

Aan de leden van de Eerste Kamer  
Der Staten-Generaal  
Postbus 20017  
2500 EA den Haag

Date 21 November 2019  
Subject Uniper ISDS threat regarding the 'wet verbod op kolen bij energieproductie 35.167'

We welcome the proposed law banning the burning of coal for power generation ('**Law 35.167**') which is a central part of the Dutch government's plans to meet its climate goals. In early September 2019, Uniper Benelux CEO Hans Schoenmakers threatened<sup>1</sup> to sue the Dutch state under the Energy Charter Treaty ('**ECT**') if the Eerste Kamer adopts the law.

Uniper's potential claim concerns the 1.7 billion euros investment the company made in 2007 in the Maasvlakte Power Plant 3 ('**MPP3**'). The plant started operating in 2016. The new law will prohibit MPP3 to burn coal by 2030. The Uniper CEO claimed the company is "*de facto* expropriated without compensation". In addition, Uniper's main shareholder Fortum stated that "[t]he International Energy Charter Treaty protects the rights of companies in the event of unilateral regulatory changes".<sup>2</sup>

The ECT is an investment treaty that permits foreign investors to directly claim compensation for government action that may affect their investment before private international tribunals - the Investor-State Dispute Settlement ('**ISDS**') mechanism. The very public way in which both Uniper and Fortum made these statements before the measure is even passed show the potential for a chill on legitimate climate protection measures.

The sweeping allegations made by Uniper may seemingly have a basis in the ECT, but they are fundamentally flawed. The legal opinion attached to this letter demonstrates how the Uniper's claims are legally unfounded.

First, Law 35.167 does not constitute expropriation, neither *de jure* or *de facto*: The law is a legitimate exercise of the regulatory powers of a State. In addition, the evolving legal framework around large combustion plants and other developments in the European electricity market will make coal generated electricity unprofitable long before 2030.

Second, the argument that Uniper based their investments on legitimate expectations created by the Dutch state is false. Coal plant operators in 2007 knew perfectly well that in order to be allowed continuous operation of their plants, significant CO<sub>2</sub> reductions would need to be achieved. These reductions were initially expected to be achieved through the application of

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<sup>1</sup> De Telegraaf, Claim om kolenverbod voor Staat, 5 September 2019  
<https://www.telegraaf.nl/financieel/1134267479/claim-om-kolenverbod-voor-staat> Studio Energie, Hans Schoenmakers (Uniper) over waarom en hoe Nederland drie nieuwe kolencentrales kreeg, 10 September 2019,  
<https://soundcloud.com/studio-energie/afl-63-hans-schoenmakers-uniper-over-waarom-en-hoe-nederland-drie-nieuw-kolencentrales-kreeg>.

<sup>2</sup> De Telegraaf, *op. cit.*; Fortum, "7 things to know about Fortum's Uniper acquisition", 16 October 2019,  
<https://www.fortum.com/about-us/blog/forenergy-blog/7-things-to-know-about-fortums-uniper-acquisition>


CCS technology. A joint CCS development program was then established, but Uniper and Engie pulled out of the program in 2017.<sup>3</sup>

Uniper's litigation threat illustrates how fossil fuel companies may seek to use ISDS to shift their losses from stranded assets onto states and seek compensation for poor business decisions. It also shows the detrimental impact ISDS could have on climate policy if States bend to these threats.

Considering the above, we urge the Eerste kamer not be influenced by the unfounded threats of Uniper - or other investors - in deciding to adopt Law 35.167.

Kind regards,

James Thornton, CEO ClientEarth



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<sup>3</sup>Port of Rotterdam, 'Road project to be cancelled' 29 June 2017 <https://www.portofrotterdam.com/en/news-and-press-releases/road-project-to-be-cancelled-ccs-to-continue>

## Annex: Legal opinion on Uniper’s legally misconceived ISDS threat to Dutch Coal Phase-Out

### Contents

Summary .....	2
Introduction .....	4
Section A. The Energy Charter Treaty .....	4
Section B. Competence of arbitral tribunals in intra-EU disputes based on the ECT .....	4
Section C. Potential basis for claims under the ECT .....	5
1. Expropriation and compensation .....	6
1.1 State “police powers” .....	7
1.2 The effect on the investment .....	11
1.3 Conclusion .....	14
2. Fair and equitable treatment .....	14

## Summary

### ***Allegations by Uniper and Fortum***

Uniper and its main shareholder Fortum have argued that Uniper was being “*de facto expropriated without compensation*” and that “[t]he *International Energy Charter Treaty protects the rights of companies in the event of unilateral regulatory changes*”.<sup>1</sup> These are implicit references to Article 13 of the Energy Charter Treaty as concerns expropriation, and to Article 10.1 of the same treaty as concerns the alleged protection against regulatory changes. While the sweeping allegations made by Uniper may seemingly have a basis in the Energy Charter Treaty, they are fundamentally flawed. The present legal opinion demonstrates how the Uniper's potential claim is legally unfounded.

