, a drop in the CO_2 price undermined the original business case (and indeed the business cases of other CCS projects in the EU) and the ROAD Project was no longer economically viable as a result.[359] [redacted]

199. Mr Schoenmakers further elaborated in an article that he co-wrote in 2013 that:

> "When the CCS demonstration projects started planning in 2008, companies (and indeed, legislators and regulators) were expecting a further rise of certificate prices in the near future, giving a sound optimism that the savings in CO_2 certificates will be able to compensate for the additional costs of CCS after the demonstration phase, therefore opening a business perspective for the technology. Certificate prices of 25 Euros per tonne of CO_2 had been a common assumption and went into the economic calculations of the project proponents. […] the certificate prices have, however, declined since then and now languish at a price of around 7.5 Euros per tonne. Since, for a 250 MW CCS facility, the total emission to be captured is around 1 Million Tons of CO_2 per year, the drop in the certificate price produces an additional financial gap of about 20 Million Euros per year for the operator. At a price level of 7.5 Euro per certificate, the operational costs of the CCS chain is more expensive than the potential savings, so each hour of additional operation will lead to additional losses.
>
> It should be noted that all demo projects in Europe are faced by the same economic challenges. […] Without additional European or National support, the demanding CCS

[356] **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 2.

[redacted]

[359] **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 2; [redacted]

demo program of the EU, having 8-12 demo projects running in 2015, will fail. In the worst case, no CCS demo project might be realized. This would most likely harm the further development of CCS in Europe for a long time".[362]

200. For that reason, Mr Schoenmakers explained that "[u]*rgent action*" was needed "*to bundle forces to achieve and retain the necessary minimum critical mass to stay prepared for the future*".[363]

201. [redacted]

202. After significant efforts by all involved – [redacted] – in late 2014, a possible new funding structure was identified, and was further explored in 2015 and 2016, including cost reductions and additional grants.[369] The primary cost saving resulted from a change to the storage sink to a smaller gas field much closer to MPP3, which required only a 6 km pipeline.[370]

[redacted]

362 **C-0139**, P. Radgen, R. Irons, H. Schoenmakers, *Too Early or Too Late for CCS - What Needs to be Done to Overcome the Valley of Death for Carbon Capture and Storage in Europe?*, Energy Procedia 37 (2013) 6189–6201, 2013, (pdf) p. 5.

363 **C-0139**, P. Radgen, R. Irons, H. Schoenmakers, *Too Early or Too Late for CCS - What Needs to be Done to Overcome the Valley of Death for Carbon Capture and Storage in Europe?*, Energy Procedia 37 (2013) 6189–6201, 2013, (pdf) p. 8.

[redacted]

369 **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 2. *See also*, **C-0181**, ROAD Project Close-Out Report Project Costs and Funding (8), 1 February 2018, pp. 1-2, 9-10.

370 **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 2.

203. On the funding side, the gap was filled through contributions including from the Global CCS Institute, which granted financial support of EUR 4.3 million, and the Port of Rotterdam, which agreed to support the project through investment in the CO_2 pipeline.[371]

204. These cost savings and the development of a new funding scheme resulted in a re-mobilisation of the ROAD Project in 2016 [redacted] However, by mid-2017, work was again halted as a direct result of the Respondent's stated intention to phase out coal. This is explained further at Section 2563.7(c) below.

(b) MPP3 was built to co-fire biomass

205. [redacted]

Co-firing biomass is more environmentally friendly than burning exclusively on coal. "Biomass" is an umbrella term for all materials consisting of or derived from plants or animals, i.e. organic material.[374] [redacted]

206. In 2002 (before the development of MPP3), Uniper (and other owners of coal-fired power plants in the Netherlands) reached a voluntary agreement (the "**2002 Coal Covenant**") with the Ministers of Economic Affairs and VROM to reduce CO_2 emissions each year in the period 2008-2012.[377] As explained in MPP3's EIA, "[f]*or E.ON, the* [2002 Coal Covenant] *amounts to a CO_2 reduction of 805 ktonnes of CO_2 in the Kyoto period until 2012. E.ON therefore strives, in line with government policy to further increase the use of biomass in its production park*".[378] The Claimants also took into account the DCMR Framework, which "*considered that*

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371 **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 2. [redacted]

[redacted]

374 *See* **C-0210**, U.S. Energy Information Administration Webpage, Biomass Explained, (last accessed 26 April 2022), https://www.eia.gov/energyexplained/biomass/.

[redacted]

377 *See* **C-0079**, 2002 Coal Covenant between the Dutch Government and Power Plant Operators, 24 April 2002, Preamble, Articles 2 and 4, (pdf) pp. 2, 5, 7.

378 **C-0099**, MPP3 Environmental Impact Assessment, December 2006, -S.4-, (pdf) p. 19.

the use of biomass in coal plants is desirable and expect that the new plants will be suitable for this".[379]

207. Thus, as confirmed in the Claimants' application for the MPP3 Environmental Permit, "*E.ON has indicated that it will use up to 20% biomass as a secondary fuel*".[380] (The conditions of the Environmental Permit contain a maximum amount (in kt) of biomass that can be burned in MPP3 (580kt),[381] which replaces approximately 15% of coal.)

208. However, biomass was (and is) more expensive and generates less energy than coal [redacted] The Netherlands recognised this and the Respondent put in place a subsidy scheme, up to a maximum of 25 petajoules (the "**SDE+ subsidy**"), [redacted] which MPP3 has utilised. [redacted] The SDE+ subsidy finances the difference between the costs of generating electricity from biomass and the market price, the so-called 'unprofitable top' [redacted]

209. On 30 November 2016, the SDE+ subsidy was awarded to MPP3 for the co-firing of biomass (equivalent to approximately 15%), starting in October 2018 and with a duration of eight years.[386] [redacted]

(c) MPP3 was built to provide district heating

210. Finally, from the outset, MPP3 was designed to decouple heat. The Press Release [redacted] for example, notes that "[s]*tudies are underway into* [a] *possible further*

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379 **C-0094**, DCMR Framework, 4 July 2006, p. 2.

380 **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 31.

381 **C-0021**, MPP3 Environmental Permit, 26 October 2007, p. 65. Pursuant to the MPP3 Environmental Permit, the combustion of 2,650,000t coal per year is permitted. This amount is based on a calorific value ("**LHV**") of coal of approximately 25 GJ/t. Based on mass, a maximum of 580,000t per year biomass may be used to replace part of the coal. Biomass, however, has a lower LHV as coal, so approximately 18 GJ/t (average) is used. 580,000t at 18 GJ/t approximately equals 15% of 2,650,000t at 25 GJ/t implying that co-firing 580,000 t/y biomass leads to a reduction of approximately 15% of amount of coal that may be combusted under the MPP3 Environmental Permit.

[redacted]

386 **C-0159**, Letter from the Netherlands Enterprise Agency to Uniper Benelux N.V. granting a SDE subsidy, 30 November 2016.

[redacted]

increase of energy efficiency via heat supply to greenhouses and industrial clients".[388] [redacted]

211. [redacted]

3.6 Post the Claimants' investment in MPP3, the Netherlands continued to support new coal-fired power plants

212. The Respondent continued to support investment in new coal plants [redacted] This support continued throughout the construction period of MPP3. The story remained consistent: whilst the Netherlands wanted there to be a reduction in CO_2 emissions – modern coal-fired power stations were not inconsistent with that objective if emissions reductions efforts were made.

213. In February 2007, a new government was elected, which affirmed previous government policy on coal-fired power plants. On 28 June 2007, Minister Cramer explained that: (i) new coal investment is compatible with the Netherlands' climate objectives – especially since they offer the possibility of co-firing biomass, and there may also be gains to be made from heat utilisation; (ii) modern coal-fired power stations are advantageous because they replace both imports and older power stations, which is more sustainable; and (iii) as regards CCS, this is not yet market-ready or commercially available.[392]

214. Likewise, the new Government also stressed that CO_2 emissions were to be regulated exclusively through the EU ETS. Following a consultation, in August 2007, the Respondent announced that it would not impose any obligations in the area of CO_2 emissions other than having sufficient CO_2 emission rights as part of the EU ETS: "[t]*he Netherlands cannot include conditions for CO_2 emissions in their permit* […] *The producers of the coal plants to be built*

[388] **C-0018**, E.ON Benelux Press Release, *New power station based on clean coal technology: E.ON selects Maasvlakte for new large-scale power plant*, 3 March 2006, (pdf) p. 2.

[redacted]

[392] **C-0105**, Parliamentary documents 2006–2007, 28 240-29 023, No. 77, Letter from the Minister of Housing, Spatial Planning and the Environment regarding the licensing of coal plants at Maasvlakte, 28 June 2007, pp. 3-6.

know that they have to deal with a [EU ETS] *system in which CO_2 emissions have a price*".[393] In the Respondent's view, harmonisation at the European level was "*essential*" for the sake of a level playing field for coal-fired power plants in the Netherlands. In any case, the new coal-fired power plants in the Netherlands would "*be among the cleanest* […] *in the world*".[394]

215. In June 2008, the Government published its latest Energy Report (the "**2008 Energy Report**"), which stressed (once again) support for modern coal-fired power stations which would "*continue to play an important role over the next decades*".[395] The 2008 Energy Report referred to the need for the further diversification of the fuel mix including from coal,[396] and set out that CO_2 emissions can be drastically reduced through energy saving and CCS.[397]

216. [redacted]

217. On 29 September 2008, the then-Minister of Economic Affairs, Minister Van der Hoeven, answered questions about the 2008 Energy Report.[400] Consistently, the answers demonstrated that the Respondent fully supported new coal-fired power plants (like MPP3), provided that strict environmental requirements were satisfied:

> "Coal plants will always have to meet the environmental requirements and the CO_2 emissions must fit within the emission ceiling imposed via the ETS. The [2008] Energy

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393 **C-0108**, Parliamentary documents 2006-07, 28 240, No. 86, Report of a General Consultation on the construction of coal plants, 8 August 2007, p. 6.

394 **C-0108**, Parliamentary documents 2006-07, 28 240, No. 86, Report of a General Consultation on the construction of coal plants, 8 August 2007, p. 6.

395 **C-0023**, 2008 Energy Report, 18 June 2008, p. 21 (emphasis added). *See also* p. 12. The 2008 Energy Report described different scenarios for the Dutch energy supply market in 2050 and anticipated that energy generated via coal-firing was to play a role.

396 **C-0023**, 2008 Energy Report, 18 June 2008, pp. 82-85.

397 **C-0023**, 2008 Energy Report, 18 June 2008, p. 11.

[redacted]

400 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008.

> Report also indicates that companies that invest in new coal plants in the Netherlands are welcome if they are serious about their efforts to offset the increase in CO_2 emissions. This policy is well aligned with the Clean and Economical Work Programme and the industry accord concluded in that context with the Energy industry"[401] (emphasis added).

218. Minister Van der Hoeven also stated in this communication that the Respondent would not impose prohibitions on specific technologies (for example, coal) because that would ignore "*the international character of the energy issue and uncertainties about future (technological) developments*".[402] Moreover, in a "*good and stable investment environment* […] *there must be clear rules for all energy options that do not change all the time, so that investors can make a realistic assessment of the risks they run throughout the lifespan of those energy options*".[403] Such rules "*should not make investment in certain technologies impossible*" but rather ensure that negative environmental effects are minimised.[404]

219. The Minister specifically acknowledged that, by 2015, a total of 3,740 MW of new coal-fired power generation would be realised, including "*E.On, 1070 MW*" (i.e. MPP3),[405] and that a modern coal-fired power station had a lifetime of 40 years.[406]

220. The Netherlands' view that coal would continue to play a role in the energy mix was shared by the European Commission too. In January 2008, the Commission stated that "[f]*ossil fuels will remain the primary source of energy worldwide for decades to come*" and "[s]*tocks of coal will be needed to provide energy in Europe* […]".[407] For that reason, the European Council supported investment in CCS, including the setting up of demonstration plants by 2015.[408]

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401 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008, p. 13.

402 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008, pp. 12-13.

403 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008, p. 16.

404 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008, p. 16 (emphasis added).

405 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008, p. 25.

406 **C-0118**, Parliamentary documents 2008–2009, 31 510, No. 2, List of Questions and Answers regarding the Energy Report 2008, 29 September 2008, p. 28.

407 **C-0116**, Communication from the European Commission to the European Parliament, *20 20 by 2020, Europe's climate change opportunity*, 23 January 2008, p. 9. In another communication of the same date, the Commission recognised that "[…] *fossil fuels remain important parts of the EU and global energy mix* […]" (**C-0115**, Communication from the European Commission to the European Parliament, *Supporting Early Demonstration of Sustainable Power Generation from Fossil Fuels*, 23 January 2008, p. 3).

408 **C-0116**, Communication from the European Commission to the European Parliament, *20 20 by 2020, Europe's climate change opportunity*, 23 January 2008, p. 9.

221. On 28 October 2008, the Respondent concluded the 2008 Energy Covenant.[409] Pursuant to the agreements thereunder, as of 2015, CO_2 emissions were to be reduced. According to a letter from Minister Cramer to the Lower House of 27 October 2008, the agreements "*should give the Cabinet the assurance that the necessary reductions are being achieved*".[410]

222. The Respondent agreed that "[w]*hen shaping government policy*", it would "*not use measures that bindingly limits the number or type of (coal-fired) power stations*" and "*offer the market an investment perspective for 2020 and beyond*".[411] In turn, the energy sector committed to ensuring that "*new coal-fired power stations are among the cleanest in Europe, and that new (coal-fired) power stations are as energy-efficient as possible compared to the current generation of power stations*".[412]

223. The energy sector also agreed to "*advance that the operators of the coal-fired power stations in the Netherlands will have very substantially reduced CO_2 emissions from 2015 onwards*"[413] and "*implement the agreements of this agreement* […] *and invest in sustainable energy and the application of CCS*".[414] In this respect, "[t]he *start of the demonstration projects*" was considered a "*necessary step*".[415] The energy sector undertook to make every effort to develop its new power stations to be CCS-ready, so that CCS could be applied as soon as the technology would be market-ready and economically viable.[416] The parties therefore sought to "*ensure that the technology of CO_2 capture and storage is sufficiently market-ready around 2020 and is applied on a large-scale basis at a competitive CO_2 price*".[417]

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409 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008. Specifically, the Minister of Economic Affairs, the Minister of Housing, Spatial Planning and the Environment, and the State Secretary of Transport.

410 **C-0119**, Parliamentary documents 2008–2009, 31 209, No. 42, Letter from the Minister of Housing, Spatial Planning and Environmental Management, 27 October 2008, p. 22.

411 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 2.2.1 (emphasis added).

412 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 2.2.2.

413 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 2.2.5.

414 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 2.2.5.

415 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 2.2.5.

416 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 7.4.1.

417 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 7.2.2. *See also* Article 5(3).

224. With respect to biomass, the parties agreed to achieve the co-firing of sustainable biomass.[418] In particular, the parties' intention was "*to maximise the contribution of biomass to the objective of 20% sustainable energy within the preconditions of sustainability and cost-effectiveness by 2020*".[419] The Respondent, meanwhile, undertook to examine how the co-firing of sustainable biomass in power plants could be achieved and to "*offer a definite answer about the perspective on financial support in this regard*" by January 2009.[420]

225. Later, in 2010, a bill was introduced by the then opposition, aimed at taxing CO_2 emissions from coal-fired power plants with a special tax until CO_2 emission rights under the EU ETS were allocated by auction in 2013.[421]

226. The Government advised *against* the bill. The then-Minister of Finance, Mr Jan Cornelis de Jager, stated that the proposal "*should be discouraged*",[422] and stressed the central role and rationale of the EU ETS:

> "The aim of the [EU] ETS is to achieve emission reductions wherever possible at the lowest cost on a European scale. The private bill ignores this and forces both existing and new coal plants to take CO_2 reduction measures or the acceptance of substantially higher tax costs".[423]

227. Minister de Jager also highlighted that commitments had already been made to a transition towards sustainable energy – and agreed the 2008 Energy Covenant.[424] There was, therefore, no need to go beyond that.

228. Additionally, new coal-fired power plants were already required to be built "CCS ready" and the timetable behind this policy was "*already ambitious*".[425] By the intended entry of force of the bill (1 January 2013), large-scale deployment of CCS would not yet be possible, and it

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418 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Article 3(1).

419 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Annex 1, Article 5.1.1.

420 **R-0008**, 2008 Covenant between the Government and the Energy Sector, 28 October 2008, Article 3.6 and Annex 1, Article 5.3.5.

421 **C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010.

422 **C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, p. 2.

423 **C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, pp. 2-3.

424 **C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, p. 3.

425 **C-0128,** Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, p. 3.

would be very difficult for plants to remain below the proposed 550g/kWh threshold.[426] This could "*come down to the closure of existing coal plants, refraining from new construction or switching to natural gas as fuel. This is not in accordance with the Cabinet's opinion that currently no form of energy generation should be excluded in advance*".[427] In other words, the Government objected to restrictions on coal beyond the EU ETS and agreements already in place.

229. The 2011 Energy Report followed on from 2005 and 2008 versions. According to the Government, the aim was to achieve a "*balanced mix between green and grey energy*" because conventional energy sources would, "*for the time being*", still provide "*the majority of energy demand*".[428] Modern, efficient power stations generating electricity with fossil fuels, including coal-fired power stations, remained necessary for that purpose. Consistently, the 2011 Energy Report emphasised the role of the EU ETS as "*the main tool to reduce CO_2-emissions in the EU*".[429] Under a "*well-functioning ETS system*", it is "*up to market parties to choose the most efficient technology and to ensure that the reduction of CO_2 emissions is achieved at the lowest possible social costs*".[430]

230. In September 2013, the "*Energy Agreement for Sustainable Growth*" was agreed between the Government and representatives of local government, employers' associations and unions, financial institutions and other stakeholders (the "**2013 Energy Agreement**").[431] This comprised ten "pillars" that signatories voluntarily agreed to "*offer*[ing] *a long-term perspective* […] [and] *creat*[ing] *trust and with that reduces investment uncertainty* […]".[432] Parties committed to objectives including energy savings and an increase in renewables.[433]

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426 **C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, p. 3.

427 **C-0128**, Parliamentary documents 2009–2010, 31 362, No. 12, Letter from the Minister of Finance on the Legislative Proposal to amend the Environmental Tax Act, 20 May 2010, p. 3 (emphasis added).

428 **C-0131**, Parliamentary documents 2010–2011, 31 510, No. 45, Energy Report 2011 ("**2011 Energy Report**"), 10 June 2011, p. 25.

429 **C-0131**, 2011 Energy Report, 10 June 2011, p. 4.

430 **C-0131**, 2011 Energy Report, 10 June 2011, p. 4.

431 **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013.

432 **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, pp. 11-12.

433 **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, p. 11.

E.ON was represented by Energie Nederland in the 2013 Energy Agreement negotiations, and Energie Nederland signed the Agreement.[434]

231. The 2013 Energy Agreement confirmed, once again, the Respondent's long-held view that highly efficient coal plants were an important part of the energy mix, and explicitly acknowledged that "[i]*n the period until 2050, fossil fuels will be an important part of the energy consumption*" even with the Agreement's aim to reduce emissions.[435] Again, consistent with previous policy, the 2013 Energy Agreement emphasised the "*crucial*" importance of the EU ETS to "*long-term development towards a sustainable energy supply*".[436]

232. The sixth "pillar" of that Agreement was the phase out, by 2016-2017, of five older and less efficient coal-fired power plants constructed in the 1980s (including Uniper's MPP1 and MPP2 plants).[437] In return, there would be no taxation on the supply of coal. A limit for co-firing biomass up to 25 petajoules was agreed, and it was contemplated that remaining modern coal-fired power plants (such as MPP3) would be able to apply for the SDE+ subsidy (which MPP3 qualified for in 2016).[438]

233. The obligation for older plants to close was instead implemented through Article 5.12 of the Environmental Management Activities Decree, which set a minimum efficiency requirement of 40% for coal-fired power plants.[439] Thus, after 1 July 2017, only three modern coal-fired power stations remained in the Netherlands (those commissioned in 2015-2016 by Uniper, RWE and Engie) and it was understood at the time that these *new* coal plants would remain allowed to operate for the remainder of their useful life.

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[434] **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, p. 136.

[435] **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, p. 20.

[436] **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, p. 20.

[437] **C-0025**, 2013 SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, p. 97.

[438] **C-0025**, SER (Social and Economic Council) Report, *Energy Agreement for Sustainable Growth*, 6 September 2013, p. 18. *See* **C-0159**, Letter from the Netherlands Enterprise Agency to Uniper Benelux N.V. granting a SDE subsidy, 30 November 2016.

[439] The legislator chose to introduce this efficiency requirement because the Netherlands Authority for Consumers and Markets (*Autoriteit Consument & Markt*) had advised that the joint agreement to the closure of power stations by the energy sector had a restrictive effect on competition within the meaning of the ban on cartels contained in Section 6 of the Competition Act.

3.7 The Netherlands' significant change to its policy towards coal and the enactment of the Coal Ban Act

(a) Events in 2015-2016

234. In 2015 and 2016, a number of developments took place which preceded a significant change in the Respondent's policy towards coal-fired power plants. However, it was not until the Coalition Agreement in October 2017 that a definitive plan to phase out even modern coal-fired power stations without any financial compensation was publicly announced. Indeed, even in the two years prior to the Coalition Agreement, despite political headwinds against coal, the Respondent continued to publicly express its support for modern coal-fired power stations.

235. In June 2015, the Hague District Court in *Urgenda Foundation v. State of the Netherlands* ("***Urgenda***") ruled that the Respondent must ensure that the aggregate volume of annual Dutch greenhouse gas emissions be reduced in such a way that, by the end of 2020, this volume would reduce by at least 25% compared to the level of the year 1990.[440] The Respondent has opposed the *Urgenda* decision and subsequently appealed. However, it was upheld by both the Court of Appeal and, ultimately the Supreme Court on 20 December 2019.[441]

236. Subsequently, on 18 November 2015, a motion was submitted by two Members of Parliament van Weyenberg and van Veldhoven (the "**2015 Motion**") in which the Respondent was called upon to "*phase-out the Dutch coal-fired power stations and to draw up a plan for this with the sector*",[442] taking into account "*the growth in the share of renewable energy, the legal and financial aspects, potential leakage of CO_2 to other countries and the security of supply of energy and innovation*".[443] The 2015 Motion required the Minister to report back to the Lower House in 2016.[444] But it was otherwise scant on information – it did not specify what was meant by "*phase-out*", whether compensation would be paid or include any timeframe. Indeed, the

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[440] **C-0197**, *The State Of The Netherlands (Ministry Of Economic Affairs And Climate Policy) v. Stichting Urgenda*, *Supreme Court of the Netherlands, ECLI:NL:HR:2019:2006*, 20 December 2019, Summary of the Decision, (pdf) pp. 2-3 and ¶¶ 8.3.4-8.3.5.

[441] **C-0197**, *The State Of The Netherlands (Ministry Of Economic Affairs And Climate Policy) v. Stichting Urgenda*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2006, 20 December 2019, (pdf) pp. 2-3.

[442] **R-0010**, Parliamentary documents 2015-2016, 34 302, No. 99, Amended Motion by Members van Weyenberg and van Veldhoeven , 18 November 2015, p. 1.

[443] **R-0010**, Parliamentary documents 2015-2016, 34 302, No. 99, Amended Motion by Members van Weyenberg and van Veldhoeven, 18 November 2015, p. 1. *See also* **C-0146**, *Dutch Lawmakers Approve Plan to Close Coal Power Plants,* Phys Org, 26 November 2015.