### ***Expropriation and compensation***

As concerns expropriation, it is an accepted principle of international law that the exercise by a State of its regulatory powers does not qualify as expropriation if the regulations pursue a legitimate purpose, are non-discriminatory, adopted in accordance with due process and are proportionate to the aim pursued. In such case, no compensation is required. The proposed Dutch law prohibiting the use of coal for electricity production satisfies all these conditions. As a consequence, Uniper is not entitled to compensation under the Energy Charter Treaty.

Where, in exceptional circumstances, a regulatory measure does not qualify as a lawful exercise of state police powers (e.g. because it is discriminatory or manifestly arbitrary), there is still an *additional* condition to be met for the measure to qualify as an expropriation. That additional condition is concerned with the effect of the measure on the foreign investor's investment. The required effect has been described differently by different tribunals and may also vary depending on the text of the applicable treaty. There is, however, general agreement that the threshold is a high one, meaning that the effect must be very severe for a measure to qualify as an expropriation.

Again, this is not the case, in particular for the following reasons. *First*, it is highly unlikely that Uniper's power plant MPP3 would have any remaining economic value and would be profitable post-2030 in the light of evolving market conditions and the poor investment decision made in 2007-2008. *Second*, Uniper can avoid closing MPP3 by converting the plant and switching to other energy sources. Studies show how European utilities that have focused heavily on renewables have outperformed the most carbon-intensive utilities, in terms of earnings and share price.

Investment treaties are not intended to protect poor business decisions resulting from the inability to appropriately predict and plan for risk.

### ***Fair and Equitable Treatment, Legitimate Expectations and Legal Stability***

The requirements of legitimate expectations and legal stability as manifestations of the standard of fair and equitable treatment do not deprive host States of their right to adapt their legal system to changing circumstances. Rather, regulatory changes only violate the fair and equitable treatment standard in very specific and exceptional circumstances. The standard is thus violated

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<sup>1</sup> De Telegraaf, “Claim om kolenverbod voor Staat”, 5 September 2019, <https://www.telegraaf.nl/financieel/1134267479/claim-om-kolenverbod-voor-staat>; Studio Energie, “Hans Schoenmakers (Uniper) over waarom en hoe Nederland drie nieuwe kolencentrales kreeg”, 10 September 2019, <https://soundcloud.com/studio-energie/afl-63-hans-schoenmakers-uniper-over-waarom-en-hoe-nederland-drie-nieuw-kolencentrales-kreeg>; Fortum, “7 things to know about Fortum's UNiper acquisition”, 16 October 2019, <https://www.fortum.com/about-us/blog/forenergy-blog/7-things-to-know-about-fortums-uniper-acquisition>.

where specific promises were made, or where the host State has enacted legislation containing guarantees for investors, and where such promises or guarantees are subsequently withdrawn in an arbitrary manner.

In the present instance, Uniper concedes that no promises have been made and no guarantees have been given. The only legitimate expectation Uniper could have was that of progressively more onerous and stringent climate regulation in light of the broad scientific consensus around climate change and the UNFCCC. The Netherlands' international climate obligations indeed form part of the legal and regulatory framework in which Uniper sought to, and is required to, operate its coal-fired power plant.

Moreover, coal plant operators in the Netherlands in 2007 knew perfectly well that in order to be allowed continuous operation of their plants, significant CO<sub>2</sub> reductions would need to be achieved. These reductions were initially expected to be achieved through the application of carbon capture storage technology; however, Uniper and Engie pulled out of the carbon capture storage development program in 2017.

## Introduction

The proposed Dutch law banning the burning of coal for power generation ('Dutch coal phase-out law') is a central part of the Dutch government's plans to meet its climate goals. In early September 2019, Uniper Benelux CEO Hans Schoenmakers threatened to sue the Dutch state under the Energy Charter Treaty ('ECT') if the Dutch Senate (*Eerste Kamer*) adopts the law.

Uniper's potential claim concerns the 1.7 billion euros investment the company made in 2007 in the Maasvlakte Power Plant 3 ('MPP3'). The plant started operating in 2016. The new law will prohibit MPP3 to burn coal by 2030.

The Uniper CEO claimed the company is "*de facto expropriated without compensation*" by the new Dutch law. In addition, Uniper's main shareholder Fortum stated that "[t]he *International Energy Charter Treaty protects the rights of companies in the event of unilateral regulatory changes*". These allegations are legally fundamentally flawed.

This legal opinion will first briefly explain the investment protection regime under the ECT (section A), and the implications of the *Achmea* ruling on the competence of arbitral tribunals in intra-EU disputes based on the ECT (section B). It will then set out why Uniper's claim against the Dutch coal phase-out law is legally misconceived (section C).<sup>2</sup>

## Section A. The Energy Charter Treaty

1. The Energy Charter Treaty ('ECT') is a multilateral investment treaty which protects investments in the supply of energy. It entered into force in 1994 and has today 53 parties, including the European Union ('EU') itself and its Member States (except Italy).
2. Like other bilateral and regional investment treaties, the ECT was initially designed to ensure stability in the investment environment and broadly defined investor protection standards such as the right for "Fair and Equitable Treatment", protection against non-discrimination and guarantees for compensation in case of expropriation.
3. If a foreign company considers that a domestic measure negatively affects its investment, it can use investor-State dispute settlement ('ISDS') provisions to challenge States in relation to those measures before an arbitration tribunal, without the obligation to first exhaust local remedies. Arbitration tribunals are composed of three private lawyers designated by the parties to the dispute, and investors with successful claims are typically awarded compensation, which can include 'lost future profits'. ISDS provisions do not permit states to bring claims against investors, nor permit third parties whose rights may be impacted by the outcome of a dispute to meaningfully intervene in the proceedings.