[444] The motion called upon the Government to report back to the House of Representatives when the Energy Agreement was revised in 2016 (*see* **R-0010**, Amended Motion by Members van Weyenberg and van Veldhoeven, 18 November 2015, p. 1).

only concrete measure proposed was that no new permits be granted for coal-fired power plants in the Netherlands.[445]

237. The 2015 Motion was approved by the Lower House by a small majority, and the Minister of Economic Affairs commenced an investigation accordingly.[446] However, the ruling party was reported as "*vehemently opposed to the plans*".[447] Prime Minister Rutte opposed the proposal on the basis that it would lead to electricity imports from more polluting plants elsewhere – and these plants are "*not nearly as super modern as three of the newest coal power plants in the Netherlands*".[448]

238. Then, on 28 April 2016, the Respondent published a new Energy Report, "*Transition to Sustainability*" (the "**2016 Energy Report**").[449] Even against the backdrop of the Paris Agreement (concluded in late 2015), however, the message of the 2016 Energy Report remained in line with previous reports: namely, that fossil-fuels remained important for the supply of electricity. The newer coal-fired plants (including MPP3), which co-fire biomass, also "*contribut*[e] *more than 1 percentage point to our targets of 14% renewable energy in 2020 and 16% in 2023*".[450]

239. Further, the EU ETS remained *the* instrument for achieving emissions reductions. With respect to coal-fired power stations specifically, the 2016 Energy Report emphasised:

> "An effective price incentive provided through the ETS will eventually provide a sufficient economic impulse for the operators of coal-fired power plants to reduce their emissions, for example by implementing biomass co-firing, CCS, a combination of both, or by shutting their plants down"[451] (emphasis added).

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445 **R-0010**, Amended Motion by Members van Weyenberg and van Veldhoeven, 18 November 2015, p. 1.

446 In December 2015, Minister Kamp confirmed in a letter to the Lower House (*see* **C-0148**, Parliamentary documents 2015-16, 30 196 and 32 813, No. 380, Letter from the Minister of Economic Affairs to the Lower House regarding the phase out of coal plants, 18 December 2015) that "*further research is necessary to clarify which variants* [in the 2015 Motion] *are available to enable phasing out, what the consequences are* […] *and how these consequences could be dealt with*" (p. 2). This included investigating: (i) how the different scenarios affect the emission of CO_2 in the Netherlands; (ii) whether a coal phase out would induce a transfer of domestic CO_2 emission to neighbouring countries (carbon leakage aboard); (iii) the effect on security of supply; (iv) how different scenarios would affect the import/export balance of the Netherlands (import dependency); and (v) the impact on innovation. Minister Kamp noted that the five newer plants largely function as the "base load" and provide a significant part of the supply (p. 3).

447 **C-0146**, *Dutch Lawmakers Approve Plan to Close Coal Power Plants*, Phys Org, 26 November 2015, p. 1.

448 **C-0146**, *Dutch Lawmakers Approve Plan to Close Coal Power Plants*, Phys Org, 26 November 2015, p. 2.

449 **C-0027**, Minister of Economic Affairs of the Netherlands, *Energy Report: Transition to sustainable energy*, 28 April 2016.

450 **C-0027**, Minister of Economic Affairs of the Netherlands, *Energy Report: Transition to sustainable energy*, 28 April 2016, p. 127.

451 **C-0027**, Minister of Economic Affairs of the Netherlands, *Energy Report: Transition to Sustainable Energy*, 28 April 2016, p. 35. *See also* p. 6.

240. The Respondent anticipated that it would "*get together with the sector and other stakeholders to flesh out alternative plans for phasing out the coal-fired power plants*".[452] Clearly, no definitive choice had been made at that point. Moreover, the 2016 Energy Report indicated that the Respondent intended to reach agreement with the energy sector – as it had done in the past with respect to the 2002 Coal Covenant, the 2008 Energy Covenant and the 2013 Energy Agreement.

241. In the same month as the 2016 Energy Report was published, MPP3 officially opened. On the eve of the opening, a Dutch television station (NOS) reported comments from Minister Kamp that MPP3 represented a – "*fuel-efficient, effective and efficiently operating plant of its kind*" – and pointing out that, until 2050, "*we still need a lot of fossil energy and this coal-fired power plant is part of that*".[453] Thus, even as MPP3 officially opened [redacted], the Respondent remained in favour of MPP3, and stated as much publicly.

242. In September 2016, a motion on the timeline for the closure of coal-fired plants was proposed by Members of Parliament Pechtold, Klever and Segers (the "**2016 Motion**").[454] This was supported by a majority of the Lower House.

243. But the Respondent had not yet decided the course of action. On 4 September 2016, a Dutch newspaper reported that "*Minister* [Kamp] *d*[id] *not want to close new coal plants*", quoting him as saying that the Respondent would be "*crazy*" if we closed down Europe's cleanest coal plants.[455] Minister Kamp believed this was not necessary and that it would be "*much smarter to close the old polluting plants in Germany and Poland*".[456]

244. [redacted]

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[452] **C-0027**, Minister of Economic Affairs of the Netherlands, *Energy Report: Transition to sustainable energy*, 28 April 2016, p. 6. *See also* p. 127.

[453] **C-0151**, NOS News Article, *Kamp: new coal-fired power station fits within the rules*, NOS Nieuws, 20 April 2016, p. 1. Another newspaper reported that Minister Kamp stated that whilst closing down old power plants from the 1990s is justifiable, the new power plants (which included MPP3) "*are the cleanest of all Europe, we would be crazy if we close them*" (**C-0153**, *Minister Henk Kamp of Economic Affairs does not want to close new coal plants*, NU nl, 4 September 2016, p. 2).

[454] **C-0155**, Parliamentary documents 2016–2017, 34 550, No. 14, Legislative Proposal by Member Pechtold, 22 September 2016, p. 1.

[455] **C-0153**, *Minister Henk Kamp of Economic Affairs does not want to close new coal plants*, NU nl, 4 September 2016, pp. 1-2.

[456] **C-0153**, *Minister Henk Kamp of Economic Affairs does not want to close new coal plants*, NU nl, 4 September 2016, p. 2.

[redacted]

245. [redacted]

246. On 26 September 2016, the Claimants wrote to the Minister of Economic Affairs and Secretary of State for Infrastructure and Environment in relation to the proposed coal phase out. The Claimants reiterated that "[b]*y far the most effective and efficient measure to achieve CO_2-emission reduction in the industrial and energy sectors* [wa]*s to limit the amount of emission allowances within the EU ETS*",[460] that Uniper Benelux was prepared to "*take measures at the Maasvlakte plant such as ROAD-CCS, biomass co-firing and heat decoupling, which* [would] *gradually bring CO_2-emissions to the level of a gas plant*", and that the Maasvlakte site would be "*the key to an efficient and sustainable development of the Rotterdam port area by expanding our co-siting activities*".[461] The Claimants also stressed that if the Respondent believed closure was necessary, "*adequate financial compensation*" should be provided and "*quick decision making* [wa]*s crucial*".[462]

247. [redacted]

[redacted]

460 **C-0156**, Letter from Frits Bruijn (Uniper) to the Minister of Economic Affairs regarding the phase out of coal, 26 September 2016, p. 2.

461 **C-0156**, Letter from Frits Bruijn (Uniper) to the Minister of Economic Affairs regarding the phase out of coal, 26 September 2016, p. 2.

462 **C-0156**, Letter from Frits Bruijn (Uniper) to the Minister of Economic Affairs regarding the phase out of coal, 26 September 2016, p. 3.

[redacted]

[redacted]

248. [redacted]

249. [redacted]

250. [redacted]

[redacted]

251. [redacted]

(b) Events in 2017

252. [redacted]

253. On 16 February 2017, Member Vos proposed two amendments to the Electricity Act 1998, which would set the net electrical efficiency of (i) the two remaining coal-fired power plants from the 1990s to at least 45% from 1 January 2021; and (ii) the three modern coal plants to at least 48% from 1 January 2031 ("**2017 Motion**").[478] Member Vos explained that the purpose of the amendment was "*to phase out the last five coal plants* [i.e. including MPP3] […] *they must be closed by 2030 at the latest*".[479] The 2017 Motion contemplated transitional periods for the closure of coal plants, but made no provision for financial compensation. Mr Vos also claimed that such a measure was foreseeable as early as 2007 because Minister Cramer of VROM had indicated "*that coal plants will be limited in their possibilities*" in answers to parliamentary questions.[480] The 2017 Motion was referred to the Advisory Board of the Council of State (the "**Advisory Division**") for further consideration.[481]

[redacted]

478 **C-0165**, Parliamentary documents 2016–2017, 34 627, No. 9, Proposed Amendment of the Member Jan Vos to the Electricity Act 1998 and the Gas Act, 16 February 2017, p. 2; and **C-0166**, Parliamentary documents 2016–2017, 34 627, No. 10, Proposed Amendment of the Member Jan Vos to the Electricity Act 1998 and the Gas Act, 16 February 2017, p. 1.

479 **C-0166**, Parliamentary documents 2016–2017, 34 627, No. 10, Proposed Amendment of the Member Jan Vos to the Electricity Act 1998 and the Gas Act, 16 February 2017, p. 2.

480 **C-0166,** Parliamentary documents 2016–2017, 34 627, No. 10, Proposed Amendment of the Member Jan Vos to the Electricity Act 1998 and the Gas Act, 16 February 2017, p. 3.

481 *See* **C-0173**, Parliamentary documents 2016-2017, 34 627, No. 14, Letter from the Minister of Economic Affairs to the Lower House regarding the proposed amendment to the to the Electricity Act 1998 and the Gas Act, 18 July 2017.

254. On 17 July 2017, the Advisory Division issued an Advisory Opinion (the "**2017 Advisory Opinion**") which concluded that the closure of coal plants by prescribing unobtainable efficiency requirements was unlawful. The Opinion suggested, *inter alia*, that closure should be carried out in a more direct way, such as a prohibition on the use of all electricity production with coal plants on a certain date.[482] Nevertheless, the Advisory Division cautioned that such a proposal "*should be considered carefully*" – especially since "*the* [EU] *ETS system is in effect for these issues*", which "*aims for optimal considerations at the European economic level*".[483] Moreover, the "*the closure of – relatively modern – coal plants is a very different approach than for which it was chosen in a European context. Therefore, on* [a] *European scale, this could be inefficient as a result of the so-called waterbed effect*".[484] The "waterbed effect" refers to the fact that if Dutch coal plants were closed, their electricity production (and their CO_2 emissions) would simply be replaced by coal-fired power stations in Germany.[485]

255. The Advisory Division also opined that the 2017 Motion was wrong in its claim that a closure of coal-fired power plants would have been foreseeable for about a decade. Rather, such a measure was, at best, only a possibility following the 2015 Motion.[486] The Advisory Division explained that:

> "Other than the explanation with the amendments, closure could not yet have been foreseen in 2007, as the debate at the time was focused on opportunities to limit greenhouse gas emissions (e.g. CO_2 capture and storage; CCS), but not to close coal plants"[487] (emphasis added).

256. Ultimately, the Advisory Division advised against the 2017 Motion.

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[482] **C-0172**, Parliamentary documents 2016-2017, 34 627, No. 15, Council of State Advice on the Amendment of the Electricity Act 1998 and of the Gas Act, 17 July 2017, p. 9.

[483] **C-0172**, Parliamentary documents 2016-2017, 34 627, No. 15, Council of State Advice on the Amendment of the Electricity Act 1998 and of the Gas Act, 17 July 2017, p. 9.

[484] **C-0172**, Parliamentary documents 2016-2017, 34 627, No. 15, Council of State Advice on the Amendment of the Electricity Act 1998 and of the Gas Act, 17 July 2017, p. 9.

[485] *See* ¶ 424 below.

[486] **C-0172**, Parliamentary documents 2016-2017, 34 627, No. 15, Council of State Advice on the Amendment of the Electricity Act 1998 and of the Gas Act, 17 July 2017, p. 12.

[487] **C-0172**, Parliamentary documents 2016-2017, 34 627, No. 15, Council of State Advice on the Amendment of the Electricity Act 1998 and of the Gas Act, 17 July 2017, p. 12.

(c) The Claimants' decision to withdraw from the ROAD Project

257. [redacted]

258. [redacted]

259. [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

260. [redacted] Indeed, the Government had also previously recognised the integral link between the continuation of MPP3 and the viability of the ROAD Project. In the 19 January 2017 letter, Minister Cramer remarked:

> "The correlation between innovation and the coal plants should in particular be sought in the realisation of CCS and the stimulation of the biobased industry. Currently, the Netherlands with the [ROAD Project] has the most promising CCS project of Europe. As a result of this demonstration project valuable experience can be gained in realising a large-scale and complex project around CCS, involving a large number of parties. That experience means that the European Commission and other countries are interested in contributing to the financing of this project".[498]

261. The decision in principle to withdraw from the ROAD Project was also communicated to the Municipality of Rotterdam that same week. [redacted]

262. A public "*Close-Out Report*" was subsequently published by Maasvlakte CCS Project C.V. in February 2018 (the "**Close-Out Report**").[500] This described the various successes of the project – "*a genuine trailblazer for CCS in Europe*" – but concluded that ultimately the "[r]*emaining high-level challenges*" included a "[l]*ack of public and/or political acceptance of coal-fired power generation*".[501] [redacted]

263. The Close-Out Report was published with the objective "*to give future CCS project developers, knowledge institutes, researchers and other interested parties the maximum opportunity to use the knowledge gained and lessons learnt by the ROAD project team*".[503] This was achieved through the preparation of ten additional separate reports covering the various elements of the project "[in the] *hop*[e] *that this experience will make a substantial contribution to future CCS deployment*".[504]

[redacted]

498 **C-0162**, Parliamentary documents 2016–2017, 30 196, No. 505, Letter from the Minister of Economic Affairs to Lower House of the States, 19 January 2017, pp. 7-8.

[redacted]

500 **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018.

501 **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 6.

[redacted]

503 **C-0174**, ROAD Project Close-Out Report, Overview (1), February 2018, p. 1.

504 *See* **C-0175**, ROAD Project Close-Out Report Capture and Compression (2); **C-0176**, ROAD Project Close-Out Report Transport (3); **C-0177**, ROAD Project Close-Out Report CO2 Storage (4); **C-0178**, ROAD Project Close-Out Report Risk Management (5); **C-0179**, ROAD Project Close-Out Report Permitting Regulation

(d) The Coalition Agreement 2017

264. On 10 October 2017, the parties forming the new coalition Government published the Coalition Agreement, in which the new Government committed to "*a new national climate and energy agreement*", based on a "*target of 49% fewer greenhouse gas emissions by 2030*".[505] Achieving this reduction would "*require an extra CO_2 reduction of 56Mt on top of the current policy scenario*".[506] The Coalition Agreement indicated that 12Mt of that reduction would be achieved through "[s]*hutting down coal-fired power plants*" by "*the end of 2030 at the latest*".[507] As anticipated by the Claimants following discussions with the Respondent in December 2016, the decision was taken to force even modern coal-fired power plants such as MPP3 to shut down by 2030. The Coalition Agreement also announced the possible introduction of a minimum carbon price and the end of grants for co-firing biomass after 2024.[508]

265. The Coalition Agreement foresaw that the implementation of the ban would be regulated by an "agreement" with the energy sector.[509] But no attempts were made to reach any agreement. Whilst companies and civil society organisations were invited to discuss the impact of the Paris Agreement, a coal ban did not comprise part of discussion. This was confirmed by the Cabinet's proposal for a Climate Agreement, published on 28 June 2019.[510] The lack of attempt to reach an agreement with the sector represents a break with the policy of previous governments that had sought to reach agreements with the energy sector – the 2002 Coal Covenant; the 2008 Energy Covenant; and the 2013 Energy Agreement.

266. Given that the Respondent was forcing existing businesses to shut down in order to reduce greenhouse gas emissions, it should have provided adequate compensation measures in order to protect investors' legitimate property rights and respect its obligations under Dutch and international law. Yet, the Coalition Agreement announcement revealed the Respondent's intention to force MPP3 to cease operating as a coal-fired power plant by as early as 2030

(6); **C-0180**, ROAD Project Close-Out Report Governance and Compliance (7); **C-0181**, ROAD Project Close-Out Report Project Costs and Funding (8); **C-0182**, ROAD Project Close-Out Report Finance and Control (9); **C-0183**, ROAD Project Close-Out Report Knowledge Sharing (10); **C-0184**, ROAD Project Close -Out Report Public Engagement (11).

505 **C-0029**, Confidence in the Future: 2017-2021 Coalition Agreement, People's Party for Freedom and Democracy (VVD), Christian Democratic Alliance (CDA), Democrats '66 (D66) and Christian Union (CU), 10 October 2017, p. 41.

506 **C-0029**, Coalition Agreement, 10 October 2017, p. 41.

507 **C-0029**, Coalition Agreement, 10 October 2017, pp. 42-43.

508 **C-0029**, Coalition Agreement, 10 October 2017, pp. 42-43.

509 **C-0029**, Coalition Agreement, 10 October 2017, p. 43: "*A timetable for achieving this will be agreed with the sector*".

510 *See* **C-0190**, The National Climate Agreement, 28 June 2019.

without any commitment to pay compensation. Given that MPP3 had, at that stage, been in commercial operation for only 16 months, and that the Respondent was fully aware that it had an anticipated capital recovery period of around 40 years (i.e. 2056), the Respondent also would have been fully aware that its actions would cause substantial financial harm to the Claimants. But the Respondent proceeded with its plans in any event.

267. On 13 December 2017, the then-Minister of Economic Affairs and Climate Policy, Minister Wiebes, explained to the Lower House that "[i]*n the* [Coalition Agreement] *the Cabinet made a clear choice: the coal plants in the Netherlands will be closed by 2030*".[511] Whilst the Respondent was "*working out how this agreement can best be implemented*", the "*most obvious measure*" was to phase out the use of coal in the electricity supply in a regulatory ban on production with coal.[512] Minister Wiebes recognised that this represented a "*far-reaching decision as the government is interfering with the ownership rights of the owners of the coal plants*".[513]

(e) Publication of the draft Coal Ban Act in 2018 and the explanatory memorandums

268. On 19 May 2018, the draft Coal Ban Act was published for public consultation, with an accompanying Explanatory Memorandum.[514] The draft legislation comprised just two pages.

269. The draft Coal Ban Act proposed as follows:[515]

(a) it is "*prohibited to generate electricity in a production plant using coal*" (Article 2);

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511 **C-0030**, Parliamentary documents 2017-2018, 30 196, 32 813, No. 567, Letter from the Minister of Economic Affairs to the House of Representatives, 13 December 2017, p. 1

512 **C-0030**, Parliamentary documents 2017-2018, 30 196, 32 813, No. 567, Letter from the Minister of Economic Affairs to the House of Representatives, 13 December 2017, p. 1. *See also* **C-0162**, Parliamentary documents 2017-2018, 30 196, 32 813, No. 505, Letter of 19 January 2017; and **C-0163**, Annex to Letter from Minister of Economic Affairs dated 19 January 2017, *Assessment of Possible Measures*, 19 January 2017.

513 **C-0030**, Parliamentary documents 2017-2018, 30 196, 32 813, No. 567, Letter from the Minister of Economic Affairs to the House of Representatives, 13 December 2017, p. 1.

514 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018. The Explanatory Memorandum was then updated in October 2018 (*see* **C-0186,** Draft Coal Ban Act and Updated Explanatory Memorandum, 9 October 2018) and March 2019 (**C-0035,** Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019). Unless otherwise stated, where reference is made in this Memorial to the "Explanatory Memorandum" it is to the May 2018 version. Where "Explanatory Memorandums" is used, the reference is to all three.

515 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, published for consultation on 19 May 2018, pp. 1-2.

(b) for production plants with a net efficiency of 40-44%, a prohibition from 1 January 2025 (Article 3);

(c) for coal plants above that threshold (such as MPP3, which has a net efficiency of approximately 46%), a prohibition from 1 January 2030 (Article 3), i.e., there is a Transition Period from the enactment of the ban until this date, during which the expectation was that plants could be converted to another fuel type; and

(d) affected operators would receive unspecified relief if they are "*burdened disproportionately compared to other operators of a coal-fired production plant*" (Article 4).

270. Thus, the draft Coal Ban Act made clear that MPP3 would have to be shut down by 1 January 2030, unless during it could economically switch to an alternative fuel by the end of the Transition Period. No financial compensation was on offer unless MPP3 could demonstrate it was affected in a disproportionate way when compared to other coal plants. Of course, this meant there would be no compensation in practice because all plants were subject to the same requirements under the draft law.

271. The Explanatory Memorandum also suggested the prospective prohibition on the use of coal for the generation of electricity was foreseeable from the period during which the three new coal plants were granted their permits – despite the fact that the 2017 Advisory Opinion from the Council of State had already recognised this not to be the case.[516]

272. On 12 October 2018, the Minister of Economic Affairs and Climate Policy sent the proposed legislation, together with an amended version of the Explanatory Memorandum following the consultation period (the "**Second Explanatory Memorandum**"), for the closure of all coal-fired power plants in the Netherlands to the Advisory Division of the Council of State. On 16 January 2019, the Advisory Division issued its opinion (the "**2019 Advisory Opinion**").[517] While the Advisory Division concluded that the proposed coal ban would reduce CO_2 emissions, it had a number of concerns, which it recommended be taken into account before the draft Coal Ban Act was introduced before the Lower House.[518]

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[516] *See* **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 4. *See also* **C-0185**, Draft Coal Ban Act and Updated Explanatory Memorandum, 9 October 2018, (pdf) pp. 6-8; and **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, pp. 4-5.

[517] **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019.

[518] **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019, p. 1.

273. In particular, the Advisory Division noted that certain "*questions remain*", including whether "*coal plants can still recoup their investments, in which regard the economic life of said plants is relevant*".[519] It recommended that the Second Explanatory Memorandum be amended to account "*for any financial risks or consequences resulting from the possible need to compensate individual operators*".[520] In other words, the Advisory Division recognised that investors needed to recoup their investments and, therefore, further compensation would be needed if this were not possible by the end of 2029 (as would be the case for MPP3). The Advisory Division also raised questions regarding whether the operators of the plants, which had not hitherto used biomass as a principal fuel, could in practice switch to biomass firing within the Transitional Period as had been suggested.[521]

274. Unfortunately, the Respondent ignored the advice of its Advisory Division. On 18 March 2019, the Respondent introduced the draft Coal Ban Act before the Lower House and, on 19 March 2019, published the 2019 Advisory Opinion, together with its response to concerns raised by the Advisory Division.[522] The Respondent also published a further amended explanatory memorandum (the "**Final Explanatory Memorandum**").[523]

275. The following points must be emphasised about the draft Coal Ban Act, further addressed in the sub-sections below.

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519 **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019, p. 4. The questions were as follows:

"– whether operators can still generate revenue during the conversion,

– whether sufficient biomass is available, what the future market price of biomass would be in the event of scarcity, and the likelihood that this scarcity will occur,

– whether and to what extent operators will receive subsidies for conversion of biomass,

– whether and to what extent the revenue levels during the transition periods will be affected by the introduction of a minimum CO_2 price".

520 **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019, p. 5.

521 **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019, p. 5. The Advisory Division added "[…] *according to the explanatory memorandum, although it may be technically possible to modify the production process within three years, it is conceivable that the firing of biomass will require knowledge, skills and organization that are very different for the firing of coal*" (p. 4). Further, the Advisory Division queries "*whether the operators can still generate revenue during the conversion*" and "*whether sufficient biomass is available, what the future market price of biomass would be in the event of scarcity, and the likelihood that this scarcity will occur*" (p. 4).

522 *See* **C-0034**, Parliamentary documents 2018-2019, 35 167, No. 2, Legislative proposal for the prohibition of coal for electricity production, 19 March 2019; and **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019.

523 **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019.

(a) the Respondent considered that the Transition Period constituted compensation, yet it did not review whether the Transition Period represented adequate compensation or whether it was sufficiently long to allow investors to recover their investments (sub-section (i)); and

(b) the Respondent did not consider the feasibility of conversion of coal-fired power plants to other fuels (sub-section (ii)).

(i) The Transition Period does not constitute adequate compensation

276. First, the Respondent considered the Transition Period represented compensation for the ban on coal. The Respondent explicitly recognised that the Claimants would suffer "*damage due to the prohibition of the use of coal*":

> "[…] offers the operators of these relatively new plants a period of more than 10 years to limit their damage due to the prohibition of the use of coal. In the opinion of the Cabinet, this is an adequate transition period. This is because with the offered transitional period, the operators of the plants are given the opportunity to earn back (a large part of) their investments and to ready the plant, whether or not in phases, for further operation with fuels other than coal".[524]

277. Yet the Respondent failed to undertake any analysis as to whether the Transition Period was, in fact, adequate compensation, or would allow Uniper to recover its investment in MPP3. The Respondent simply assumed (wrongly) that this was the case.

278. The Final Explanatory Memorandum also made clear that the Respondent's attempt to respect the property rights of investors such as the Claimants was limited to the inclusion of the Transition Period. Indeed, the Respondent stated that the Transition Period allegedly constituted a form of "*in kind*" compensation for the substantial harm caused to investors as a result of the coal-ban.[525] According to the Respondent:

> "This transition period offers the operators of these relatively new plants a ten-year period to mitigate their losses resulting from the prohibition on the use of coal. The Government believes that this is an adequate transition period: the proposed transition

[524] **C-0186**, Draft Coal Ban Act and Explanatory Memorandum, 12 October 2018, (pdf) p. 12. *See also* **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

[525] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 10 ("*the Hemweg plant will not be given any transition period and the prohibition will take effect for this plant on 1 January 2020. As a result, the operator of the Hemweg plant will not receive any compensation in kind*" (p. 10)). This document also describes the Transition Period as follows: "[the] *Bill therefore does not a priori provide for additional compensation for losses in addition to the transition periods already offered*"*;* "*the transition period* […] *ensures that there will be no excessive burden* […] *any additional right to compensation, other than the aforementioned transition period, has therefore not been included*" (p. 10). *See also* **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 15.

> period gives plant operators the opportunity to recover (a major part of) their investments and make the plant ready, whether in stages or not, for future operation using fuels other than coal"[526] (emphasis added).

279. The Respondent thus recognised that the intended purpose of the Transition Period was to provide a form of compensation allowing investors to allegedly "*mitigate their losses*". But the Transition Period would not even allow the operators of new coal plants (such as the Claimants) to recover their investments, let alone earn a return on those investments. The Respondent was therefore fully aware that its forced closure of MPP3 would cause substantial harm, even with the Transition Period.

280. The Respondent further distinguished between old coal-fired power plants and new, modern plants such as MPP3. At the time of the draft Coal Ban Act, the Respondent recognised that older plants – built in the 1990s – had already largely recovered their investment costs. The Respondent explained that, for them, "*the transition period presents an opportunity to create additional revenues for a number of years and to make the plant ready for using other fuels, whether in stages or not*".[527] This situation contrasts starkly with new plants such as MPP3 which will have been operating for only 14 years by the time it is forced to close in 2030, out of a useful lifetime of at least 40 years.

281. To be clear, as noted above, Article 4 of the Coal Ban Act does not offer adequate compensation either. This only grants compensation to "*disproportionately affected*" operators. In other words, it is only if Uniper is able to show that is affected disproportionately as compared to the other modern coal-fired plants[528] that it may (hope) to be able to claim compensation. However, all three plants are subject to the same requirements and thus no compensation would be possible under Article 4. In fact, the Explanatory Memorandum explained:

> "It is expected that the owners of the Hemweg plant, Amer 9 plant, Eemshaven plant, MPP3 plant and the Rotterdam plant do not sufficiently differentiate from each other, so that one cannot not speak of an individual burden. Therefore, an additional right to compensation, other than the aforementioned transition period, is not included".[529]

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[526] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9 (emphasis added). *See also* ("[t]*he transition period is also intended to make the plants transitioning to other, low-carbon, fuels, to allow plant operations to continue*" (p. 9)).

[527] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

[528] As of 1 July 2017, four coal-fired power plants remain in the Netherlands: MPP3, Engie's Maasvlakte Power Station (the ownership of which has been transferred to Onyx/Riverstone); RWE's Eemshaven Power Station and Amer Power Station, but the Amer Power Station was built in the mid-90s and is subject to a different Transition Period.

[529] **C-0031**, Legislative proposal containing a ban on producing electricity using coal, 19 May 2018, p. 15.

(ii) The Respondent did not review the feasibility of conversion of coal-fired power plants to other fuels

282. Second, the Respondent considered that the Transition Period might allow operators time to switch to alternative low-carbon fuels such as biomass, and thus "*mitigate their losses resulting from the prohibition on the use of coal*".[530] The Respondent explained that: "*During the* [Transition Period], *operators can still generate income from electricity generation because the replacement of coal capacity by (for example) biomass capacity is done gradually*".[531]

283. Yet the Respondent did not review the feasibility of conversion of coal-fired power plants (such as MPP3) to other fuels. The Explanatory Memorandums state that the plants "*are suitable for generating electricity using other fuels than coal*" – for example, biomass, biodiesel, hydrogen, gas or ammonia.[532] None of these are proven technologies and, [redacted], it is not economic for MPP3 to converted into a 100% biomass plant.[redacted]

284. The Respondent would have understood this had it commissioned appropriate studies to determine if its assumptions were realistic. But it did not do so. In its Final Explanatory Memorandum (i.e., after it had received the 2019 Advisory Opinion), the Respondent merely mentioned biomass power stations elsewhere (Drax in England (three of six boilers); Avedore I and II power stations in Denmark; Atikokan in Canada; Les Awirs and Rodenhuize in Belgium)[534] – not how those projects had been realised, at what cost, whether they had been subsidised, or whether they could serve as a comparable precedent.[535]

285. A response to a question from the Senate in October 2019 as to whether "*the government ha*[d] *analyses showing the technical and financial feasibility, reliability and security of supply and*

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530 **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

531 **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

532 *See* **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 7; **C-0186,** Draft Coal Ban Act and Updated Explanatory Memorandum, 12 October 2018, (pdf) p. 7; and **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 4.

[redacted]

534 **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 8.

535 *See also* **C-0194**, Parliamentary documents 2019–2020, 35 167, E, Further Memorandum of Reply on Rules for producing electricity using coal (Prohibition on coal for electricity production), 22 November 2019, pp. 10-11.

other relevant aspects of this alternative for the coal plants affected by this decision"[536] is telling. The Minister of Economic Affairs and Climate Policy responded as follows:

> "The Cabinet did not and cannot perform such analyses, because it does not have the company-specific data of the various coal plants. As already noted above, there are numerous examples of former coal plants that have been successfully converted into biomass plants. Given the agreements about hydrogen in the Climate Agreement, among other things, it is also plausible that the developments regarding hydrogen and other CO_2 low fuels will take off. It is up to the operators of the plants themselves to make a choice on how they wish to proceed with the operation of their plant based on their own business economics assessment".[537]

286. Thus, the Respondent's assumptions about the economic viability of switching to biomass were not based on any objective analysis, but rather, mere speculation. As one Member pointed out during the parliamentary debate in the week prior to the enactment of the Coal Ban Act: "[i]*t is quite likely that it is technically possible. It is probably also technically possible to make it* [the coal-fired power station] *an amusement park, but we have doubts about the business economic feasibility*".[538]

287. The Claimants, meanwhile, did commission an independent study from Frontier Economics (which had also advised the Respondent), analysing "*Profitability and Dispatch of MPP3 Power Plant in case of Biomass Conversion*".[539] Specifically, Frontier Economics considered the economic viability of fully converting MPP3 into a biomass power plant in 2030 – analysis based on the market framework and power market assumptions used in studies on the impact of a carbon price floor ("**CPF**") for the Ministry previously.[540] The "*overall conclusion*" was that biomass conversion in 2030 is "*not a profitable investment*": the NPV of the investment is

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536 **C-0040**, Parliamentary 2019-2020, 35 167, B, Memorandum of Reply, Rules for producing electricity using coal, 17 October 2019, p. 11

537 **C-0040**, Parliamentary 2019-2020, 35 167, B, Memorandum of Reply, Rules for producing electricity using coal, 17 October 2019, p. 11 (emphasis added).

538 **C-0195**, Transcript of the Senate Plenary Debate on the Prohibition of Coal in Electricity Production, No. 4, 3 December 2019, p. 10-4-3.

539 **C-0038**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant in Case of Biomass Conversion, A short report for Uniper Benelux*, September 2019.

540 **C-0038**, Frontier Economics Report, *Profitability and Dispatch of MPP3 Power Plant in Case of Biomass Conversion, A short report for Uniper Benelux*, September 2019, p. 4. *See also* p. 6 ("*Uniper Benelux has asked Frontier Economics to conduct a study in order to analyse the future dispatch, revenues and costs of burning biomass in the MPP3 power plant. The study aims at providing an answer to the question whether converting MPP3 into a biomass power plant might be a commercially viable investment option. As the* [draft Coal Ban Act] *aims to prohibit the use of coal from 2030 onwards, we analyse the effects of converting the power plant in 2030 and its commercial and dispatch effects in the years thereafter*").

"[negative] *123 mn. EUR (real, 2017)*".[541] Frontier Economics further noted that "*the economic decision would rather be to close the plant than to convert it into a biomass plant in 2030*".[542]

288. [redacted] the report was provided by Uniper to the Ministry of Economic Affairs and Climate Policy on 6 September 2019 [redacted] But the Respondent essentially ignored it. On 17 October 2019, in response to a parliamentary question, Minister Wiebes indicated that:

> "The Cabinet has taken note of this report by Frontier Economics in which research is being conducted into the possibilities for converting the coal plant of Uniper […] into a biomass plant. The Cabinet notes that this study does not provide insight into the possibilities of using alternatives for coal other than biomass. Nor does this research, which specifically relates to Uniper's MPP3 plant, provide any insight into the possibilities of converting the other plants into biomass plants. In addition, the Cabinet believes that based on the report commissioned by Uniper, it cannot be concluded in advance that conversion to a biomass plant from 2030 is not profitable".[544]

289. In October 2019, Frontier Economics issued another report to Uniper Benelux titled "*Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels*", which analysed the economic viability of different fuel switch options of MPP3 from 2030 onwards and represented an update to the September 2019 report.[545] Updates were made to the analysis of the commercial viability of converting MPP3 into a biomass plant in 2030, and Frontier Economics also considered the commercial viability of converting MPP3 into a combined biomass and hydrogen plant in 2030.[546]

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[541] **C-0038**, Frontier Economics Report, *Profitability and Dispatch of MPP3 Power Plant in Case of Biomass Conversion, A short report for Uniper Benelux*, September 2019, p. 4 (emphasis added). According to Frontier Economics, this decision was driven by negative EBITDA in the first ten years after the conversion. EBITDA was expected to turn positive for MPP3 in 2042. Frontier noted that "[w]*hile investments in power plants normally benefit from high returns in the period after the investment, this is not the case for the biomass conversion case discussed here*" (p. 4). *See also* p. 10.

[542] **C-0038**, *Profitability and Dispatch of MPP3 Power Plant in Case of Biomass Conversion, A short report for Uniper Benelux*, September 2019, p. 4.

[redacted]

[544] **C-0040**, Parliamentary 2019-2020, 35 167, B, Memorandum of Reply, Rules for producing electricity using coal, 17 October 2019, p. 12.

[545] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019.

[546] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, p. 5.

290. Again, the conclusions were bleak:

(a) The NPV for conversion of MPP3 to biomass was updated to EUR negative 200 million, and so "[f]*rom a commercial perspective, the power plant would rather be closed than converted into a biomass plant in 2030* […] *the NPV remains negative and converting the plant to 100% biomass does not represent a viable option* […]".[547]

(b) The NPV for conversion of MPP3 into a combined biomass and hydrogen plant in 2030 was estimated to be EUR negative 246 million[548] and so, "[f]*rom a commercial perspective, the power plant would rather be closed than converted into a biomass plant in 2030*".[549]

291. [redacted] But the Respondent again simply ignored this analysis entirely. [redacted]

292. In any event, if conversion to biomass (or another fuel) were independently attractive and economically viable, owners of coal-fired power plants would have done so naturally in response to market conditions. Instead, the Respondent recognised that such a switch could only "*mitigate their losses*", meaning that the investors were only doing it to avoid further harm caused by the Coal Ban Act. The Respondent was in no doubt that substantial losses would still occur.

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[547] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, pp. 16, 22.

[548] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, p. 5. *See also*, p. 17.

[549] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, p. 22.

[redacted]

[redacted]

(f) The Respondent initiated a consultation on the draft Coal Ban Act, but Uniper's response was ignored

293. On 15 June 2018, the Claimants submitted a response to the draft Coal Ban Act as part of the consultation.[552] The Claimants explained that:

> "Uniper's decision to invest on a large scale in MPP3 has not been taken lightly but was based on the justified confidence that Uniper could achieve a reasonable return on this investment during the lifespan of MPP3. Uniper was strengthened in its justified expectation because the State emphasised the relevance of coal plants for the Dutch energy supply and underlined the importance of a reliable government and stable regulatory framework to promote long-term investments. Uniper decided to invest in MPP3 – one of the most efficient coal plants that meets the most stringent environmental standards – based on numerous statements and policies of the State in which the importance of coal plants was emphasised to ensure supply security in the Netherlands, and the importance of providing the Dutch energy intensive industry with electricity at competitive prices ('coal parity')" (emphasis added).[553]

294. The Respondent had repeatedly emphasised the importance of a stable investment climate due to the significant lifespan of a coal plant. Further, the actual construction of the Claimants' plant was made possible by various permits granted by local and national governments – and which are endorsed by the Administrative Law Department of the Council of State.[554]

295. As regards the conversion to biomass, the Claimants explained that:

> "Even if it would be technically possible to generate the same amount of electricity with fuels other than coal (e.g. biomass), such transformation requires massive investments and increases operating costs such that the exploitation of MPP3 would become unprofitable. The Minister's suggestion that the operators can fund the transformation with the SDE grant for the biomass contributor is incorrect and demonstrates that the Minister has not assessed the consequences of the Legislative Proposal carefully"[555] (emphasis added).

296. The Claimants added that:

> "Uniper regrets this approach […] because it goes against that which they should be able to expect from a reliable government. Uniper strongly believes that the government and the industry in collaboration would be able to find the most effective,

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[552] **C-0032**, Uniper's Response to consultation on draft legislative proposal for prohibition of coal with electricity production, 15 June 2018; [redacted]

[553] **C-0032**, Uniper's Response to consultation on draft legislative proposal for prohibition of coal with electricity production, 15 June 2018, p. 2.

[554] **C-0032**, Uniper's Response to consultation on draft legislative proposal for prohibition of coal with electricity production, 15 June 2018, p. 2.

[555] **C-0032**, Uniper's Response to consultation on draft legislative proposal for prohibition of coal with electricity production, 15 June 2018, p. 4.

balanced and practical manner to contribute to the CO_2 reduction objectives of the State".[556]

(g) The draft Coal Ban Act is approved

297. The draft Coal Ban Act was subsequently debated in the Lower House on 26 June 2019. In that debate, the Respondent recognised that, if an "*alternative way of operating*" was not available to the operators of coal-fired power plants, "*it becomes a closure act and then we are dealing with a very different legal framework* [...] *it is no longer regulation of property but in some sense expropriation*".[557] This has of course borne out to be correct – which is not surprising given that the Respondent made no effort to determine if conversion was realistic.

298. On 4 July 2019, and despite broad criticism,[558] the Lower House assented to the (unchanged) draft Coal Ban Act.[559]

299. On 3 December 2019, the draft Coal Ban Act was debated by the Senate.[560] The principal focus of the debate concerned alternatives for coal – namely biomass – proposed by Minister Wiebes. Various members expressed concern that biomass was being overly promoted as an alternative to coal post-2030, and called upon the Government to consider a ban on wood burning for energy generation, and to ensure that any switch to biomass does not lead to a net increase in CO_2 emissions to 2050. During the debate, Minister Wiebes remarked that reforming the EU ETS was a much better idea than the draft Coal Ban Act – the most efficient solution for everyone.[561]

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[556] **C-0032**, Uniper's Response to consultation on draft legislative proposal for prohibition of coal with electricity production, 15 June 2018, p. 4.

[557] **C-0037**, House of Representatives Plenary Debate of Coal Ban Act Transcript, 26 June 2019, pp. 98-6-20-21.

[558] The results of the consultation were published in October 2018 and the same month the draft Coal Ban Act was submitted to the Advisory Division of the Council of State for an Opinion. *See* **C-0185**, Consultation Report on the draft Coal Ban Act, 9 October 2018. No changes in substance were made to the draft Coal Ban Act; only a technical adjustment as to how the efficiency of the coal-fired power plants is determined. The initial draft had used a "net electrical efficiency" threshold (calculated by dividing the electricity supplied to high voltage grid by the energy content of the fuels used), which was simplified to the "electrical efficiency" stipulated in the Environmental Permit (*see* **C-0186**, Draft Coal Ban Act and Explanatory Memorandum, 12 October 2018, Article 1).

[559] *See* **C-0191**, Parliamentary Papers 2018-2019, 31 657, No. 74, Vote on the Coal Ban Act, 4 July 2019.

[560] **C-0196**, Transcript of the Senate Plenary Debate on the Prohibition of Coal in Electricity Production, No. 9, 3 December 2019.

[561] **C-0196**, Transcript of the Senate Plenary Debate on the Prohibition of Coal in Electricity Production, No. 9, 3 December 2019, p. 10-9-23.

300. On 10 December 2019, the Senate assented to the draft Coal Ban Act. It became law on 11 December 2019, and the law entered into force on 20 December 2019.[562] As enacted, Articles 2 and 3(b) of the Coal Ban Act (read together) will require MPP3 to cease generating electricity using coal by 1 January 2030. The Coal Ban Act entered into force with immediate effect. That it applies only from 1 January 2030 onwards is because the law grants MPP3 a non-financial compensation in the form of a ten-year Transition Period which is not adequate and in breach of the Netherlands' obligations under Article 13 of the ECT.

301. The effect of the Coal Ban Act is to substantially deprive the Claimants of the value of their investment. The Claimants' entitlement to continue operating MPP3 until 2030 under the Transition Period does not provide compensation for that substantial deprivation in value, in particular because conversion to biomass is uneconomic.

3.8 Events after the Coal Ban Act entered into force – 35 % cap

302. Shortly after the introduction of the Coal Ban Act, Parliament approved on 7 July 2021 an Act amending the [Coal Ban Act] (the "**Amendment Act**"),[563] in order to comply with the Supreme Court's judgment in *Urgenda*. This limited annual production of electricity from coal to an amount corresponding to 35% of the CO_2 emissions that a plant would produce in a year if it were to operate on coal at full capacity between 2022 and 2024. In essence, the Respondent has required Uniper to provide further CO_2 reduction services by capping its emissions at 35% for a three-year period.

303. In recognition of the interference with Uniper's property rights, the Amendment Act provided that "[u]*pon request of an operator of a production plant,* [o]*ur Minister shall grant a compensation for damages*" and that the rules pertaining to compensation amounts may be set by a general administrative measure.[564]

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[562] **C-0042**, Act of 11 December 2019 establishing the Regulations for the Use of Coal to Generate Electricity (Act Prohibiting the Use of Coal to Generate Electricity), the Netherlands Official Gazette, Volume 2019, 493, 11 December 2019.

[563] **C-0202**, Law amending the Law on Prohibition of Coal in Electricity Production, 7 July 2021 (the "**Amendment Act**"). *See also* **C-0205**, Decree No. 641 to establish the time of the entry into force of the Act of 7 July 2021, to amend the Law on the prohibition of coal for electricity production, 16 December 2021; and **C-0204**, Decree No. 640 containing rules with regard to compensation for damage suffered by operators of coal-fired power stations in connection with the limitation of CO2 emissions, 16 December 2021.

[564] **C-0202**, Law amending the Law on Prohibition of Coal in Electricity Production, 7 July 2021, p. 2. *See also* **C-0200**, Draft Amendment for Coal Phase Out Act, Explanatory Memorandum, 9 December 2020, (pdf) p. 6 ("*The production limitation included in this legislative proposal shall enter into force on 1 January 2021. In view of the fair balance between the public interest that is served with the present legislative proposal and the interests of the operators that are affected by the interference in their property right, the legislative proposal stipulates that compensation will be granted upon request if the production limitation imposed with the underlying legislative proposal causes damage for an operator that should not remain at its expense*").

304. On 16 December 2021, a decree was issued outlining the compensation scheme for the Amendment Act (the "**Compensation Decree**").[565] This specified the methodology for the calculation of compensation, which required compensation to be paid based on the difference between the "but-for" world (no emissions cap) and the "actual" world (with the emissions cap), [redacted] The compensation calculation was to be based on the forward prices for electricity as of December 2021 for the period 2022 to 2024. The affected parties had to submit a compensation request by 1 April 2022. The Compensation Decree and the Amendment Act both came into force on 1 January 2022.[567]

305. The Amendment Act and the Coal Ban Act contrast starkly. There is no financial compensation offered by the Coal Ban Act (only the Transition Period), whereas the Amendment Act does include a financial compensation mechanism as one would expect. [redacted]

306. [redacted]

4. JURISDICTION

307. The Claimants set forth below the Tribunal's jurisdiction under the ECT and the ICSID Convention. The Claimants note that the Respondent foreshadowed that it will bring certain objections to the jurisdiction of this Tribunal. The Claimants reserve their rights to address

[565] **C-0205**, Decree No. 641 to establish the time of the entry into force of the Act of 7 July 2021, to amend the Law on the prohibition of coal for electricity production, 16 December 2021.

[redacted]

[567] **C-0205**, Decree No. 641 to establish the time of the entry into force of the Act of 7 July 2021, to amend the Law on the prohibition of coal for electricity production, 16 December 2021.

[redacted]

[redacted]

these objections once they have been fully particularised in the context of the present Arbitration proceedings.

4.1 The Claimants and their investments qualify for protection under the ECT

308. Article 26(1) of the ECT sets forth the rules governing the resolution of "[d]*isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former*". Article 26(2) of the ECT provides that:

> "If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: […]
>
> (c) in accordance with the [provisions of Article 26 relating to international arbitration]".

309. Each of the requirements in Article 26 of the ECT has been satisfied in the present case. They are considered in turn below.

(a) Jurisdiction *Ratione Personae*

(i) The Netherlands is a "*Contracting Party*" to the ECT

310. A "*Contracting Party*" to the ECT is a State that has consented to be bound by the ECT and for which the ECT is in force.[570] The Netherlands signed the ECT on 17 December 1994 and ratified it on 11 December 1997. The ECT entered into force with respect to the Netherlands on 16 April 1998.[571] The Netherlands is therefore a "*Contracting Party*" to the ECT.

(ii) Each of the Claimants is an "*Investor of another Contracting Party*"

311. Pursuant to Article 1(7)(a)(ii) of the ECT, "*Investor*" (of a Contracting Party) means "*a company or other organisation organised in accordance with the law applicable in that Contracting Party*".

312. As explained above, the First Claimant is a company registered under the laws of Germany. Germany is a "*Contracting Party*" to the ECT.[572] The First Claimant is therefore an "*Investor of another Contracting Party*" for the purposes of Article 26 of the ECT.

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[570] **CL-0001**, Energy Charter Treaty ("**ECT**"), 17 December 1994, Article 1(2).

[571] **C-0003**, Instrument of ratification of the Energy Charter Treaty for the Netherlands, 27 March 1998; and **C-0056**, Energy Charter Treaty, Members and Observers, the Netherlands, (last accessed 13 April 2021), https://www.energycharter.org/who-we-are/members-observers/countries/the-netherlands/.

[572] Germany signed the ECT on 17 December 1994 and ratified it on 14 March 1997. The ECT entered into force with respect to Germany on 16 April 1998. *See* **C-0057**, Energy Charter Treaty, Members and Observers,

313. The Second and Third Claimants are incorporated under the laws of the Netherlands.[573] However, Article 26(7) of the ECT provides that the Netherlands' consent to the resolution of disputes under Article 26 by arbitration under the ICSID Convention extends to "[a]*n Investor other than a natural person which has the nationality of a Contracting Party to the dispute* […] *which* […] *is controlled by Investors of another Contracting Party*". Article 26(7) of the ECT allows a legal entity to bring a claim against the Contracting Party in which it is incorporated, provided that it "*is controlled by Investors of another Contracting Party*". Pursuant to Article 26(7) of the ECT, that entity shall be treated, for the purposes of Article 25(2)(b) of the ICSID Convention, as a "*national of another Contracting State*".

314. As explained above, both the Second and Third Claimants have been controlled at all relevant times by Investors of another Contracting Party, including *inter alia*, Uniper Holding GmbH[574] and the First Claimant, both German registered entities.[575] The Tribunal thus has jurisdiction over the Second and Third Claimants under the ECT.

(iii) Jurisdiction *Rationae Materiae*: The dispute relates to an "*Investment*" in the "*Area*" of the Netherlands

315. Article 1(6) of the ECT defines an "*Investment*" broadly as follows:

> "'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;

Germany, (last accessed 13 April 2021), https://www.energycharter.org/who-we-are/members-observers/countries/Germany.

573 **C-0050**, Uniper Benelux Holding B.V., Extract from the Commercial Register of the Netherlands Chamber of Commerce, 12 March 2021; **C-0051**, Uniper Benelux N.V., Extract from the Commercial Register of the Netherlands Chamber of Commerce, 12 March 2021.

574 **C-0053**, Uniper Holding GmbH, Extract from the Commercial Register B of the Düsseldorf District Court, 16 March 2021.

575 **C-0049**, Uniper SE, Annual Report 2020, 3 March 2021, pp. 149-150, 241-242. *See also* **C-0044**, 2019 Annual Report of Uniper Benelux Holding B.V., 6 April 2020, p. 19; and **C-0045**, 2019 Annual Report of Uniper Benelux N.V., 6 April 2020, p. 17.

(e) Returns;[576]

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector".[577]

316. Article 1(6) of the ECT also specifies that, to enjoy protection under the ECT, an investment must be "*associated with an Economic Activity in the Energy Sector*". Article 1(5) of the ECT defines "*Economic Activity in the Energy Sector*" as "*an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products* […]". Article 1(4) of the ECT defines "*Energy Materials and Products*" as the items included in Annex EM of the ECT, which includes both coal and electrical energy.[578]

317. Article 1(6) of the ECT further provides that qualifying investments are:

> "all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date".

318. The Claimants have substantial investments in the power sector in the Netherlands, which include, without limitation, the First Claimants' direct and indirect shareholdings and debt interests in the Second and Third Claimants (Article 1(6)(a)), the latter of which in turn owns the MPP3 plant itself. The Claimants also own movable and immovable property pertaining to MPP3 and related assets (Article 1(6)(a)); rights conferred by law such as applicable licences, permits or contracts relative to the operation of these assets (Article 1(6)(f)); claims to money (Article 1(6)(c)); and returns (Article 1(6)(e)). The Claimants' investments thus fall within the ECT's definition of "*Investment*".

319. Given that the Third Claimant, which is owned by the First and Second Claimants, owns and operates MPP3, the Claimants' investments are associated with "*an Economic Activity in the Energy Sector*" within the meaning of Articles 1(4) and 1(5) of the ECT.

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[576] **CL-0001**, ECT, Article 1(9), "*Returns*" means "*the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind*".

[577] **CL-0001**, ECT, Article 1(6).

[578] **CL-0001**, ECT, Annex EM I, Items 27.01 and 27.16.

320. Further, the "*Effective Date*", based upon the entry into force of the ECT for Germany and the Netherlands, is 16 April 1998. As discussed in Section 3.4 above, each of the Claimants made their investments in the Netherlands after the Effective Date.

321. Finally, each of the Claimants' investments is located within the territory of the Netherlands. Thus, those investments are in the "*Area*"[579] of the Netherlands.

(b) Parties' consent to arbitration pursuant to the ECT

322. Pursuant to Article 26(3) of the ECT, the Netherlands has given its "*unconditional consent to the submission of a dispute to international arbitration*". The Netherlands' standing offer to foreign investors to settle disputes through international arbitration has been accepted by the Claimants by filing their Request for Arbitration on 22 April 2021, which also constitutes the Claimants' written consent for the submission of their disputes with the Netherlands to the jurisdiction of the Centre pursuant to Article 26(4) of the ECT.

323. Moreover, as explained in Part 5, the dispute relates to breaches of Articles 10 and 13 (Part III) of the ECT, and therefore meets the requirement of Article 26(1) of the ECT that the dispute concerns "*an alleged breach of an obligation of* [a Contracting Party] *under Part III*".

(c) Claimants' compliance with the Cooling-off period

324. The Claimants have complied with the three-month negotiation period prescribed in Article 26(2) of the ECT, before exercising their right to pursue remedies through arbitration by serving a Request for Arbitration on the Respondent on 22 April 2021. [redacted]

[579] **CL-0001**, ECT, Article 1(10)(a), "*Area*" (of a Contracting Party) includes the "*territory under its sovereignty*".

[redacted]

325. Thus, in good faith, the Claimants requested negotiations with the Netherlands in an attempt to reach an amicable settlement of the dispute, but these attempts have proven unsuccessful. Accordingly, the Claimants are compelled to pursue their rights by way of arbitration.

4.2 ICSID Jurisdiction

326. The jurisdiction of the Centre is governed by Article 25(1) of the ICSID Convention, which provides as follows:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

327. The requirements for the existence of the Centre's jurisdiction are satisfied in the present case. The Claimants submit to the jurisdiction of the Centre a legal dispute arising out of their investments in the coal sector in the Netherlands, which they and the Netherlands have agreed in writing to submit to ICSID. Each element necessary to establish the jurisdiction of the Centre is addressed in turn.

(a) A legal dispute

328. The dispute being referred to the Centre is a legal dispute – that is, a difference of opinion as to law or fact – as it relates to the Netherlands' breach of its obligations under the ECT with respect to the Claimants and the Claimants' investments.

(b) A dispute that arises directly out of an investment

329. The Claimants' investments in the Netherlands constitute an "*investment*" for the purposes of both the ECT and the ICSID Convention. As discussed above, it is clear from the terms of Article 1(6) of the ECT that the Claimants' investments (as described in paragraph 318) constitutes an "*Investment*" protected by the ECT.

330. In light of the Contracting Parties' agreement on the meaning of the term "*Investment*" set out in Article 1(6) of the ECT, and the offer to submit disputes arising out of such investments to ICSID set out in Article 26 of the ECT, it is clear that the Claimants' assets and interests which fall within the meaning of "*Investment*" in Article 1(6) of the ECT also amount to an "*investment*" as that term is used in Article 25(1) of the ICSID Convention.

(c) A dispute between a Contracting State and a national of another Contracting State

331. The Netherlands signed the ICSID Convention on 25 May 1966, and deposited its instrument of ratification on 14 September 1966. The ICSID Convention entered into force for the Netherlands on 14 October 1966.[581] The Netherlands is therefore a "*Contracting State*" for the purposes of Article 25 of the ICSID Convention.

(i) Each of the Claimants is or shall be considered a "*national of another Contracting State*"

332. Pursuant to Article 25(2) of the ICSID Convention, the jurisdiction of the Centre extends both (i) to claims brought by investors that are nationals of another Contracting State; and (ii) to any juridical person which has the nationality of the Contracting State party to the dispute, but which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State.

333. The ICSID Convention itself does not specify any particular test to determine the nationality of a juridical person. The standard test to determine the nationality of a juridical person applied in international law and in ICSID case law is the place of incorporation.

334. Germany, the home State of the First Claimant, is a Contracting State to the ICSID Convention.[582] The First Claimant is therefore a "*national of another Contracting State*" for the purposes of Article 25 of the ICSID Convention, with standing to submit a claim to the Centre.

335. Article 26(7) of the ECT provides that "[a]*n Investor other than a natural person which has the nationality of a Contracting Party to the dispute* […] *which* […] *is controlled by Investors of another Contracting Party*" shall be treated as a "*national of another Contracting State*" for the purposes of Article 25(2)(b) of the ICSID Convention. As explained above, the Second and Third Claimants fall within the scope of Article 26(7) of the ECT, and therefore fall within the jurisdiction of the Centre.

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[581] **C-0058**, Extract of ICSID Database showing ICSID Member States, (last accessed 13 April 2021), https://icsid.worldbank.org/about/member-states/database-of-member-states, (pdf) p. 4.

[582] Germany signed the ICSID Convention on 27 January 1966, deposited its instrument of ratification on 18 April 1969 and the ICSID Convention entered into force for Germany on 18 May 1969. *See* **C-0058**, Extract of ICSID Database showing ICSID Member States, (last accessed 13 April 2021), https://icsid.worldbank.org/about/member-states/database-of-member-states, (pdf) p. 2.

(ii) Written consent of the parties to submit the dispute to the Centre

336. The ECT was signed by each of Germany and the Netherlands on 17 December 1994, and entered into force between the parties on 16 April 1998. The ECT remains in force today between Germany and the Netherlands.

337. Pursuant to Article 26(5)(a)(i) of the ECT, the Netherlands' consent given in Article 26(3) of the ECT, together with the Claimants' written consent given in the Request for Arbitration pursuant to paragraph 26(4) of the ECT, expressly satisfy the requirement for the written consent of the parties to a dispute for the purposes of Article 25 of the ICSID Convention.

4.3 The Respondent's Intra-EU Objection

338. As explained at length in the Claimants' Request for Provisional Measures dated 3 December 2021 and during the hearing held on 2 February 2022 (the "**February Hearing**"), the Respondent commenced proceedings in what it refers to as "*anti-arbitration proceedings*" in domestic courts in Germany against the First Claimant (the "**German Proceedings**").[583] In the German Proceedings, the Respondent seeks a declaration from the Higher Regional Court of Cologne that the present Tribunal has no jurisdiction to hear the pending dispute on the basis that no agreement to arbitrate exists between the Claimants and the Respondent under the ECT (the "**Intra-EU Objection**"). The Respondent bases this jurisdictional objection on EU law and, in particular, on the Court of Justice of the European Union's (the "**CJEU**") decision in *Achmea B.V. v. The Slovak Republic* ("***Achmea***").[584] The Tribunal has expressed "*grave concern*" about the German Proceedings.[585] [redacted]

339. The Claimants do not propose to address the Respondent's Intra-EU Objection until it has been fully particularised by the Respondent in the context of this Arbitration. However, the Claimants make the brief observations below.

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583 [redacted] **C-0065**, Letter from Bastiaan van't Wout (Minister of Economic Affairs and Climate Policy) to Dutch House of Representatives, 17 May 2021, p. 1.

584 **CL-0030**, Judgment of the CJEU in *Achmea B.V. v. The Slovak Republic*, Case C-284/16, 6 March 2018.

585 Procedural Order No. 2, Tribunal's Decision on the Claimants' Request for Provisional Measure (operative part), 9 May 2022, ¶ 108.

586 Procedural Order No. 2, ¶ 108(h).

[redacted]

340. As a threshold matter, the Claimants note that EU law is not relevant to the matter of jurisdiction under the ECT. With respect to the applicable law, Article 26(6) of the ECT, provides that "[a] *tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*". As numerous arbitral tribunals have held, this provision is only relevant to the issues in dispute on the merits and does not apply to jurisdiction. In any event, as also confirmed by numerous ECT tribunals, EU law is not part of the general principles of international law that are applicable to determining the merits of the dispute. At most, EU law could be relevant as a fact.

341. For example, in *Vattenfall v. Germany*, the tribunal considered whether EU law (as well as the judgment in *Achmea*) was applicable to the determination of its jurisdiction under the ECT. In interpreting Article 26(6), the tribunal concluded thus:

> "Article 26(6) ECT, either viewed through Article 42(1) ICSID Convention or interpreted independently of the ICSID Convention, applies only to the merits of a dispute between the Parties. It does not apply to issues or questions relating to the Tribunal's jurisdiction. For this reason, Respondent's argument that Article 26(6) brings EU law and the ECJ Judgment into application in the context of the Tribunal's jurisdiction must fail".[588]

342. In *Landesbank v. Spain*, the tribunal noted its agreement with the reasoning in *Vattenfall*, explaining that:

> "Article 26(6) indicates the law which the Tribunal must apply to the merits of the dispute before it, and has no relevance to its jurisdiction, which is derived from the ECT and Article 25 of the ICSID Convention […] The 'issues in dispute' to which Article 26(6) refers are those issues which are in dispute on the merits of the case; the provision becomes applicable only once the jurisdiction of the Tribunal has been established over a 'dispute' falling within the provisions of Article 26(1) to (5)".[589]

343. The *Landesbank* tribunal went on to explain that even if Article 26(6) were applicable to jurisdiction, that provision does not require a tribunal to accord primacy to EU law – even in an intra-EU case.[590] In that regard:

> "When applicable, Article 26(6) directs a tribunal to 'decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.' It thus requires a tribunal to begin with the provisions of the ECT; it does not direct it to adopt an interpretation of the ECT which goes against the ordinary meaning of the

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588 **CL-0093**, *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 (Van den Berg, Brower, Lowe) ("***Vattenfall***"), ¶ 121.

589 **CL-0031**, *Landesbank Baden-Württemberg et al. v. Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019 (Greenwood, Poncet, Oreamuno Blanco) ("***Landesbank***"), ¶ 159 referring to **CL-0093**, *Vattenfall*, ¶ 121.

590 **CL-0031**, *Landesbank*, ¶ 160.

> words used on the basis that a rule of international law, applicable only between some of the Contracting Parties to the ECT, may run counter to that ordinary meaning".[591]

344. In *Eskosol v. Italy*, the tribunal also noted, "[a]*s a threshold matter*", the *Vattenfall* tribunal's conclusion that Article 26(6) applies only to the merits.[592] The *Eskosol* tribunal explained that that conclusion was based on a construction of "*shall decide the issues in dispute*", which it found persuasive. It is also consistent with the text of Article 26(3)(a) of the ECT, pursuant to which the Contracting Parties provide "*unconditional consent to the submission of a dispute to international arbitration*".[593]

345. The *Eskosol* tribunal likewise concurred with the *Landesbank* tribunal in finding that even if, *arguendo*, Article 26(6) were considered relevant to jurisdiction, the effect would not be to incorporate EU law: "[t]*his is based both on the 'natural and ordinary meaning' of the terms in Article 26(6), and on the 'context' of those terms in relation to other provisions of the ECT*".[594]

346. In any event, the CJEU's decision in *Achmea* (and, for that matter, *Komstroy v. Moldova*) is a judgment taking juridical effect only at the EU level,[595] and cannot affect this conclusion.[596] No arbitral tribunal that has ever considered the relevance of *Achmea* or *Komstroy* has found that

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591 **CL-0031**, *Landesbank*, ¶ 160.

592 **CL-0098**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019 (Kalicki, Tawil, Stern) ("***Eskosol***"), ¶ 113.

593 **CL-0098**, *Eskosol*, ¶ 113.

594 **CL-0098**, *Eskosol*, ¶ 114.

595 *See* **CL-0030**, Judgment of the CJEU, *Achmea B.V. v. The Slovak Republic*, Case C-284/16, 6 March 2018; **CL-0033**, Judgment of the CJEU, *Republic of Moldova v. Komstroy LLC, successor in law to the company Energoalians*, Case C-741/19, 2 September 2021.

596 *See* **CL-0034**, *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, ¶ 493 ("*It is uncontroversial that EU law derives from international treaties and is therefore governed by international law. However, it does not follow that EU law is international law in all circumstances. The reference to 'international law' in Article 26(6) of the ECT must, in its context, only refer to public international law since the ECT is a multilateral treaty that governs the international relations between the EU, Member States, and non-EU States. Given that EU law only governs the relations between Member States, EU law cannot form part of the international law applicable between EU Member States and non-EU countries. Under EU treaties, EU law forms part of the internal law of Member States. In this respect, the role of the Tribunal is to apply the provisions of the ECT, and principles of public international law as may be applicable*"); **CL-0031**, *Landesbank Baden-Württemberg et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, ¶ 159 ("*Article 26(6) indicates the law which the Tribunal must apply to the merits of the dispute before it, and has no relevance to its jurisdiction, which is derived from the ECT and Article 25 of the ICSID Convention . . . . The 'issues in dispute' to which Article 26(6) refers are those issues which are in dispute on the merits of the case; the provision becomes applicable only once the jurisdiction of the Tribunal has been established over a 'dispute' falling within the provisions of Article 26(1) to (5)*").

EU law deprived it of jurisdiction.[597] The legal basis for the Respondent's Intra-EU Objection is thus manifestly without any legal merit, and any Intra-EU Objection to be made by the Respondent is bound to fail.

5. MERITS OF THE CLAIMS

347. In this Part, the Claimants set out their legal case. Section 5.1 sets out the applicable law, and Section 5.2 explains how the provisions of the ECT should be interpreted. Thereafter, the sub-sections set out how the Respondent has breached its obligations under the ECT and the ICSID Convention, namely:

(a) Article 13(1) of the ECT by illegally indirectly expropriating the Claimants' investment in MPP3 (Section 5.3);

(b) Article 10(1) of the ECT by failing to accord, at all times, Fair and Equitable Treatment ("**FET**") to the Claimants' investment (Section 5.4); and

(c) Article 10(1) of the ECT by impairing, through unreasonable measures, the "*management, maintenance, use, enjoyment or disposal*" of the Claimants' investment (Section 5.5).

5.1 Applicable law

348. The relevant provisions for determining the law applicable to the merits of this dispute are Article 42(1) of the ICSID Convention and Article 26(6) of the ECT.

349. Article 42(1) of the ICSID Convention provides:

> "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" (emphasis added).[598]

350. In an arbitration brought under the ECT, the parties have agreed the rules of law applicable to the substance of the dispute through Article 26(6) of the ECT, which provides that a tribunal shall "*decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*".[599] Thus, the ECT is the primary source of law. Where the

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[597] *See* Annex B to this Memorial: (updated) Annex A to Claimants' Request for Provisional Measures, 3 December 2021, *Table of (i) ECT Tribunals, (ii) ICSID Annulment Committees, and (iii) Non-ECT Tribunals that have Dismissed the Intra-EU Objection to Jurisdiction*, May 2022.

[598] ICSID Convention, Article 42(1) (emphasis added).

[599] **CL-0001**, ECT, Article 26(6).

ECT is silent, the Tribunal should apply customary international law and general principles of international law. For the avoidance of doubt, EU law does not form part of either customary international law or general principles of international law and thus is not applicable to the merits of the dispute, but may be relevant as a fact.

5.2 Interpretation of the ECT

(a) Principles of treaty interpretation

351. The ECT, as an international treaty, is to be interpreted by applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "**Vienna Convention**").[600] This was confirmed in the interpretive statement made by the Chairman of the European Energy Charter Conference on the occasion of its formal adoption of the text of the ECT in Lisbon on 17 December 1994.[601]

352. These provisions of the Vienna Convention provide as follows:

> "Article 31: '*General rule of interpretation*'
>
> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32: '*Supplementary means of interpretation*'

[600] **CL-0007**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 23 May 1969, Articles 31, 32.

[601] **CL-0114**, The Energy Charter Treaty, Trade Amendment and Related Documents, "*Chairman's Statement at Adoption Session*", Energy Charter Secretariat, 17 December 1994

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable".

353. Thus, according to the above principles, the ECT shall be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the ECT's object and purpose.

(b) Context, object and purpose of the ECT

354. The ECT is unique as an energy sector-specific multilateral agreement that covers all major aspects of international energy business and economic activity: production, storage, trade, transit, investment and energy efficiency. It is the first multilateral investment treaty containing binding provisions on the promotion and protection of investments specifically in relation to the energy sector.[602] To ascertain and understand the scope and content of the ECT's provisions, these must be read with regard to the overall economic, political and social context in which the ECT was negotiated in order to address the particular needs of energy sector investments.

355. Article 2 of the ECT confirms that the purpose of the ECT is to:

> "[…] [establish] a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter" (emphasis added).[603]

356. The 1991 European Energy Charter (the "**European Energy Charter**"), which preceded the ECT, in turn includes the following objectives and principles relating to the promotion and protection of investments:

(a) Recognition of the role of entrepreneurs, "*operating within a transparent and equitable legal framework* […]".[604]

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602 **CL-0125**, A. Konoplyanik and T.W. Wälde, *Energy Charter Treaty and its Role in International Energy* (2006), 24, Journal of Energy & Natural Resources Law 523, 13 March 2006, p. 528 (noting that the ECT "*can be considered as the multilateral investment treaty with the widest scope; it is distinct from all other bilateral treaties by the fact that it is only applicable to energy – defined in a wide way*"). *See also* **CL-0001**, ECT, Article 1(5).

603 **CL-0001**, ECT, Article 2.

604 **CL-0001**, ECT, Concluding Document of the Hague Conference on the European Energy Charter, Preamble, p. 28.

(b) Creation of "*a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy*".[605]

(c) Provision at national level for "*a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade*" in order to promote the international flow of investments in the energy sector.[606]

357. These objectives also elucidate the context and purpose of the ECT.

358. In fact, one of the original goals of the European Energy Charter was to enhance energy security and facilitate cooperation in the European energy sector after the dissolution of the Soviet Union and the independence of the former Soviet Republics.[607] By providing Contracting States and their investors with certain standards of protection and dispute resolution mechanisms relating to energy investments, the ECT sought to create more predictable legal frameworks that would foster significant international investments. As the late Professor Wälde explained:

> "The overall background of the [ECT] was the effort to help the transition economies of Eastern European to attract investment, mainly by helping to install a rule of law, safeguarding of property, respect for contracts and liberalisation of investment conditions in the model of Western market economies".[608]

359. Thus, the fundamental objective of the ECT is to facilitate transactions and investments in the energy sector by providing protection to property interests and reducing political and regulatory

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605 **CL-0001**, ECT, Concluding Document of the Hague Conference on the European Energy Charter, Title I (Objectives), p. 29.

606 **CL-0001**, ECT, Concluding Document of the Hague Conference on the European Energy Charter, Title II(4) (Promotion and protection of investments), p. 33 (emphasis added). These objectives are also enshrined in the substantive provisions of the ECT, with Article 10(1) providing that the "*Contracting Parties*" shall "*encourage and create stable, equitable favourable and transparent conditions for Investors*" (**CL-0001**, ECT, 17 December 1994, Article 10(1)).

607 **CL-0131**, C. Baltag, *The Energy Charter Treaty: The Notion of Investor*, Chapter 1, *Energy Resources and the Energy Charter Treaty* (Kluwer Law International), 2012, pp. 8-9.

608 **CL-0124**, T.W. Wälde, *In the Arbitration under Art. 26 Energy Charter Treaty (ECT), Nykomb v The Republic of Latvia - Legal Opinion* (2005), 2, Transnational Dispute Management, 5 November 2005, ¶ 31. *See also* **CL-0125**, A. Konoplyanik and T.W. Wälde, *Energy Charter Treaty and its Role in International Energy* (2006), 24, Journal of Energy & Natural Resources Law 523, 13 March 2006, pp. 553-554 (noting that the main appeal of the ECT for resource-rich countries in the East "*was to appear attractive to investors, to be seen to play the rules of the global economy, reduce their political risk perception and not to be left out of a possibly significant energy policy dialogue*(s)", and that "[t]*his was and is the more important aspect as most of the Eastern countries have problems in attracting (and keeping) foreign investment (which are needed both in order to bring innovations as well as for risk- mitigation and risk sharing in raising new projects), mainly in terms of legal and political instability and insecurity*").

risks.[609] The ECT seeks to accomplish this objective, in particular, by requiring the Contracting States to pay prompt, adequate and effective compensation for direct and indirect expropriation and by maintaining a stable, predictable and transparent legal and regulatory framework for such investments.[610] By ratifying the ECT, Contracting States agreed: (i) to provide such a framework to Investors in the energy sector; and (ii) to be held to account in the event that they fail to do so.

360. Energy investments are different from many other types of investments due to:[611]

(a) their capital-intensive nature, with very high upfront capital costs;

(b) the lengthy period of time required for the investor to receive a return of and on their investment; and

(c) their decades-long operating horizons.

361. In other words, energy investments tend to involve high-value and long-term financial commitments in projects that cannot adapt their cost and financing structures to short-term changes in investment conditions and that are, therefore, particularly sensitive to legal and political changes and other associated risks. As explained above, MPP3 is such an investment. The Claimants invested more than [redacted] in MPP3 and expected to recover that investment (and earn a return) over a 40-year period.

362. These particular characteristics make a stable, predictable and transparent legal and regulatory framework a *sine qua non* for energy investments.[612] Thus, as one commentator observes:

> "Legal security and predictability are particularly important in the energy field because it usually takes a long period of time and great magnitudes of capital for the initial investments to yield profit. Those risks pose a fundamental issue for the legal security of foreign investments which cannot be solved in a fully satisfactory way on the basis

609 **CL-0001**, ECT, Preamble, pp. 37-39.

610 **CL-0001**, ECT, Articles 10(1) and 13.

611 *See* [redacted] **CL-0131**, C. Baltag, *The Energy Charter Treaty: The Notion of Investor*, Chapter 1, *Energy Resources and the Energy Charter Treaty* (Kluwer Law International), 2012, p. 1 ("*Energy investments distinguish themselves from other forms of investment essentially by their large size and the lengthy period between the initial commitment and the first returns*").

612 **CL-0129**, E. Sussman, *The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development* (2008), 14, ILSA Journal International & Comparative Law 391, pp. 401-402; **C-0140**, European Parliament Resolution, on making the internal energy market work (2013/2005(INI)), 10 September 2013, ¶ 34.

of a national legal system alone. Therefore, one may need to resort to international law for legal protection".[613]

363. This need for equitable and stable legal regimes to promote energy investments, and the role of the ECT in this regard, has also been repeatedly recognised by multinational organisations and *fora*:

(a) The 1998 G8 Energy Ministerial Meeting on the World Energy Future recognised that "[energy] *markets require stable, transparent, non-discriminatory legal, fiscal and regulatory structures creating a favourable investment climate*".[614] In this context, the meeting supported "*economic reform efforts with regard to conditions of investment, trade and transit*",[615] citing as an example "[r]*atification and implementation by signatories of the Energy Charter Treaty*".[616]

(b) At the G8 Summit in 2006, the Energy Security Declaration issued explicitly "*support*[ed] *the principles of the Energy Charter and the efforts of participating countries to improve international energy cooperation*" and committed to a set of principles which included "*transparent, equitable, stable and effective legal and regulatory frameworks, including the obligation to uphold contracts, to generate sufficient, sustainable international investments upstream and downstream*".[617]

(c) Similarly, the 2007 G8 Summit Declaration noted the importance of "*improving* [the] *investment climate in the energy sector*",[618] and supported the principles of the European Energy Charter.

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[613] **CL-0116**, E. Paasivirta, *The Energy Charter Treaty and Investment Contracts: Towards Security of Contracts* in T. W. Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International), 1996, p. 350.

[614] **CL-0117**, G8 Energy Ministerial Meeting on "The World Energy Future Communique", Moscow, Russian Federation, 1 April 1998, p. 2.

[615] **CL-0117**, G8 Energy Ministerial Meeting on "The World Energy Future Communique", Moscow, Russian Federation, 1 April 1998, p. 2.

[616] **CL-0117**, G8 Energy Ministerial Meeting on "The World Energy Future Communique", Moscow, Russian Federation, 1 April 1998, p. 2. *See also* **CL-0120**, G8 Energy Ministers Meeting, "Co-Chairs' Statement", Detroit, Michigan, United States of America, 2-3 May 2002, ¶ 8.

[617] **CL-0126**, G8 Summit 2006, *Global Energy Security*, St. Petersburg, Russian Federation, 16 July 2006, pp. 2-3. *See also* **CL-0120**, G8 Energy Ministers Meeting, *Co-Chairs' Statement*, Detroit, Michigan, United States of America, 2-3 May 2002, ¶ 7.

[618] **CL-0127**, G8 Summit 2007, Summit Declaration, *Growth and Responsibility in the World Economy*, Heiligendamm, Germany, 7 June 2007, ¶ 44. *See also* **CL-0129**, E. Sussman, *The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development* (2008), 14, ILSA Journal International & Comparative Law 391, p. 401 (noting that accession to the ECT by a State "*would improve the investment climate in the energy sector by (1) creating a more secure investment environment; and (2) lowering the cost of investments*").

364. In fact, it is beyond doubt that, in order to address the specific sectorial needs of energy investments, the ECT offers a "*higher*" or more robust level of protection than most bilateral investment treaties. As Professor Wälde explains:

> " […] the overriding purpose of the [ECT] is the encouragement of private investment by stable, equitable, transparent conditions at a 'high level' of protection […] The tools—the "investment disciplines" in part III of the Treaty—have to be seen as instruments to implement the overall emphasis on promotion of private investments […]
>
> […] the [ECT] emphasises a "high" (i.e. not as other BITs a "normal") level of protection of foreign investors, encourages specifically "co-generation", highlights the importance of "liberalisation", i.e. movement away from socialist command-control energy economy and monopolies with a new emphasis on property, contract and competition and highlights all features of a market economy in energy which are the opposite of socialist energy industry—that is respect for property rather than pervasive state control, separation of private ownership and entrepreneurship from politicised comingling of state, politics and energy industry, fair and transparent treatment of foreign investor[s]—rather than exposing them to the volatilities and vagaries of intricate and not easily intelligible political manoeuvring . . . The Treaty's language has therefore to be seen before the background and overall objectives and context—liberalisation and modernisation of still state-dominated energy industries, and the objects and purposes—to provide in a legally binding form with maximum effectiveness a high degree of investment security […]
>
> From this detailed identification of relevant objectives of the Treaty identified in a formal, explicit and legally relevant form (i.e. not super-imposed by the interpreter's personal subjective views and preferences) it seems clear that the broad thrust of the ECT is intended to offer extensive, rather than restrictive, protection to foreign energy investors and their investments" (emphasis added).[619]

365. In this regard, the Energy Charter Secretariat's Reader's Guide to the ECT also notes that, while the "*ECT's investment provisions build upon the content of bilateral investment treaties as they have developed during the last half-century*", the ECT has "*added value as compared to the bilateral investment treaties*" given that the ECT "[i]*s the first multilateral agreement on the promotion and protection of foreign investment, covering all important investment issues and providing high standards of protection*".[620] As noted by the tribunal in *Infrastructure Services v. Spain*:

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[619] **CL-0124**, T.W. Wälde, *In the Arbitration under Art. 26 Energy Charter Treaty (ECT), Nykomb v The Republic of Latvia - Legal Opinion* (2005), 2, Transnational Dispute Management November 2005, p. 23 (emphasis added). *See also* **CL-0121**, T.W. Wälde, "Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice" (2004) 1 Transnational Dispute Management 2, p. 4 (noting that the ECT "*can not be properly applied without an eye towards the authoritative interpretative guidance in the 1991 'European Energy Charter' and its preamble – both express the idea of a 'high quality' of investment protection and a special purpose of transparent, stable and attractive investment conditions*").

[620] **CL-0119**, Energy Charter Secretariat, *The Energy Charter Treaty: A Reader's Guide*, 2002, pp. 19-20 (emphasis added). *See also* **CL-0121,** T.W. Wälde, *Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice* (2004), 1, Transnational Dispute Management 2, May 2004, p. 19 (observing

> "In sum, considering the context, object and purpose of the ECT, the Tribunal concludes that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments".[621]

366. The comprehensive promotion and protection provided by the ECT is further evidenced by the limited latitude of regulatory action accorded by the Contracting Parties.[622] One of the devices which States employ to balance the tension between regulatory space and their investment-treaty obligations to foreign investors is to create express exceptions to the application of the treaty.[623] There are, however, few exceptions in the ECT in order to safeguard the regulatory freedom of the states, and those that do exist in Article 24 of the ECT ("*Exceptions*"), are hedged with qualifications and caveats that substantially restrict the nexus, breadth or scope of permissible objectives.

367. Notably, none of the exceptions provided for in Article 24(2) apply at all to the provisions on compensation for losses (Article 12) and expropriation (Article 13). Moreover, the principal environmental exception – actions taken to protect human, animal or plant life or health – does not apply to <u>any</u> of the substantive investment protections such as Article 10, at issue in this case. In other words, the Contracting Parties to the ECT deliberately chose to elevate investor protections above the right to regulate in the interest of the environment. This express policy choice by the Contracting Parties must be taken into account when interpreting the scope of the ECT.

368. Further, the three exceptions contained within Article 24(2) are all subject to the limitations that the measure in question:

(a) must be *bona fide* and non-discriminatory, i.e., "*shall* [not] *constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties*"; and

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that the ECT is "*the most pronounced investment protection and pro-property rights multilateral treaty around*").

621 **CL-0093**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 532.

622 **CL-0115**, C. Bamberger, "An Overview of the Energy Charter Treaty", in T. W. Wälde (ed), "The Energy Charter Treaty: An East-West Gateway for Investment and Trade" (Kluwer Law International), 1996, p. 24.

623 **CL-0130,** J.W. Salacuse, "The Law of Investment Treaties" (Oxford University Press), 2010, p. 340; **CL-0128,** W.W. Burke-White and A. von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non- Precluded Measures Provisions in Bilateral Investment Treaties" (2008) 48 Virginia Journal of International Law 307, 2008, p. 316.

(b) must be narrowly-tailored to achieve its purpose, i.e., "*shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end*".[624]

369. Three further exceptions are contained in Article 24(3) of the ECT. This set of exceptions begins with a prefatory limitation that the Contracting Party considers it "*necessary*" to take the measure. The first specific exception is for measures considered necessary for the protection of "*essential security interests*", including those relating to "*the supply of Energy Materials and Products to a military establishment*", or "*taken in time of war, armed conflict or other emergency in international relations*". The second exception is for measures considered necessary with regard to nuclear proliferation. The third exception is for measures considered necessary for the maintenance of public order. All of these exceptions relate to highly specific and unusual circumstances and are also subject to the limitation that the measure in question must not constitute a disguised restriction on transit.[625]

370. Given the above, it is clear that the drafters of the ECT intended for the investment-protection provisions to be broad and subject to very few exceptions with respect to a Contracting Party's right to regulate, where such regulation would run afoul of the ECT's legal framework and the fundamental principles of stability and transparency as essential features of that framework.

371. This narrow exceptions regime under Article 24 of the ECT is to be contrasted with the approach taken in other bilateral and multilateral investment agreements. For example, Article 1114 of the North American Free Trade Agreement ("**NAFTA**") – which was negotiated and agreed around the same time as the ECT – ensured that parties to NAFTA were not prevented from "*adopting, maintaining or enforcing any measure*" that they consider "*appropriate*"[626] to ensure that investment activity is undertaken in a manner sensitive to environmental concerns. This provided latitude to the NAFTA contracting parties to adopt and implement measures that would otherwise contravene the provisions relating to investment protection,[627] including those relating to national treatment, most-favoured nation treatment, and expropriation and compensation.[628] The 2012 US Model Bilateral Investment Treaty

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624 **CL-0001**, ECT, Article 24(2).

625 **CL-0001**, ECT, Article 24(2).

626 It is pertinent to contrast the use of the word "*appropriate*" with the use of "*necessary*". The former implies a lower threshold than the latter for the state's measure to fall within the exception.

627 **CL-0111**, North American Free Trade Agreement, Chapter 11, Part Five (NAFTA) ("**NAFTA**"), 17 November 1993 (entered in to force 1 January 1994), Chapter 11.

628 **CL-0111**, NAFTA, 17 November 1993 (entered in to force 1 January 1994), Articles 1102, 1103 and 1110.

("**BIT**") contains a similarly worded exclusion to investment protection.[629] (The treaty which replaced NAFTA – the USMCA – likewise contains similar provisions.[630])

372. In sum, the scope for a Contracting Party's regulatory freedom is deliberately much narrower under the ECT than other investment treaties, and various controls are placed on it within the text of the ECT itself. As the above analysis demonstrates, while the ECT recognises the legislative authority of the Contracting Parties in relation to matters of vital national interests, it also carefully circumscribes that authority in favour of the ECT's legal framework and the investment protection obligations contained therein.

373. That deliberate policy choice by the Contracting Parties makes sense in the energy context where, as mentioned above, a substantial amount of capital is invested at the outset of a project, with an expectation that the plant will generate cash flows plus a reasonable rate of return over the long term, and whose investors cannot adapt their cost and financing structures to short-term changes in investment conditions.

374. The Respondent's treatment of the Claimants, its specific breaches of the ECT and the interpretation of the standards in the ECT, must all be viewed in relation to the above context, objectives and purposes of the ECT.

5.3 The Respondent breached Article 13(1) of the ECT by illegally expropriating the Claimants' investment in MPP3

375. The Respondent breached Article 13(1) of the ECT by illegally indirectly expropriating the Claimants' investment in MPP3. Article 13(1) reads as follows:

> "(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:
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> (a) for a purpose which is in the public interest;
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> (b) not discriminatory;
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> (c) carried out under due process of law; and
>
> (d) accompanied by the payment of prompt, adequate and effective compensation.

[629] **CL-0112**, Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment of 2012, Article 12(5) ("*Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*").

[630] **CL-0113**, United States, Mexico and Canada Agreement, 1 July 2020, Chapter 14, Article 14.15 and Annex 14-B, 3(b).

> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the 'Valuation Date').
>
> Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment".[631]

376. On the facts, no formal expropriation has taken place (the Claimants are still in ownership of MPP3 and the permits). It follows from Article 13(1) of the ECT, however, that a state violates the provision where it (i) enacts "*a measure having effect equivalent to* […] *expropriation*" that (ii) fails the criteria set out in Article 13(1)(a)-(d).[632] In addition, compensation must amount to the fair market value of the investment.

377. As two leading commentators on the ECT explain:

> "The post-investment obligations reaffirm customary international law as evidence by most modern arbitral awards and BITs. They are basically about protecting property and treating investors fairly in order to render the host state attractive, reduce any perception of political risk and bring some discipline to beat on bureaucratc [sic.] excesses and the natural tendencies of domestic protectionism.
>
> Property (it is defined widely and would include upstream oil and gas 'licenses' such as concessions of production-sharing contracts) is protected against *expropriation* by the duty to pay full, prompt and effective compensation (ECT Article 13). Such duty also extends to 'regulatory takings', ie government regulatory action that is in its impact equivalent to expropriation. This obligation does not mean expropriation is prohibited, but that full compensation has to be paid. This is probably the current standard of customary international law (based on the so-called 'Hull formula')" (emphasis added).[633]

378. Professor Wälde similarly explains that it is "*now generally recognised that governmental action can constitute a compensable expropriation even if no formal 'taking' and transfer of ownership has taken place*".[634] Thus:

> "It is acknowledged that in modern business it is less tangible property, but the ability to manage the bundle of proprietary rights in a commercially profitable way which counts. Government can, by intervening in the context, in particularly [sic.] the competitive context, of a business undermine its ability to function properly. The US-

631 **CL-0001**, ECT, Article 13(1).

632 **CL-0001**, ECT, Article 13(1).

633 **CL-0125,** A. Konoplyanik and T.W. Wälde, *Energy Charter Treaty and its Role in International Energy* (2006), 24, Journal of Energy & Natural Resources Law 523, 13 March 2006, p. 534.

634 **CL-0121**, T.W. Wälde, *Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice* (2004), 1, Transnational Dispute Management 2, p. 26.

> Iran claims tribunal cases confirm mainly that a formal taking is not necessary, but that the government's interference in the ability of the owner to manage their property or its omission to protect the property against disruption, can amount to expropriation".[635]

379. This principle has been confirmed by numerous arbitral tribunals. For example, the tribunal in *Middle East Cement v. Egypt* found that a governmental decree prohibiting the import of cement was expropriatory, because it prevented the claimant from utilising its import licence. The Tribunal reasoned that the claimant had been deprived of the use and benefit of its investment although it retained nominal ownership of its rights in the licence.[636]

380. The Respondents' enactment of the Coal Ban Act was "*a measure having effect equivalent*" to expropriation within the meaning of Article 13(1) – i.e., an indirect expropriation (Section (a)). That expropriation, in turn, was illegal (Section (b)). The Coal Ban Act was not tailored to its proffered purpose. Nor was it accompanied by the payment of compensation that was prompt, adequate and effective.

(a) The Respondent's enactment of the Coal Ban Act effected an indirect expropriation of the Claimants' investment in MPP3

381. The Respondent's enactment of the Coal Ban Act effected an indirect expropriation of the Claimants' investment in MPP3. While no direct taking of Claimants' investment in MPP3 has taken place, the Coal Ban Act:

(a) substantially deprives the Claimants of the value of their investment in MPP3 (sub-section (i)); and

(b) deprives the Claimants of the use of their investment in MPP3 (sub-section (ii)).

382. In short, the Coal Ban Act forces the Claimants to shut down MPP3 just 14 years into its (minimum) 40-year lifetime, without adequate compensation.

383. Article 13(1) of the ECT protects investors against "*measures having effect equivalent to nationalisation or expropriation*",[637] and thus, indirect expropriation.[638] The Respondent

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635 **CL-0121**, T.W. Wälde, *Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice* (2004), 1, Transnational Dispute Management 2, p. 26.

636 **CL-0052**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107.

637 **CL-0001**, ECT, Article 13(1).

638 **CL-0067**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 189-193 (holding that Article 13(1) of the ECT internalises the concept of indirect expropriation).

expressly acknowledged this in the Second Explanatory Memorandum to the Coal Ban Act: "[u]*nder Article 13 of the ECT, it is prohibited to nationalise or expropriate a production plant where electricity is generated or to subject such to measures that have a similar effect as nationalisation or expropriation*".[639]

384. The *jurisprudence constante* at international law provides that a state can expropriate an investor's investments through indirect means; i.e., "[w]*hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment*".[640] In these circumstances, "*the investor is deprived by such measures of parts of the value of his investment*".[641]

385. The tribunal in *TECMED v. Mexico* summarised the position as follows:

> "[…] it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that […] 'any form of exploitation thereof […]' has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary" (emphasis added).[642]

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639 **C-0186**, Draft Coal Ban Act and Updated Explanatory Memorandum, 12 October 2018, (pdf) p. 15.

640 **CL-0052**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107.

641 **CL-0052**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107. *See also* **CL-0049**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103 ("[t]*hus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State*"); **CL-0050**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 200 ("[i]*ndirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralises the enjoyment of the property*").

642 **CL-0053,** *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 116.*See also* **CL-0069**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 443 ("*an expropriation might occur even if the title to the property is not affected, depending on the level of deprivation of the owner*"); **CL-0045**, *Starrett Housing Corporation, et al. v. The Government of the Islamic Republic of Iran et al.*, IUSCT Case No. 24, Interlocutory Award No. ITL 32-24-1 (19 December 1983), p. 51 ("*it is recognised in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner*").

386. Investment tribunals have acknowledged that a wide variety of measures can constitute an indirect expropriation.[643] Thus, determining whether an indirect expropriation has occurred involves a context-specific analysis grounded in the facts of each case.[644] Professor Schreuer also states that "[t]*he decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without a physical taking*," and that indirect expropriation "*may take place through a large variety of forms of indirect interference with the investors' economic interests*".[645]

387. It is widely accepted that regulatory measures enacted by a state can effect an indirect expropriation.[646]

(i) The Coal Ban Act substantially deprives the Claimants of the value of their investment in MPP3

388. The Coal Ban Act substantially deprives the Claimants of the value of their investment in MPP3 and amounts to an indirect expropriation. In assessing whether a state measure constitutes an indirect expropriation, investment tribunals – including those constituted under the ECT – have consistently asked whether the impugned measure "*substantially deprived*" an investor of the value of its investment.[647] Whether an investor has suffered a "*substantial deprivation*" is

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643 *See e.g.*, **CL-0050**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 200 ("[i]*t is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation*").

644 **CL-0050**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 200 (noting that "*each case is therefore to be decided on the basis of its attending circumstances*"); **CL-0102**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 221 (noting that the analysis "*requires a tribunal to take into account the circumstances of the case*").

645 **CL-0123**, Christoph H. Schreuer, "The Concept of Expropriation under the ECT and other Investment Protection Treaties" (2005) 2 Transnational Dispute Management 5, p. 5.

646 *See e.g.*, **CL-0105**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, ¶ 533 ("*Sixth, regulatory measures can constitute indirect expropriation. This is so where the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without the receipt of any compensation*").

647 **CL-0075**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 6.62 ("*the Tribunal considers that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment*"); **CL-0101**, *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 505 (same); **CL-0105**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, ¶ 531 ("*expropriation, direct or indirect, entails 'substantial deprivation', i.e. the loss of all significant economic value, where the loss of value is such that it could be considered equivalent to a deprivation of property, or the loss of all attributes of ownership*"). *See also* **CL-0102**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 221 ("[f]*or an indirect expropriation to exist, it is generally accepted that the act or acts of the public authority concerned must have the effect of substantially depriving the investor of the*

assessed against the anticipated lifecycle of the investment. The investment must be "*viewed as a whole*".[648] The tribunal in *LG&E v. Argentina* explained that one must consider the severity of the economic impact and this analysis "*focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation*".[649]

389. Arbitral tribunals have also held that state measures causing an investment to lose its capacity to earn a commercial return – i.e., a profit – constitutes a substantial deprivation. The *Burlington v. Ecuador* tribunal stated as follows:

> "The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment […] The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return" (emphasis added).[650]

390. Similarly, in *Eco Oro v. Colombia*, the tribunal held that a state measure that "*deprive*[d] Eco Oro *of more than 50% of its mining rights such that the economics of the* [] *Project are destroyed*" amounted to a substantial deprivation.[651]

391. The tribunal also acknowledged that investments that involve high upfront capital costs typically must operate for some time before an investor can reap the economic benefits of its investment. It reasoned that "*Eco Oro's expectation in entering into the Concession was to make a profit* […]*, and it is typically only in the exploitation phase of a project such as this that significant economic benefits may be obtained, the costs of exploration having been incurred*".[652]

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economic value of its investment"); **CL-0049**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103; **CL-0053**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 115.

[648] *See e.g.*, **CL-0058**, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 67 ("[t]*he Tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value*").

[649] **CL-0060**, *LG&E v. Argentina*, Decision on Liability, 3 October 2006, ¶ 191.

[650] *See* **CL-0076**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶¶ 397-398 (emphasis added); **CL-0049**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 113 (finding an expropriation where state measures "*negate*[d] *the possibility of any meaningful return on Metalclad's investment*").

[651] **CL-0109**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, ¶¶ 633-634.

[652] **CL-0109**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, ¶ 634.

392. In this case, the Coal Ban Act prohibits MPP3 from doing what its irrevocable permits allow it to do: generate electricity by firing coal. The Coal Ban Act will force MPP3 to shut down entirely at the end of 2029 (a conversion to biomass or another alternative fuel is not economically viable), making it useless to the Claimants some 26 years before it was expected to cease operations. This will further deprive the Claimants from making any commercial return on their investment. [redacted]

393. Other investment tribunals have found indirect expropriations in circumstances similar to these. The *Abengoa* tribunal held that Mexico indirectly expropriated the claimant's investment in a waste management plant by cancelling the claimant's license, which would otherwise have permitted the claimant to operate the plant for a minimum of 25 years.[654] Similarly, in *Eco Oro v. Colombia*, the tribunal found that the loss of "*a potential right to exploit*" a mining concession in the future "*is capable of being considered to be a substantial deprivation, such as to amount to an indirect expropriation*".[655] Equally, in *Casinos Austria v. Argentina*, the tribunal found that Argentina's revocation of the claimants' gaming license that still had 17.5 years to run constituted a substantial deprivation, of their investment.[656]

394. Notably, in this case, the Claimants irrevocable permits have not been cancelled. Yet the Claimants will nonetheless be prohibited from operating the plant using coal as a result of the Coal Ban Act.

395. The Respondent can be expected to argue that the Claimants were not substantially deprived of their investments because it provided the Claimants with the Transition Period. But this is at odds with the Respondent's contemporaneous characterisation of the Transition Period as compensation that <u>followed</u> its expropriatory measure—i.e., the Coal Ban Act. Indeed, at the

[redacted]

654 **CL-0077**, *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 [Redacted] [Spanish], ¶ 610 (unofficial translation) ("[t]*he Arbitral Tribunal therefore concludes that the CMI, and successively the City Council, are responsible for a series of actions between January 2009 and March 2010 that culminated in the second cancellation of the Operating License in March 2010, and came to totally and definitively deprive the Applicants of the use and enjoyment of their investment, thus constituting an indirect expropriation of the Plant and* [of] *the investment made by the Claimants in SDS*").

655 **CL-0109**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, ¶ 634.

656 **CL-0110**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award of the Tribunal, 5 November 2021, ¶¶ 353-354 ("*Claimants have been permanently and substantially deprived of their investment in L&E and/or ENJASA, as ENJASA's exclusive license for the remaining 17.5 years could not simply be replaced by new and less favorable licenses that were still to be negotiated and did not have the same scope as ENJASA's operation and were not exclusive*").

time, the Respondent repeatedly acknowledged that it was offering compensation for the Coal Ban Act through the Transition Period in recognition of the severity of the measure.

396. In its explanation of the draft legislation, the Respondent explained that in the Explanatory Memorandums that:

(a) "[i]*t is expected that the owners of the Hemweg plant, Amer 9 plant, Eemshaven plant, MPP3 plant and the Rotterdam plant do not sufficiently differentiate from each other, so that one cannot not speak of an individual burden. Therefore, an additional right to compensation, other than the aforementioned transition period, is not included*".[657]

(b) the time period between enactment of the Coal Ban Act and prohibition is a Transition Period which:

> "[…] offers the operators of these relatively new plants a period of more than ten years to limit their damage due to the prohibition of the use of coal. In the opinion of the Cabinet, this is an adequate transition period. This is because with the offered transitional period, the operators of the plants are given the opportunity to earn back (a large part of) their investments and to ready the plant, whether or not in phases, for further operation with fuels other than coal"[658] (emphasis added).

(c) the Transition Period offers operators of new plants:

> "[…] a ten-year period to mitigate their losses resulting from the prohibition on the use of coal. The Government believes that this is an adequate transition period: the proposed transition period gives plant operators the opportunity to recover (a major part of) their investments and make the plant ready, whether in stages or not, for future operation using fuels other than coal"[659] (emphasis added).

(d) the Transition Period "*presents an opportunity to create additional revenues for a number of years and to make the plant ready for using other fuels, whether in stages or not*".[660]

397. Minister Wiebes also stated in answers to questions to the Lower House from May 2019 that:

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[657] **C-0031**, Legislative proposal containing a ban on producing electricity using coal, 19 May 2018, p. 15 (emphasis added).

[658] **C-0186**, Draft Coal Ban Legislation and Explanatory Memorandum, 12 October 2018, (pdf) p. 12.

[659] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

[660] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

> "It is not possible for the government to indicate when the new generation of coal-fired power plants [are] expected to have recovered their investments. In order to establish this, the government must have all company-specific information at its disposal. The government does not have this, as it concerns business confidential information from these companies. Typically, operators coal plant operators have a depreciation period of around 40 years for their plant. This Bill, however, allows operators to reduce their investment costs. The operators of the latest generation of coal-fired power plants, will be offered a long transition period in which, in addition to recovering a large part of their investments in the power plant, whether or not in phases, they will also be able to make them ready for further exploitation with fuels other than coal. Operators therefore have the possibility of generating income in the future with the generation of electricity, however, from fuels other than coal, and can thus recoup their investment in the plant. […]
>
> The operators all (again with the exception of the operator of the Hemweg plant)receive compensation in kind for the disadvantage they suffer as a result of the ban. In this transitional period of more than 10 years, they can still generate income with their power plant and thus recouping a (large) part of their investments"[661] (emphasis added).

398. In November 2019, Minister Wiebes – attempting to explain that the Coal Ban Act did not represent an expropriation – stated in a memorandum that:

> "[…] the owners of the coal plants will be offered subsequent compensation due to the proposed ban in the form of a transitional period of 5 or 10 years, respectively. This compensation is equivalent to reimbursing for missed income for this period if the ban were to become effective right away, that is to say without a transitional period".[662]

399. In December 2019, Minister Wiebes also stated that "*compensation* […] *is a transitional period*" since "[i]*t offers plants the opportunity to look for other fuels and to partially earn back their investments*".[663]

400. But it is not economically feasible for MPP3 to be converted to an alternative fuel source, a fact which the Respondent simply ignored despite having evidence in its possession which

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[661] **C-0188**, Minister Response 35 167 No. 6 to Questions from the Lower House on Coal Ban Act, 20 May 2019, pp. 13-14. *See also*, **C-0037**, House of Representatives Plenary Debate of Coal Phase Out Act Transcript, 26 June 2019, p. 98-6-20 ("[t]*hese transitional periods also provide compensation in kind. This is important because the legislative proposal provides these transitional periods but does not provide financial compensation*").

[662] **C-0194**, Parliamentary documents 2019–2020, 35 167, E, Further Memorandum of Reply on Rules for producing electricity using coal (Prohibition on coal for electricity production), 22 November 2019, p. 20. *See also*, p. 15 ("[i]*n the opinion of the Cabinet, the proposed transitional period of 10 years provides sufficient disadvantage compensation (in kind) to the operators*"). It was also the Advisory Division's opinion that "[the draft Coal Ban Act] *does not provide for a general compensation scheme for the coal plant operators as a result of the coal ban. The transition periods are considered sufficient to adequately limit the damage*" (*see* **C-0036**, Parliamentary documents 2018-2019, 35 167, No. 4, Advisory Opinion of the Advisory Division of the Council of State and Further Report, 19 March 2019, p. 2).

[663] **C-0196**, Senate Plenary Debate of Coal Phase Out Act Transcript, No. 9, 3 December 2019, p. 10-9-21.

confirmed this to be the case. [redacted]

401. Indeed, the Minister's comments are extraordinary in circumstances where MPP3 is being permitted to run for just 14 years of an at-least 40-year expected useful lifetime – a lifetime that the Respondent was fully aware of when MPP3 was granted its permits. The quotes above confirm that the Respondent understood that MPP3 had a 40-year recovery period for its investment, but yet claims a Transition Period allowing MPP3 to operate for just 14 years was considered adequate compensation. [redacted]

402. Thus, while the Respondent can be expected to argue that the Claimants have not been substantially deprived of their investment in MPP3 because it was provided with the Transition Period, that argument is unavailing. It conflates (i) the Respondent's expropriatory measure with (ii) the compensation that the Respondent must pay in respect of that measure under Article 13(1) of the ECT. Since the Respondent has acknowledged that the Transition Period constitutes compensation, it cannot also rely on the Transition Period as evidence that its expropriatory measure did not substantially deprive the Claimants of their investment in MPP3. Indeed, if one were to consider that any compensation granted – however insufficient – was relevant to determining the impact of the measure on the value of the investment, then States would be able to escape liability under the ECT by simply offering insufficient compensation. Thus, the key question for the Tribunal is whether the Transition Period constitutes prompt, adequate and effective compensation. It does not, as explained in paragraph 442 below.

403. In any event, even taking into account MPP3's cash flows until 2030, the Coal Ban Act substantially deprives the Claimants of the value of their investment. [redacted] The Respondent is wrong to say, as it does in the Final Explanatory Memorandum that "[n]*or does the Bill* […] *result in the investment becoming (largely) worthless*".[667] The *Casinos Austria* tribunal put the point as follows:

[redacted]

667 **C-0035,** Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 12.

> "Whatever financial revenues ENJASA or Claimants could still draw after the revocation of ENJASA's license from their investments [. . .] are matters that concern the calculation of compensation or damages, but do not affect the assessment whether a permanent and substantial deprivation of Claimants' investment has occurred in the first place".[668]

404. Thus, the (i) existence of an expropriation; and (ii) any compensation paid by the state in respect of that expropriation are analytically separate questions. The Netherlands should not be permitted to conflate these two issues (especially given the numerous public statements it has made, described above), in order to escape a finding of expropriation by pointing to (inadequate) compensation paid *ex post* for that dispossession.

(ii) The Coal Ban Act deprives the Claimants of the use of their investment in MPP3

405. The Coal Ban Act also amounts to an expropriation since it substantially deprives the Claimants of the use of their investment in MPP3. The tribunal in *Middle East Cement v. Egypt* found that a governmental decree prohibiting the import of cement was expropriatory, because it prevented the claimant from utilising its investment—*i.e.*, its licence to import cement. The tribunal reasoned that:

> "When measures are taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation".[669]

406. Similarly, in *Saar Papier v. Poland*, the tribunal found that the Polish government's ban on the import of a specific type of makulatura—*i.e.*, waste paper—effected an indirect expropriation of the claimant's investment, which was a factory that was purpose-built to process that type of makulatura.[670]

407. The facts of this case are on all fours. The Coal Ban Act will require MPP3 to shut down entirely. The Respondent was aware of this fact (as it was in possession of the Frontier Economics analysis on the conversion of MPP3), yet it went ahead with the Coal Ban Act in any event. Thus, MPP3 cannot be used for the purpose for which it was designed, built and permitted.

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668 **CL-0110**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award of the Tribunal, 5 November 2021, ¶ 355.

669 **CL-0052**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107.

670 **CL-0047**, *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Award, 16 October 1995, ¶¶ 87, 89.

(b) The Respondent's expropriation was illegal

408. The Respondent's expropriation of the Claimants' investment in MPP3 in the Netherlands was illegal. Article 13(1) of the ECT provides that liability for expropriations can only be excused where the expropriatory measure is: (i) made for a public purpose; (ii) not discriminatory; (iii) carried out under the due process of law; and (iv) accompanied by the payment of prompt, adequate and effective compensation.[671] These are cumulative requirements. As a result, an expropriatory measure must meet **all** of these conditions if a state is to avoid liability for illegal expropriation under Article 13(1).[672]

409. As explained below, the Coal Ban Act was: (i) not tailored to the Respondent's proffered public purpose; and (ii) not accompanied by adequate compensation as required by Article 13(1).

(i) The Respondent's expropriatory measure was not tailored to its proffered public purpose

410. The Respondent's expropriation of the Claimants' investment in MPP3 was not narrowly tailored to its proffered public purpose. In assessing whether an expropriatory state measure was enacted for a public purpose, investment tribunals ask whether the measure bears proportionate relation to the policy objectives sought to be achieved, when viewed against the deprivation caused to the investor.[673]

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671 **CL-0001**, ECT, Article 13(1).

672 *See e.g.*, **CL-0088**, *Conocophillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Interim Decision, 17 January 2017, ¶ 145 ("[t]*he conclusion of this analysis is that the term 'obligation', as it is used in paragraph 404(d) of the 2013 Decision, must be understood as having the same meaning as the term 'condition' found in Article 6 of the BIT. If and to the extent that the requirements of Article 6(c) have not been complied with, one of the three cumulative conditions set out in Article 6 has not been fulfilled, and the effect is that Article 6 has been breached*"); **CL-0097**, *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Final Award, 26 April 2019 [Spanish], ¶ 295 [unofficial translation] ("[i]*t is important to note that, according to Article V of the Treaty, for an expropriation to be considered illegitimate, it is not required that each and every one of the exceptions established in it occur simultaneously* […] *but it is sufficient to demonstrate the non-compliance of one of them. In the specific case, even assuming that the Measures could have complied with the requirements of the public purpose and that they are not discriminatory, the failure to pay 'prompt, adequate and effective' compensation constitutes, in itself, a breach of sufficient entity to make the expropriation illegal*"); **CL-0095**, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 610 [redacted] ("[b]*ased on the above reasons, the Tribunal concludes that, although the Reversion fulfills the requirements under Article 5 of the Treaty relating to public purpose and social benefit, as well as due process, it does not fulfill the compensation requirement established under the same article*").

673 *See* **CL-0053**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 122 ("[t]*here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not*"); **CL-0086**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award,

411. The Respondent's enactment of the Coal Ban Act fails this requirement.

412. The stated purpose of the Coal Ban Act was to achieve certain CO_2-reduction goals by 2030. This goal was explained in the Explanatory Memorandum, which provided that:

> "The purpose of the Bill is to achieve a considerable reduction of Dutch carbon emissions. The Government has committed to implementing measures that will cut total carbon emissions by 49% by 2030 (from 1990 levels). Cutting the CO2 emissions of Dutch coal-fired power plants will significantly contribute to this".[674]

413. However, the Coal Ban Act is not narrowly tailored to achieve this goal for several reasons.

414. First, the Coal Ban Act imposes the entirety of its carbon emissions reductions on operators of coal-fired power plants. The Respondent considered, but ignored, other more proportionate solutions, which would have achieved reductions in emissions across all plants that emit carbon in the Netherlands. In other words, the Netherlands could have adopted a measure less draconian than the phase out of electricity produced from modern, efficient power plants and imposed a measure that reduced CO_2 emissions, but shared the burden across the energy sector. The Coal Ban Act also presented a risk of "carbon leakage", discussed below.

415. One option was continuing to regulate CO_2 emissions through the EU ETS (the underlying principle of which is the creation of a level playing field). [redacted]

15 April 2016, ¶ 296 ("*the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose*").

674 **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 18 March 2019), p. 2. *See also* **C-0186**, Draft Coal Ban Act and Updated Explanatory Memorandum, 12 October 2018, (pdf) p. 4; and **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 3.

[redacted]

[redacted]

416. The Respondent's own independent advisors, Frontier Economics, reported in 2016 that a multilateral CPF would have been effective in reducing emissions.[677] A multilateral CPF would also cost less per tonne of CO_2 reduced, and offers "*significant emissions reductions at relatively low cost*".[678] [redacted]

[redacted]

417. [redacted]

418. [redacted]

[677] [redacted] **C-0028**, Frontier Economics Report, *Research of Scenarios for Coal-fired Power Plants in the Netherlands*, A Report for the Ministry of Economic Affairs (MinEZ), 1 July 2016.

[redacted]

419. [redacted]

420. [redacted]

421. [redacted]

422. [redacted]

[redacted]

[redacted]

423. Indeed, no account is made of the fact that not all gas-fired power stations in the Netherlands are new and efficient. [redacted]

424. The Respondent also ignored the warning from its independent adviser at the time, Frontier Economics, that a coal phase out would actually stimulate more emissions from power stations in other European countries. This is because the closure of Dutch coal plants would prompt the import of more electricity from other European countries, which would stimulate more electricity production and more emissions by fossil-fuelled power stations elsewhere, including less efficient coal-fired power stations than MPP3[redacted] In the Explanatory Memorandum, the Respondent acknowledged that there would be a leakage effect, but reasoned that was not a concern since "[i]*n the case of the application of alternative fuels*" – in other words, assuming coal-fired power plants are successfully converted – "*no carbon leakage is foreseen at all*".[691] As discussed below, however, the conversion option is not feasible.

425. Second, the Coal Ban Act is premised on the fact that operators such as the Claimants are offered a Transition Period. Yet the Respondent did not properly assess whether this was adequate for investors to recoup their investment or convert. It was set for political expediency.

426. According to the Respondent, during the Transition Period, operators could convert a coal-fired power plant to generate electricity from only biomass or another alternative fuel such as biodiesel, hydrogen, gas or ammonia, having converted MPP3.[692] But, as explained above, aside from biomass, none of these are proven technologies and, as regards biomass, conversion

688 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 5.

[redacted]

691 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 14.

692 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 7.

is not economical. [redacted] A legislative measure cannot be narrowly tailored to achieve a policy goal if a central part of its rationale is flawed.

427. The Explanatory Memorandum explains that 2030 is used as the point at which the Transition Period ends because "[c]*limate reports show that climate objectives* […] *are feasible if the electricity generation with the use of coal is phased out no later than in 2030*".[694] Therefore, the Respondent claims, the Transition Period "*shall end no later than by 1 January 2030*" and a long period "*is not reasonable*".[695] But there is no rational connection between what climate reports show, and whether it is feasible (economically or technically) to convert a coal-fired power plant into an alternative fuel source power plant. Thus, the Respondent's justification that the Transition Period is "*reasonable*" does not work. Later in the Explanatory Memorandum, the Respondent reasons that a period of three years is reasonable for technical adjustments and five years for "*operational changes*" such as permitting and the sourcing of biomass.[696] No analysis has been cited in support of those claims, which therefore appear to be entirely unsubstantiated and arbitrary.

428. The Explanatory Memorandum further explains that "*it is possible to convert coal-fired power plants into biomass plants* […] *shown from the fact that globally a number of formerly coal-fired power plants were already converted* […]".[697] It then refers to the examples of Drax in England (three of six boilers); Avedore I and II power stations in Denmark; Atikokan in Canada; and Les Awirs and Rodenhuize in Belgium.[698] This is an extraordinary claim for the Respondent to have made. No consideration has been given as to how those projects have been realised, or whether such modifications are financially or technically achievable on the Maasvlakte site.[699] The Minister of Economic Affairs and Climate Policy expressly confirmed

[redacted]

694 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 13.

695 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 13.

696 **C-0031,** Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 14.

697 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 10.

698 **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 10.

699 *See also* **C-0194**, Parliamentary documents 2019–2020, 35 167, E, Further Memorandum of Reply on Rules for producing electricity using coal (Prohibition on coal for electricity production), 22 November 2019, pp. 10-11.

that "[t]*he Cabinet did not and cannot perform such analyses, because it does not have the company-specific data of the various coal plants*".[700]

429. The Respondent also considered that developments regarding hydrogen and other CO_2 low fuels "*will take off*". But again, no analysis appears to have been done by the Respondent and this claim is unsubstantiated. [redacted]

[redacted]

430. Thus, the Respondent's assumptions about the viability of coal-fired power plants switching to another fuel was not based on any objective analysis, but rather, mere speculation. The Respondent confirms as much in the Explanatory Memorandum: "[i]*t is currently not known how the owners will adjust the plants*".[702] The economic viability of a conversion of MPP3 to a biomass and hydrogen plant was considered by Frontier Economics, who concluded that "[f]*rom a commercial perspective, the power plant would rather be closed than converted into a biomass plant in 2030*".[703] [redacted]

431. Third, the Respondent's imposition of the Coal Ban Act fails to take account of the fact that, from the outset, MPP3 was designed to mitigate its CO_2 emissions. [redacted] As discussed earlier in this Memorial, the Claimants also voluntarily agreed to efforts to reduce their carbon emissions pursuant to the 2008 Energy Covenant.[706]

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[700] **C-0040**, Parliamentary 2019-2020, 35 167, B, Memorandum of Reply, Rules for producing electricity using coal, 17 October 2019, p. 11.

[redacted]

[702] **C-0031**, Legislative proposal containing a ban on producing electricity using coal (Law on the prohibition of coal for electricity production) and Explanatory Memorandum, 19 May 2018, p. 16.

[703] **C-0039**, Frontier Economics, *Profitability and Dispatch of MPP3 Power Plant with Alternative Fuels, A report for Uniper Benelux*, October 2019, p. 22.

[redacted]

[705] [redacted] and Section 3.5 above.

[706] *See* ¶ 188 above.

432. [redacted]

433. To be clear, MPP3 *was* built CCS ready. MPP3 *did* originate a state-of-the-art CCS demonstration project, investing millions of EUR in its development. This was co-dependent on MPP3 generating electricity from coal. It did not make sense for the Claimants to continue.

434. The Respondent could have tailored its policy response to take account for the CO_2 mitigating efforts that the Claimants undertook – especially given that emissions comparable to modern gas-fired power stations could have been achieved and yet no measures were taken against that energy source.

435. Fourth, the Respondent's imposition of the Coal Ban Act imposes the full cost of the taking on the Claimants. [redacted] This is discussed further in Part 6 below.

436. For at least these reasons, the Coal Ban Act was not tailored to its proffered public purpose.

(ii) The Respondent failed to provide adequate compensation for its expropriation of the Claimants' investment in MPP3

437. The only compensation the Claimants will receive for the forced closure of MPP3 is to permit it to continue operating during the Transition Period. That measure of purported compensation does not save the Respondent's expropriation from violating the ECT.

[redacted]

438. Article 13(1) of the ECT requires that any expropriation be accompanied by "*prompt, adequate and effective compensation*".[712] Article 13(1) also requires that compensation "*amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment*".[713]

439. This accords with the position under international law. The United Nations Conference on Trade and Development (UNCTAD) elaborated on the meaning of "*prompt, effective and adequate compensation*" in the following terms:

> "Compensation is considered to be prompt if paid without delay; adequate, if it has a reasonable relationship with the market value of the investment concerned; and effective, if paid in convertible or freely useable currency".[714]

440. Similarly, the *Teinver v. Argentina* tribunal stated that "[c]*ompensation will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known*".[715] In this context, the *Santa Elena v. Costa Rica* tribunal held that fair market value should be calculated by reference to the expropriated investment's "*highest and best use*".[716]

441. Thus, in *Middle East Cement v. Egypt*, the tribunal considered that fair market value compensation for an expropriated license should reflect the earning capacity of the claimant's investment over its remaining life. The tribunal reasoned as follows:

> "The License being the "expropriated" investment, its <u>earning capacity during the remainder of its life</u> may well come into consideration for assessing its "market value"

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712 **CL-0001**, ECT, Article 13(1).

713 **CL-0001**, ECT, Article 13(1).

714 **CL-0132**, UNCTAD Series on Issues in International Investment Agreements II, "Expropriation", 2012, p. 40.

715 **CL-0090**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, ¶ 1033. *See also* **CL-0066**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 793 ("*the Tribunal considers that the correct approach is to award such compensation as will give back to Claimants the value to them of their shares at the time when the expropriation took place. This requires the Tribunal to take account only of the value which the shares would probably have had in the hands of Claimants if the shares had not been expropriated, and therefore to leave out of account any increase (or decrease) in the value of the shares which Claimants would probably not have enjoyed (or suffered) if the shares had remained in their hands*").

716 **CL-0048**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶ 70 ("[i]*n the present case, the Tribunal is spared the need to enter further into any doctrinal discussion of the standard of compensation because it is common ground between the parties, and the Tribunal agrees, that the compensation to be paid should be based upon the fair market value of the Property calculated by reference to its 'highest and best use'*").

under the BIT. Nothing would have prevented Claimant from concluding other cement supply contracts or contracts providing for the use of its terminal facilities. The circumstance that some of the cement supply contracts take into consideration possible increases in quantities and/or extension of duration lends support to the conclusion that the License had not exhausted its potentiality of yielding further profits to Claimant's benefit and that, accordingly, Claimant had a legitimate expectation that it could have earned additional profits under the License" (emphasis added).[717]

442. Although the Respondent purports that the Transition Period is compensation in-kind for its expropriation of the Claimants' investment,[718] that measure of purported compensation is neither prompt, adequate nor effective:

(a) As an initial matter, it would require the Claimants to operate MPP3 until the end of 2029, in order to generate the revenues that are meant to serve as compensation for a measure enacted by the Respondent in 2019. Self-evidently, compensation that takes more than 10 years to complete – even if it is adequate (which it is not) – is not prompt.

(b) The Transition Period is **necessarily** inadequate compensation. [redacted]

(c) The Respondent itself acknowledged that the Transition Period would not fully compensate the Claimant, noting (for example) that it gives plant operators the opportunity only to "*recover (a major part of) their investments* […]".[720] Indeed, "*in the Government's view, it is not necessary for the operators to recover their investments in full in this Transition Period*".[721] [redacted]

[717] **CL-0052**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 127 (emphasis added).

[718] *See* ¶ 395 *et seq.* above.

[redacted]

[720] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9.

[721] **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, p. 9 (emphasis added).

[redacted]

(d) The conversion of MPP3 to biomass post-2030 is not viable. This was the conclusion of Frontier Economics in October 2019, as discussed above,[723] [redacted] Thus, MPP3 will be shut down at the end of 2029.

443. The Respondent's actions in respect to the (older) coal plant Hemweg 8 (operated by Vattenfall) further confirm that the Respondent understands that: (i) it must pay full compensation for the shutdown of MPP3; and (ii) if the Transition Period is inadequate, then further compensation must be provided. The Final Explanatory Memorandum states as follows:

> "As mentioned above, the Hemweg plant will not be given any transition period and the prohibition will take effect for this plant on 1 January 2020. As a result, the operator of the Hemweg plant will not receive any compensation in kind. Particularly in view of the short period until the prohibition is proposed to take effect for this plant, the operator of the Hemweg plant will be offered compensation for losses based on the fair balance principle. The losses that the operator of the Hemweg plant will suffer from not being offered a transition period like the other plants will be eligible for compensation. My Ministry will consult with the operator of this plant in order to determine the amount of the compensation for losses in accordance with the legal frameworks".[725]

444. Likewise, the Respondent's actions with respect to the 35% cap also confirm that it understands that it must pay full compensation for imposing severe restrictions on MPP3. There, the government has made provision for compensation through an *ex ante* mechanism[726] on the basis that the cap "*constitutes an interference with the property right*".[727] This contrasts starkly to the Coal Ban Act where *no* financial compensation mechanism exists. In a letter from the then-Minister of Economic Affairs and Climate Policy in May 2021, Minister van't Wout explained:

> "Disadvantage compensation is compensation for disproportionate damage caused by lawful government action. In order to determine disadvantage compensation, there

[redacted]

723 *See* ¶ 287 *et seq.* above.

[redacted]

725 **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 18 March 2019, p. 10.

726 *See* Section 3.8 above.

727 **C-0201**, Parliamentary documents 2020-2021, 35 668, No. 44, Letter from the Minister of Economic Affairs and Climate Policy regarding Amendment of the Law on prohibition of coal in electricity production, 17 May 2021, p. 3.

> must be a causal link between the damage and the measure taken by the government. This damage is not part of the normal business risk and the company is disproportionately affected outside of its own fault".[728]

445. The same may be said as the case for the Coal Ban Act: there exists such a causal link, and the damage cannot be said to be part of "*normal business risk*" in light of the repeated and consistent encouragement by the Dutch Government for the Claimants to invest in a new coal-fired power plant. Both the Coal Ban Act and the 35% cap are mechanisms by which the Respondent has forced Uniper to provide emissions reductions, yet the Respondent is paying compensation for one but not the other.

446. The Minister then attempted to distinguish compensation for damages for disadvantage in the regulation of property from compensation for expropriation on the basis that the latter involves an "*unlawful act or the removal of property and the resulting damage is* fully *reimbursed*".[729] This is an even stronger affirmation that, as regards the Coal Ban Act (where an indirect expropriation has occurred), persons affected must be *fully* compensated

447. In April 2022, the Minister for Climate and Energy likewise characterised the compensation provision as offsetting the disadvantages of the 35% Production Cap:

> "Disadvantage compensation is compensation for disproportionate damage caused by lawful government action. When determining the disadvantage compensation, the starting point in European and national law is that the compensation must be as objective as possible in relation to the actual loss suffered […]
>
> The Decree on disadvantage compensation production limitation coal plants is a system with which it is ensured that the calculation of the amount of the disadvantage compensation is as objective as possible in line with the actual disadvantage suffered".[730]

448. The Respondent has no answer as to why it considers it so important to compensate coal-fired power plants such as MPP3 for a temporary cap on production – yet it provides no compensation for the fact that post-2030, MPP3 will not be able to fire coal *at all* (that is, for the remaining 16 years at least that the Claimants expected it would fire coal).

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[728] **C-0201**, Parliamentary documents 2020-2021, 35 668, No. 44, Letter from the Minister of Economic Affairs and Climate Policy regarding Amendment of the Law on prohibition of coal in electricity production, 17 May 2021, p. 1.

[729] **C-0201**, Parliamentary documents 2020-2021, 35 668, No. 44, Letter from the Minister of Economic Affairs and Climate Policy regarding Amendment of the Law on prohibition of coal in electricity production, 17 May 2021, p. 2 (emphasis in original).

[730] **C-0212**, Letter from the Minister for Climate and Energy to the Lower House regarding Compensation to coal plants for limiting their production, 28 April 2022, p. 2.

5.4 The Respondent breached Article 10(1) of the ECT by failing to accord the Claimants' investments fair and equitable treatment

449. The Respondent violated Article 10(1) of the ECT by failing to accord the Claimants' Investments FET. Article 10(1) of the ECT provides as follows:

> "Each 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 or Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party".[731]

450. As Prof. Schreuer explains, the FET standard is an open-textured guarantee designed to "*allow*[] *for independent and objective third-party determination of* [a respondent's] *behaviour on the basis of a flexible standard*".[732] The non-cumulative criteria against which tribunals have typically evaluated a State's conduct in applying the FET standard include:

(a) whether the host State breached the investor's reasonable and legitimate expectations when the investment was made;

(b) whether the State failed to provide a stable and predictable legal and business framework in relation to the investment;

(c) whether the State's conduct was transparent; and

(d) whether the State acted in an unreasonable or disproportionate manner.

451. The *Tecmed* tribunal described the content of the FET standard in the following terms:

> "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments,

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731 **CL-0001**, ECT, Article 10(1).

732 **CL-0122**, Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 The Journal of World Investment & Trade 357, June 2005, p. 365. *See also* **CL-0066**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 610 ("[t]*he concept 'fair and equitable treatment' is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interest. It is therefore a concept that depends on the interpretation of specific facts for its content. The precise scope of the standard is therefore left to the determination of the Tribunal which will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable*") (internal quotation marks and citations omitted).

> as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle".[733]

452. Similarly, investment tribunals constituted under the ECT have consistently held that the FET standard contained in Article 10(1) provides robust protection to investors and their investments. The *Masdar v. Spain* ECT tribunal had:

> "no doubt that the FET constitutes a standard the purpose of which is to ensure that an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification; and (ii) the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor".[734]

453. The *Electrabel v. Hungary* ECT tribunal also stated that:

> "the obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment".[735]

454. Whether a state has failed to accord FET is an objective question. Thus, a respondent state can breach the FET standard even if it enacted measures affecting an investor's investments with

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[733] **CL-0053**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154.

[734] **CL-0092**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 483.

[735] **CL-0075**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.74. *See also* **CL-0107**, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, ¶ 443 ("[a]*s various tribunals have pointed out, FET is made up of several components, including the duty to create stable conditions, to act in a transparent and consistent manner (with due process and in good faith), and to refrain from taking arbitrary or discriminatory measures or from frustrating investors' legitimate expectations regarding the legal, regulatory, and legislative framework and adversely affecting their investments. The next question is the scope of the host state's obligations in respect of these aspects of FET, and in the context of the unique facts and circumstances of this case*").

"*the best of intentions*".[736] In other words, no malice is required in order to establish a breach of the FET standard.

455. The FET standard contained in the ECT applies with special rigour. The European Energy Charter includes among its fundamental objectives the establishment of a "*stable, transparent legal framework for foreign investments*".[737] This objective finds its expression in the first sentence of Article 10(1) of the ECT, which obligates Contracting Parties, including the Netherlands, to "*encourage and create stable, equitable, favourable and transparent conditions*" for Investors of other Contracting Parties.[738] The provision is of particular importance in the energy sector where – as here – a substantial amount of capital was committed at the outset of the Claimants' investment in MPP3 in order to generate a long-term return. The ECT must therefore be viewed differently from other investment treaties that are not sector-specific and often do not contain the express obligations included in the first sentence of Article 10(1).

456. As relevant here, the Respondent's enactment of the Coal Ban Act breached the FET standard in three ways:

(a) it is an unreasonable and disproportionate measure (sub-section (a));

(b) it frustrated the Claimants' legitimate, investment-backed expectations (sub-section (b)); and

(c) it fundamentally and radically altered the regulatory regime against which the Claimants made their investment in MPP3 (sub-section (c)).

(a) The Coal Ban Act was an unreasonable and disproportionate measure

457. The Coal Ban Act was an unreasonable and disproportionate measure adopted in violation of the FET standard. Investment treaty tribunals have held that "[t]*here are two elements that require to be analysed to determine whether a state's act was unreasonable: the existence of a*

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[736] *See* **CL-0064**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 304 ("[e]*ven assuming that the Respondent was guided by the best of intentions, what the Tribunal has no reason to doubt, there has here been an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established by Article II(2)(a) of the Treaty has not been observed, to the detriment of the Claimant's rights*"); **CL-0062**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 268 (same).

[737] **CL-0001**, European Energy Charter, 17 December 1991, Title II.

[738] **CL-0001**, ECT, Article 10(1).

rational policy; and the reasonableness of the act of the state in relation to the policy".[739] In this context, the *AES v. Hungary* tribunal explained that:

> "A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.
>
> Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented".[740]

458. ECT tribunals have also consistently emphasised that, in assessing the reasonableness of a state measure, it should be asked whether the impugned measure was proportionate to the policy objective sought to be furthered.[741] This involves asking whether the measure was closely adjusted to the attainment of its legitimate objective.[742] Or, as the tribunal in *Micula v Romania* put it:

> "[…] for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's

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739 **CL-0073**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 10.3.7; **CL-0103**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, ¶ 644 ("[a]*s to unreasonableness, the Tribunal agrees with the Parties that, consistent with the* AES v Hungary *case, it needs to consider two factors, i.e. 'the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy'*"); **CL-0099**, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 323 (observing that the issue is whether "[a] *regulatory measure* [is] *rationally connected to a legitimate State objective*").

740 **CL-0073**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 10.3.8-10.3.9. *See also* **CL-0103**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, ¶ 644 (adopting the *AES v. Hungary* tribunal's formulation); **CL-0099**, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 323.

741 *See e.g.*, **CL-0106**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, ¶ 414 ("[t]*he requirement of proportionality is part of the reasonableness standard and of the fair and equitable treatment standard*"); **CCL-0105,** *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, ¶ 574 ("[a] *measure must be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved, and a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate with regard to the affected rights and interests*").

742 *See* **CL-0106**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, ¶ 415 ("[a] *measure must be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved, and involves a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate with regard to the affected rights and interests*").

acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors".[743]

459. Similarly, in assessing the reasonableness of Kazakhstan's revisions to its "Law on the Electric Power Industry", the *AES v. Kazakhstan* tribunal found that the respondent "*failed to establish that it could not have prevented* [a] *collapse through other, less intrusive, measures*".[744] The tribunal concluded that the measures "*cannot be considered proportional or reasonable and are therefore in breach of the FET standard afforded under Article 10(1) of the ECT*".[745]

460. The purpose of the Coal Ban Act is, as explained in the Explanatory Memorandums, to reduce CO_2 emissions.[746]

461. The Claimants do not dispute that the policy goal of reducing carbon emissions is a legitimate one. The question for the Tribunal, therefore, is whether the Coal Ban Act was the least intrusive measure available to the Respondent in order to achieve that goal and whether the Respondent took its measures with "*due regard for the consequences imposed on*" the Claimants.[747] The Respondent failed to do so.

462. The Claimants have already discussed in detail above that the Coal Ban Act was not properly tailored to its proffered purpose and also how the Respondent ignored the evidence presented by Uniper that MPP3 could not be converted to biomass or any other alternative fuel. Those submissions are not repeated again here, but the Tribunal is directed to review paragraphs 414 to 436 above. In summary:

(a) The Coal Ban Act imposes the entirety of its carbon emissions reductions on operators of coal-fired power plants. [redacted] The Coal Ban Act also ignored the potential for carbon leakage which

[743] **CL-0079**, *Ioan Micula et al. v. The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 525 (emphasis added).

[744] **CL-0078**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 407.

[745] **CL-0078**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 409.

[746] *See* **C-0031**, Legislative Proposal Containing a Ban on Producing Electricity Using Coal, 19 May 2018, p. 5 ("*The aim of the legislative proposal is to significantly reduce the Dutch CO_2-emissions. The Rutte III government in its agreement committed to measures that add up to a reduction in CO_2 emissions of 49% in 2030 (compared to 1990). The realisation of CO_2-reduction at Dutch coal-fired power plants significantly contributes to this*"); and **C-0035**, Parliamentary documents 2018-2019, 35 167, No. 3, Explanatory Memorandum, 19 March 2019, pp. 1-2.

[747] **CL-0079**, *Ioan Micula et al. v. The Republic of Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 525.

significantly reduced the effectiveness of the measure. Thus, the Respondent had available to it alternative and less intrusive measures that would have in fact been more efficient for meeting its policy goal of reducing emissions, but it instead chose the politically expedient option of banning the use of coal entirely for the production of electricity.

(b) Further, the Respondent ignored the fact that MPP3 was already taking significant steps to reduce its CO_2 emissions so that they would be equal to (or perhaps even lower than) gas-fired power plants. There was, therefore, no rational basis for banning the use of coal entirely in circumstances where gas-fired power plants will continue to operate and emit at similar CO_2 emissions levels.

(c) The Coal Ban Act is designed to provide operators such as the Claimants with a Transition Period – yet no assessment was made by the Respondent as to the adequacy of that time period, nor to whether it was possible for plants such as MPP3 to be converted to generating electricity from an alternative fuel type. It was therefore entirely arbitrary. The Claimants provided the Respondent with the analysis prepared by Frontier Economics which showed that it is not economically viable for MPP3 to convert into plant that burns biomass or other alternative fuels. The Respondent was aware of that fact before the Coal Ban Act was enacted, but it simply buried its head in the sand. Indeed, the Respondent did not carry out any analysis as to whether the conversion of plants such as MPP3 was, in fact, possible; it was mere speculation.

(d) Similarly, the Respondent assumed as part of the Coal Ban Act that the Transition Period was adequate compensation as it would allow MPP3 to earn back a major part of its investment (and the rest presumably could be earned back after conversion to a biomass plant). That assumption was also plainly wrong and the Respondent once again undertook no studies or analysis to confirm if this was the case. [redacted]

(e) The Coal Ban Act is a blunt instrument that fails to take into account the fact that MPP3 is a highly efficient plant and, from the outset, was designed to mitigate CO_2 emissions. Relatedly, the coal phase out imposes a disproportionately high cost on coal-fired power stations compared to gas-fired power stations – which, unlike the EU ETS, distorts the level playing field. Gas-fired power plants may in fact benefit from the phase out of coal, and no account is made of the fact that not all gas-fired power stations in the Netherlands are new and efficient.

463. The Respondent itself has confirmed the unreasonableness of the Coal Ban Act when one compares the approach taken with respect to the 35% Production Cap. As noted above, there the Respondent has made provision for compensation through an *ex ante* mechanism[748] on the basis that the cap "*constitutes an interference with the property right*".[749] This contrasts starkly to the Coal Ban Act where *no* proper compensation mechanism exists, demonstrating the unreasonableness of the disputed measure.[750]

(b) The Coal Ban Act's passage frustrated the Claimants' legitimate investment-backed expectations

464. The passage of the Coal Ban Act also frustrated the Claimants' legitimate, investment-backed expectations formed at the time of making their investments in the Netherlands.

465. It is a well-established principle of investment law that treatment by the host state should not "*affect the basic expectations that were taken into account by the foreign investor to make the investment*".[751] It follows that a central feature of a state's obligation to accord FET to the investments of investors in their territory is the general principle that the state must not frustrate an investor's legitimate expectations, on which that investor relied at the time of making the investment.[752] As particularly relevant here, "*the ECT expressly recognizes an obligation on the part of the host state to provide for legal stability*", as part of the host state's obligation to respect an investor's legitimate expectations.[753]

466. Numerous investment tribunals have confirmed that the FET standard prohibits a state from frustrating an investor's legitimate expectations relied upon by the investor at the time the investment was made.[754] An investor's legitimate expectations can arise from representations

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748 *See* Section 3.8 above.

749 **C-0201**, Parliamentary documents 2020-2021, 35 668, No. 44, Letter from the Minister of Economic Affairs and Climate Policy regarding Amendment of the Law on prohibition of coal in electricity production, 17 May 2021, p. 3.

750 *See* ¶¶ 444 to 448 above.

751 **CL-0053**, *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154.

752 *See, e.g.*, **CL-0056**, *Saluka Investments B. V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 302; **CL-0053**, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, ICSID Case No. ARB (AF)/00/2, 29 May 2003, ¶ 154; **CL-0051**, *CME Czech Republic B. V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 611 (finding a breach of the FET standard because of the host State's "*evisceration of the arrangements in reliance upon which the foreign investor was induced to invest*").

753 **CL-0133**, R. Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12 Santa Clara Journal of International Law 7, 17 January 2014, p. 23.

754 *See e.g.*, **CL-0087**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 247-249; **CL-0085**, *Crystallex*

or assurances, either explicit or implicit, made by the host State at the time of the investment,[755] as well as from the legal and business framework existing at the time of its investment.[756] Tribunals have considered that the type of expectations that are protected include those formed on the basis of "*the law and the totality of the business environment at the time of the investment*".[757]

International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 546-547; **CL-0081**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570; **CL-0079**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667; **CL-0072**, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, ¶¶ 222-226; **CL-0070**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264; **CL-0068**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶¶ 173-175; **CL-0056**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶¶ 301-302; **CL-0060**, *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, ¶¶ 127-128; **CL-0057**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372; **CL-0053**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154.

[755] *See e.g.*, **CL-0079**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 669 (noting that for a legitimate expectation to exist, "[t]*here must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit*"); **CL-0081**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 571 ("[t]*he investor's legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State*"); **CL-0091**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, ¶ 650 ("[a] *multitude of arbitral tribunals have established that undertakings or assurances can be explicit or implicit*").

[756] *See e.g.*, **CL-0087**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 248 ("[a]*n investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor*"); **CL-0072**, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, ¶ 226 (reviewing earlier decisions of tribunals and finding "*that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result* […] *the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably*" (emphasis in original)); **CL-0079**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 674 (finding Romania had made a promise or assurance, through its legal framework and issued certificates, which gave rise to the investors' legitimate expectation); **CL-0068**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 179 (finding breach of FET where Argentina "*fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them*"). *See also* **CL-0056**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 301; **CL-0065**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 298, 307, 310; **CL-0060**, *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, ¶ 133.

[757] **CL-0056**, *Saluka Investments B. V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 301. *See also* **CL-0079**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 669 (finding legitimate expectations based on "*a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit*").

467. It is not the Claimants' position that the obligation to accord FET as contained within the ECT means that a host state must freeze its regulatory regime. It does mean, however, that by entering into the ECT, the Respondent accepted limitations on its power to alter the regulatory framework applicable to the Claimants' investments in a way that undermines an investor's legitimate expectations without triggering the requirement to pay compensation.[758] As a result, the Respondent cannot, consistent with its ECT obligations, dispense unilaterally with the legal framework it initially put in place to attract investments in coal-fired power (and on the strength of which the Claimants made their investments in the Netherlands) without paying compensation. Instead, the Respondent is required to honour the legitimate expectations of, and meet its commitments with respect to, investors such as the Claimants.[759]

468. The *ADC v. Hungary* tribunal summarised the position at international law as follows:

> "The Tribunal cannot accept the Respondent's position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.
>
> The related point made by the Respondent that by investing in a host State, the investor assumes the 'risk' associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise".[760]

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758 *See e.g.*, **CL-0096**, *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶ 388.

759 **CL-0056**, *Saluka Investments B. V. (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, 17 March 2006, ¶¶ 305, 307 (noting that while no investor "*may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged*," the investor can still properly expect that—subsequent to the investment—the host State "*implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination*"); **CL-0075**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.77 ("*the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment*").

760 **CL-0059**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶¶ 423-424.

469. Indeed, the essence of the legitimate expectations principle is protection from State action that threatens the stability of the legal and business framework upon which an investor reasonably relied when making its investment. In *CMS v. Argentina*, the tribunal held that "[t]*here can be no doubt* […] *that a stable legal and business environment is an essential element of fair and equitable treatment*".[761]

470. As explained above, the provision of a stable, transparent and predictable legal and business environment is of particular importance in the energy sector where – as here – substantial capital was committed at the outset with a view towards generating a long-term return. Indeed, the European Energy Charter includes among its fundamental objectives the establishment of a "*stable, transparent legal framework for foreign investments*", which the ECT protects through its Article 10(1).[762]

471. Investment tribunals have consistently found that legitimate expectations can be formed when a state makes representations in order to induce an investor's investment. For example, the ECT tribunal in *Watkins v. Spain* considered that the claimant could derive legitimate expectations from "*representations made by Spain, which encouraged the investment*".[763] It proceeded to find that "*Spain made various representations which included the promotion of advertising materials*" in order to attract foreign investment, such that the claimants were "*entitled to rely on these expectations which were reasonable*".[764]

472. Similarly, the *Sempra v. Argentina* tribunal emphasised that "[a] *foreign investment must be treated in a manner such that it will not affect the basic expectations that were taken into account by foreign investor to make the investment*," and that "[t]*his requirement becomes*

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761 **CL-0055**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 274. In *CMS*, the State had provided certain guarantees for tariffs of natural gas, including in legislation, regulations and under the terms of a license. These tariff guarantees were first suspended by emergency legislation and later terminated by a series of further enactments. The tribunal found that "[t]*he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made*" and thus resulted in an "*objective breach*" of the FET standard. *See* ¶¶ 266-275, 281.

762 **CL-0001**, European Energy Charter, Title II(4) (Promotion and protection of investments). In turn, Article 10(1) provides that the Contracting Parties shall "*encourage and create stable, equitable favourable and transparent conditions for Investors*" (**CL-0001**, ECT, Article 10(1)).

763 **CL-0104**, *Watkins Holdings S.à r.l, Watkins (Ned) B.V., Watkins Spain, S.L., Redpier, S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L. and Parque Eólico La Boga S.L. v. The Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶ 517.

764 **CL-0104,** *Watkins Holdings S.à r.l, Watkins (Ned) B.V., Watkins Spain, S.L., Redpier, S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L. and Parque Eólico La Boga S.L. v. The Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶ 532.

particularly meaningful when the investment has been attracted and induced by means of assurances and representations".[765]

473. [redacted]

474. The Claimants' expectations were objectively reasonable in light of the Respondent's conduct, including *inter alia*:

(a) The Respondent actively and repeatedly encouraged investment in coal-fired power stations in order to address its concerns regarding security of supply and high energy prices in the Netherlands;[768]

(b) The Respondent recognised the decades-long lifetime of coal-fired power plants such as MPP3 and it confirmed that coal-fired power stations would be part of the energy mix until at least 2050;[769] and

(c) The Respondent granted MPP3 was granted all necessary permits, including the Environmental Permit which recognised the CO_2-emissions-limiting features that MPP3 utilised in line with the DCMR Framework.[770]

(d) The Respondent repeatedly confirmed that CO_2 emissions were to be governed by the EU ETS and not at the national level.[771]

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[765] **CL-0064**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 298.

[redacted]

[redacted]

[768] *See* Section 3.3; in particular, sub-sections 3.3(a) and 3.3(b).

[769] *See* ¶¶ 106, 116, 215, 231 and 241.

[770] *See* ¶¶ 24 and 78.

[771] *See e.g.*, ¶¶ 86, 90, 113, 123 and 214.

475. The Claimants' expectations have been frustrated by the Coal Ban Act. Indeed, MPP3 will now be shut down entirely by 2030 as a result of the Respondent's fundamental changes to its legal framework and its departure from the level-playing field established by the EU ETS.

(c) The Coal Ban Act fundamentally and radically altered the existing regulatory regime

476. The Respondent's Coal Ban Act fundamentally and radically altered the existing regulatory regime applicable to the Claimants in breach of FET. As discussed, Article 10(1) of the ECT expressly obliges its Contracting Parties to "*encourage and create stable, equitable, favourable and transparent conditions*" for Investors of other Contracting Parties.[772] Professor Dolzer has noted that "[t]*he ECT expressly recognizes an obligation on the part of the host state to provide for legal stability*".[773] Although some ECT tribunals have debated as to whether the obligation to provide stability is a standalone obligation under Article 10 or comprises part of FET, there is no doubt that the obligation exists.

477. In this context, investment tribunals applying Article 10(1) of the ECT have consistently held that state measures that fundamentally and radically alter the regulatory regime relied on by an investor in making its investment are a breach of FET.[774]

478. Unlike in the context of an investor's legitimate expectations, this obligation to provide legal stability is not contingent on a state providing assurances to an investor. As the *Silver Ridge v. Italy* tribunal recently observed, "*even in the absence of specific commitments, the fair and*

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772 **CL-0001**, ECT, Article 10(1) (emphasis added).

773 **CL-0133**, R. Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12 Santa Clara Journal of International Law 7, 17 January 2014, p. 23.

774 *See, e.g.*, **CL-0091**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, ¶ 654 ("[t]*he FET standard does, nevertheless, protect investors from a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation*"); **CL-0093**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 532 ("*a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes*"); **CL-0094**, *Foresight et al. v. Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018, ¶ 359 ("*the Tribunal agrees with the* Eiser v. Spain *and* Novenergia v. Spain *tribunals that the FET standard in the ECT protects investors from a radical or fundamental change in the legal or regulatory framework under which the investments are made*"); **CL-0101**, *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 368 ("[a]*lthough a host state enjoys the sovereignty to modify its laws and regulations, its liability towards investors may be engaged (again, depending on the facts) if, in doing so, it fundamentally or radically alters a regulatory framework upon which the investors legitimately relied to invest*").

equitable treatment standard protects foreign investors from fundamental or radical modifications to the legal framework in which they made their investment".[775]

479. To reiterate, it is not the Claimants' position that the obligation to accord "*stable*" conditions in the ECT means that a host state must completely freeze its regulatory regime. However, by entering into the ECT, the Respondent knowingly accepted limitations on its regulatory power, in particular (and among others), its ability to fundamentally alter the regulatory framework applicable to existing investments, or subject those investments to significant periods of legal uncertainty and eventually to condemn them to long-term instability without the payment of prompt and adequate compensation.[776] The *Infrastructure Services v. Spain* tribunal put the point as follows:

> "In sum, considering the context, object and purpose of the ECT, the Tribunal concludes that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes".[777]

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[775] **CL-0108**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶ 410. *See also* **CL-0103**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, ¶ 462 ("*the absence of a specific commitment does not mean that the fact that an investor has invested by reference to a given tariff regime ceases to be a relevant factor in applying the FET standard under Article 10(1)*"); **CL-0101**, *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 368 ("*the Tribunal is of the view that an expectation of consistency, i.e., that the regulatory framework will not be radically or fundamentally changed may arise even in the absence of such a specific commitment* […]"); **CL-0094**, *Foresight et al. v. Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018, ¶¶ 356, 359 ("[i]*n the absence of a specific commitment to the investor by the host State, the investor cannot expect the legal or regulatory framework to be frozen. In such circumstances, a host State has space to reasonably modify the legal or regulatory framework without breaching an investor's legitimate expectations of stability* […] *However, the Tribunal agrees with the* […] Novenergia v. Spain *tribuna*[l] *that the FET standard in the ECT protects investors from a radical or fundamental change in the legal or regulatory framework under which the investments are made*").

[776] *See, e.g.*, **CL-0091,** *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, ¶ 654 ("[a]*s expressed in* Micula v. Romania*, 'the fair and equitable treatment standard does not give a right to regulatory stability per se', rather, a state has a right to regulate and investors must expect that legislation may and will change. The FET standard does, nevertheless, protect investors from a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation*").

[777] **CL-0093,** *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 532.

480. The Coal Ban Act did represent a radical departure from the Respondent's previous policy. As detailed in Sections 3.3 and 3.6 above, successive Dutch Governments consistently, publicly and expressly encouraged and supported the Claimants' investment in MPP3. This was confirmed in meetings between the Ministry of Economic Affairs and the Claimants and also through numerous official policy documents and public statements. Moreover, the Respondent facilitated the Consortium Agreement in which it was known, from the outset, that the end-goal was the construction new coal-fired power plant. The Respondent also demonstrated support through accelerating the permit process and intervening to ensure the expansion of the necessary grid infrastructure.

481. After [redacted] the support for new coal – and MPP3 specifically – continued. Yet, less than two years after MPP3 officially opened, it was formally announced in the Coalition Agreement that as of 2030, the plant would no longer be able to generate electricity using coal.

5.5 The Respondent breached Article 10(1) of the ECT by impairing through unreasonable measures, the "*management, maintenance, use, enjoyment or disposal*" of the Claimants' investments

482. Article 10(1) of the ECT (third sentence) prohibits the Netherlands from impairing investments by "*unreasonable or discriminatory measures*". This provision prohibits impairment measures that are either unreasonable *or* discriminatory. Thus, it would suffice to show that the Coal Ban Act is either unreasonable or discriminatory in order to establish a breach of Article 10(1).[778] A breach of this obligation results in a simultaneous breach of the FET standard, as no action of the host State can be fair or equitable if it is unreasonable or discriminatory.[779]

483. The *Saluka* case describes the standard of reasonableness in this context as requiring that the "*State's conduct bears a reasonable relationship to some rational policy*".[780] In other words, a rational policy alone does not justify a regulation under Article 10(1). What is crucial is the

[778] Arbitral tribunals have generally taken the view that the disjunctive "or" in the standard has a normative function and that, accordingly, in order to establish a breach of the standard, it is sufficient for the claimant to demonstrate that one of the two legs of the standard has been breached, i.e., that unreasonable measures have been taken or that the claimant has been discriminated against: *see* **CL-0134**, V. Heiskanen, *Arbitrary and Unreasonable Measures*, in A. Reinisch (ed) Standards of Investment Protection (Oxford University Press, 2009), p. 87. **CL-0093**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 437.

[779] *See, e.g.*, **CL-0070**, *Joseph Charles Lemire v. The Republic of Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 259.

[780] **CL-0056**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 460.

way in which the policy is implemented in each particular case. In *AES Summit v. Hungary*, the tribunal put it thus:

> "There are two elements that require to be analysed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.
>
> A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.
>
> Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented"[781] (emphasis added).

484. Thus, as with the FET standard described above, the Netherlands must show that its measures were: (i) taken in pursuance of a rational policy goal; and (ii) carefully tailored to achieve that goal.

485. Paragraphs 414 to 434 above in relation to expropriation, and Section 5.4(a) above in relation to the FET standard, set out in detail why the Coal Ban Act is unreasonable, disproportionate and not based on sound analysis and those facts will not be repeated here. In short, whilst the Coal Ban Act pursues a rational policy objective, it is unreasonable and disproportionate, not based any sound analysis.

486. It cannot be disputed that the Coal Ban Act has "impaired" the Claimants' investment in MPP3. [redacted] Therefore, in addition to a violation of the FET standard under the ECT, the Netherlands' enactment of the Coal Ban Act also violates the obligation under Article 10(1) of the ECT to refrain from impairing the Claimants' investments through unreasonable measures.

6. REPARATION

487. This section explains that this Tribunal is empowered to award compensation to the Claimants for the Respondent's forced closure of MPP3 and corresponding breach of the ECT

[781] **CL-0073**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 10.3.7-10.3.9. *See also* **CL-0079**, *Ioan Micula et al. v. Romania [I]*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 525 ("*for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors*").

[redacted]

(Section 6.1). [redacted]

488. [redacted]

6.1 The Tribunal's power to award compensation

489. The Tribunal is empowered to award compensation to the Claimants under the ECT. Article 26 of the ECT empowers the Tribunal to render an award against the Respondent ordering it to "*pay monetary damages in lieu of any other remedy granted*".[785] Given the Respondent's breaches of the ECT detailed above, the Claimants are entitled to damages calculated in accordance with principles of customary international law, as codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**Articles on State Responsibility**").[786]

490. As an initial matter, the Claimants submit that the same juridical measure of damages applies both to the Respondent's breach of Article 13 of the ECT (*Expropriation*) and Article 10(1) of the ECT (*Fair and Equitable Treatment*). Article 13(1) of the ECT states that compensation for expropriation "*shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment*". But ECT tribunals have consistently found that this measure of compensation for expropriation does not apply where—as here—a respondent state's expropriation was unlawful.

[redacted]

[redacted]

785 **CL-0001**, Energy Charter Treaty, 17 December 1994, Article 26(8).

786 *See* **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 31. *See also* **CL-0082**, *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 682-84; **CL-0083**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 327-328; **CL-0061,** *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 350-352; **CL-0081**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 678-679, 681; **CL-0051**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 617-618; **CL-0087,** *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-425.

491. The tribunal in *Hulley Enterprises v. Russia* put the point as follows:

> "The text of Article 13, after specifying the four conditions that must be met to render an expropriation lawful, provides that for 'such' an expropriation, that is, for a lawful expropriation, damages shall be calculated as of the date of the taking. *A contrario*, the text of Article 13 may be read to import that damages for an unlawful taking need not be calculated as of the date of taking. It follows that this Tribunal is not required by the terms of the ECT to assess damages as of the time of the expropriation. Moreover, conflating the measure of damages for a lawful taking with the measure of damages for an unlawful taking is, on its face, an unconvincing option".[787]

492. Accordingly, where a respondent state's expropriation is unlawful, arbitral tribunals default to the general compensatory standard under international law.[788] Indeed, this was the approach of the ECT tribunal in *Kardassopoulous v. Georgia*.[789] Where appropriate, this standard allows for "*a higher rate of recovery than that prescribed* [...] *for lawful expropriations*".[790] That said, in this case, the Claimants have proposed a valuation date of October 2017, which is the point in time when the Respondent publicly announced its intention to implement the Coal Ban Act.

493. It follows that, in assessing the Claimants' damages, this Tribunal should have regard to basic principles governing reparations under customary international law. In the *Case Concerning the Factory at Chorzów*, the Permanent Court of International Justice articulated the basic purpose and principle of reparations as follows:

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[787] **CL-0080,** *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, ¶ 1765. *See also* **CL-0071,** *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, ¶ 514 ("*[i]n certain circumstances full reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award*").

[788] *See* **CL-0059**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 483 ("[*s*]*ince the BIT does not contain any lex specialis rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case*"); **CL-0046**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited*, Case No. 56, Award No. 310-56-3, 14 July 1987, 15 IRAN – U.S. C.T.R. 189, 246, ¶ 189 ("*Article IV, paragraph 2 of the Treaty determines the conditions that an expropriation should meet in order to be in conformity with its terms and therefore defines the standard of compensation only in case of a lawful expropriation. A nationalization in breach of the Treaty, on the other hand, would render applicable the rules relating to State responsibility, which are to be found not in the Treaty but in customary law*").

[789] *See* **CL-0071**, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, ¶ 502 ("*The Parties appear to agree that in the event of a lawful expropriation, the applicable standard of compensation is* 'prompt, adequate and effective compensation'*, which shall amount to the FMV of the investment as of the date immediately before the expropriation became known so as to affect the value of the investment. However, consistent with the Tribunal's findings in respect of liability, we are no longer in the realm of a lawful expropriation*").

[790] **CL-0063,** *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.5. *See also* **CL-0074**, *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶ 307 ("[*i*]*llegality of expropriation may also influence other discretionary choices made by arbitrators in the assessment of compensation*").

> "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law".[791]

494. The authoritative standard set out in *Chorzów*[792] has since been codified in the Articles on State Responsibility.[793] Specifically, Article 31(1) of the Articles on State Responsibility states that "[t]*he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*".[794] Article 31(2) defines "*injury*" to include "*any damage, whether material or moral, caused by the internationally wrongful act of a State*".[795]

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[791] **CL-0043**, *The Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47 (emphases added).

[792] *See* **CL-0085,** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 847-848 (describing *Chorzów* as "[a]*n authoritative description of the principle of full reparation*"); **CL-0059**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶¶ 484-494 (reviewing decisions of international courts and tribunals to find that "*there can be no doubt about the present vitality of the* Chorzów Factory *principle*" as the governing standard); **CL-0063**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.2.4-8.2.5 (quoting *Chorzów* and observing that "[t]*here can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice*"). *See also* **CL-0054,** *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) I.C.J. REPORTS 136, 198, ¶ 152; **CL-0044**, *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company (CALASIATIC) v. The Government of the Libyan Arab Republic*, Award on the Merits, 17 I.L.M. 1, 19 January 1977, 32, ¶ 97; **CL-0087**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-425; **CL-0055**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 400; **CL-0046**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited*, Case No. 56, Award No. 310-56-3, 14 July 1987, 15 IRAN – U.S. C.T.R. 189, 246, ¶ 191.

[793] *See* **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 31. *See also* **CL-0082**, *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 682-684; **CL-0083,** *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 327-328; **CL-0061**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 350-352; **CL-0081**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 678-679, 681; **CL-0051,** *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 617-618; **CL-0087**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-425.

[794] **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 31(1).

[795] **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 31(2).

495. The Articles on State Responsibility identify three forms of reparations: (i) restitution; (ii) compensation; and (iii) satisfaction.[796] Restitution is the primary remedy, which requires the responsible state "*to re-establish the situation which existed before the wrongful act was committed*".[797] However, where restitution is materially impossible, Article 36 explains that "[t]*he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*".[798]

496. Compensation must "*cover any financially assessable damage including loss of profits insofar as it is established*".[799] As one tribunal described:

> "It is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient **to compensate the affected party fully and to eliminate the consequences of the state's action**" (emphasis added).[800]

497. In other words, the "*full reparation*" standard under customary international law requires that the Claimants be placed in the same economic position they would have been in had the Respondent's wrongful acts not occurred and "*wip*[ing] *out all the consequences of the illegal act*"[801]—*i.e.*, the "*but-for*" scenario.[802] To determine the extent of the damage to the Claimants' Investments caused by the Respondent's breaches, the Tribunal's mandate is to assess the value

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796 *See* **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 34.

797 **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 35.

798 **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Arts. 35(a) and 36(1). *See also* **CL-0071,** *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, ¶ 512 ("*In the present case it is clear that restitution is no longer possible. The Tribunal must therefore determine the amount of compensation owing to Mr. Kardassopoulos*").

799 **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 36(2).

800 **CL-0063**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.7 (emphasis added).

801 **CL-0043**, *The Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

802 *See* **CL-0089**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 358 ("*[i]n the Tribunal's view, when quantifying the value of the expropriated assets, the Tribunal must proceed on the basis that Burlington is entitled to exercise all of the contractual rights it would have had but for the expropriation, and that Ecuador would have complied with its contractual obligations going forward. In other words, when building the counterfactual scenario in which the expropriation has not occurred, the Tribunal must assume that Burlington holds the rights that made up the expropriated assets and that those rights are respected*").

of the Investments in the *but-for* world—the world that "*in all probability*"[803] would have existed without the Respondent's breaches—and compare that value with what occurred in the actual world.

498. As will be discussed below, as a result of the Respondent's breaches of the ECT, the Respondent left the Claimants with an Investment that was without any value. Specifically, the Respondent's breaches caused the complete evisceration of the Claimants' investments. The reparation to which the Claimants are entitled, therefore, should represent the value of those investments in the *but-for* world.

[redacted]

499. [redacted]

500. [redacted]

501. Both methodologies have frequently have been adopted by investment treaty tribunals. The choice is often driven by the particular circumstances of the case and a determination by the Tribunal as to which method is most suitable in light of the facts. In this case, the Claimants have presented both methodologies to the Tribunal as alternatives. Notably, both methodologies confirm that Uniper has suffered substantial losses as a result of the Coal Ban Act.

502. [redacted]

[803] **CL-0043**, *The Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

[redacted]

503. [redacted]

504. [redacted]

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[redacted]

[809] **C-0189,** European Commission, Netherlands Prohibition of coal for the production of electricity in the Netherlands, State Aid SA.54537 (2020/NN), 3 June 2019, ¶18(a), p. 12.

[redacted]

509. [redacted]

510. [redacted]

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[redacted]

[redacted]

512. [redacted]

513. [redacted]

[redacted]

817 *See, e.g.*, **CL-0100,** *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1799-1800; **CL-0065**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 454-455; **CL-0084**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶¶ 553-554.

818 *See* **CL-0118,** Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Art. 38; **CL-0100,** *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1800; **CL-0084,** *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶¶ 539, 547.

[redacted]

[redacted]

821 *See* **CL-0100,** *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1808-1809; **CL-0057**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 440; **CL-0104,** *Watkins Holdings S.à r.l, Watkins (Ned) B.V., Watkins Spain, S.L., Redpier, S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L. and Parque Eólico La Boga S.L. v. The Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, ¶¶ 747-749; **CL-0084**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 555.

[redacted]

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519. [redacted]

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521. [redacted]

7. THE RESPONDENT'S BREACH OF ARTICLES 26 AND 41 OF THE ICSID CONVENTION

522. As described in the Claimants' Request for Provisional Measures dated 3 December 2021, in May 2021, the Respondent commenced a collateral attack on this Tribunal's jurisdiction in domestic courts in Germany against the First Claimant, Uniper SE, by commencing the German Proceedings [redacted] The circumstances surrounding and following the Respondent's initiation of the German Proceedings are well known to the Tribunal. The Claimants do not repeat them here.

523. In its Procedural Order No. 2, the Tribunal "*declare*[d] *that pursuant to Article 26 and 41 of the ICSID Convention it has exclusive competence and authority to hear and resolve any objections to its jurisdiction*', and "*express*[ed] *grave concern*" about the Respondent's initiation and maintenance of the German Proceedings.[838] But the Tribunal stopped short of ordering the Respondent to discontinue the German Proceedings on faith on certain "*express and binding representations*" made by the Respondent about the nature of the German Proceedings and its intentions in respect of those proceedings.[839]

524. Notwithstanding, the Tribunal "*consider*[ed] *that the Claimants' Request raises very serious issues*".[840] In particular, the Tribunal found that "*the German Proceedings implicate Articles 26 and 41 of the ICSID Convention and appear to be a collateral attack on this Tribunal's jurisdiction*", such that "*it was entirely reasonable for the Claimants to be concerned that the Respondent through the German Proceedings sought to prevent the Claimants from bringing their claims before this Tribunal*".[841]

[redacted]

838 Procedural Order No. 2, ¶¶ 108(a)-(c).

839 Procedural Order No. 2, ¶ 93.

840 Procedural Order No. 2, ¶ 78.

841 Procedural Order No. 2, ¶ 78.

525. The Tribunal added that it had "*serious doubts that it is appropriate*" for the Respondent to maintain the German Proceedings and recommended that the Respondent "*reconsider whether it is necessary or appropriate to continue the German Proceedings*".[842]

526. The Respondent has since stated that it will not withdraw the German Proceedings.[843] This is notwithstanding that it has never been able to articulate what purpose the German Proceedings serve, given that the Claimants do not dispute that the CJEU has determined that—as a matter of EU law—Article 26 of the ECT should be interpreted so as to not apply to intra-EU disputes.

527. In its Procedural Order No. 2, the Tribunal "*defer*[red] *for later consideration the question of whether the Respondent's initiation and continuation of the German Proceedings was a breach of Articles 26 and 41 of the ICSID Convention*".[844] This was premised on the Tribunal's finding that "*the Claimants' request that the Tribunal declare that the Respondent has breached Articles 26 and 41 of the ICSID Convention is a request for final relief and therefore not appropriate for the Tribunal to grant in a provisional measures application*".[845]

528. Accordingly, for good order, the Claimants reiterate in this submission their request that the Tribunal declare that the Respondent's initiation and maintenance of the German Proceedings is a breach of Articles 26 and 41 of the ICSID Convention.

8. PRAYER FOR RELIEF

529. The Claimants respectfully request that the Tribunal enter an award in their favour and against the Respondent as follows:

(a) Declaring that the Respondent has violated Articles 13(1) and 10(1) of the ECT, as well as its obligations under customary international law;

(b) Requiring that the Respondent make full reparation to the Claimants for the injury or losses to their investments arising out of the Respondent's violations of the ECT and international law, by way of full compensation in an amount currently in excess of [redacted]

842 Procedural Order No. 2, ¶ 108(h).

843 [redacted]

844 Procedural Order No. 2, ¶ 95.

845 Procedural Order No. 2, ¶ 77.

(c) Ordering the Respondent to pay all costs incurred in connection with this arbitration, including the Claimants' legal fees and expenses, witness, expert and consultant fees and expenses, administrative fees and expenses of ICSID and the fees and expenses of the Tribunal;

(d) Ordering interest, including post-award interest compounded monthly, on all sums awarded until full payment thereof;

(e) Declaring that the Respondent's initiation and continued participation in the German Proceedings is a breach of Articles 26 and 41 of the ICSID Convention; and

(f) Granting such other and further relief as the Tribunal may deem appropriate.

530. The Claimants reserve the right to supplement these prayers for relief in light of further actions which may be taken by the Respondent.

Respectfully submitted,

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Dated: 20 May 2022