## Section B. Competence of arbitral tribunals in intra-EU disputes based on the ECT

4. While it is not the intention of the present opinion to enter into a detailed assessment of the competence of arbitral tribunals in intra-EU disputes, it is worth recalling that the *Achmea* ruling

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<sup>2</sup> The present legal opinion was written on the basis of publicly available sources and does not constitute legal, professional, financial or investment advice. Whilst all information contained in the report is obtained from sources believed to be accurate and reliable, ClientEarth does not accept responsibility for any errors, omissions, inaccurate information or any decisions made in reliance on this report.

casts serious doubts on the compatibility with EU law, of the ECT ISDS provisions applied in intra-EU disputes.<sup>3</sup>

5. In the Political Declaration of January 2019, the Netherlands, together with 21 other Member States (including Germany, but not Finland, Luxembourg, Malta, Slovenia and Sweden) agree on the consequences of the *Achmea* ruling for intra-EU bilateral investment agreements. Investors in the EU can no longer rely on ISDS clauses in intra-EU investment agreements because they are incompatible with EU law. It also indicated that the ISDS clause of the ECT cannot be applied between Member States as this would be incompatible with the Treaties.<sup>4</sup>
6. Following this Political Declaration, most Member States agreed to sign on to a plurilateral treaty terminating intra-EU bilateral investment agreements, and indicated the need to further discuss “*whether any additional steps are necessary to draw all the consequences from the Achmea judgment in relation to the intra-EU application of the Energy Charter Treaty.*”<sup>5</sup>
7. Arbitration tribunals may thus lack competence to hear intra-EU disputes based on the ECT as a result of the *Achmea* ruling. This means that if arbitration tribunals refuse to decline jurisdiction and accept to hear such disputes, any decision requiring governments to pay compensation to aggrieved investors may not be enforceable.

## Section C. Potential basis for claims under the ECT

8. In addition to the lack of competence of arbitration tribunals over the potential dispute, the sweeping allegations made by Uniper and Fortum are fundamentally flawed and legally misconceived. These claims are not sustainable on the merits.
9. Uniper and its main shareholder Fortum have argued that Uniper was being “*de facto expropriated without compensation*” and that “[t]he *International Energy Charter Treaty protects the rights of companies in the event of unilateral regulatory changes*”.<sup>6</sup> These are implicit references to Article 13 of the Energy Charter Treaty as concerns expropriation, and to Article 10.1 of the same treaty as concerns the alleged protection against regulatory changes. The scope and limits of these core notions of the ECT are set out hereinafter on the basis of a number of important arbitral decisions.
10. Prominent among these decisions are the arbitral award in *Philip Morris v. Uruguay*<sup>7</sup> and *El Paso v. Argentina*<sup>8</sup>. The tribunals in both these cases were composed of highly reputed international arbitrators, including judges in the International Court of Justice and the European Court of Human Rights and reputed university professors.
11. The *Philip Morris* Tribunal ruled on – and rejected – Philip Morris’s claim that new regulations on the plain packaging of cigarettes amounted to an indirect expropriation and a violation of

<sup>3</sup> Case C-284/16, *Slovak Republic v. Achmea*, EU:C:2018:158 (6 Mar. 2018) (*Achmea*); See also ClientEarth and the Centre for International Environmental Law, “Implications of *Achmea*: How the *Achmea* Judgment Impacts Investment Agreements with Non-EU Countries”, 19 April 2018, <https://www.documents.clientearth.org/wp-content/uploads/library/2018-04-19-implications-of-achmea-judgment-coll-en.pdf>.

<sup>4</sup> Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en).

<sup>5</sup> European Commission, EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties [https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en).

<sup>6</sup> De Telegraaf, op. cit.; Studio Energie, op. cit.; Fortum, “op. cit.”

<sup>7</sup> *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, award, 8 July 2016.

<sup>8</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, award, 31 October 2011.



alleged international protection against regulatory changes as part of the fair and equitable treatment standard. This decision is of particular interest because the tribunal rejected the Claimants' position on the basis, amongst others, that the measures had been implemented for the purpose of protecting public health and that the connection between that objective and the utility of the measures was recognized notably by the WHO. Similarly, climate measures in response to scientific knowledge and international obligations fall squarely within governments' right to regulate.

12. The *El Paso* award was concerned with Argentina's handling of its financial crisis. It is well-known for bringing a very detailed description and analysis of the international law on indirect expropriation and fair and equitable treatment, based on a thorough analysis of the existing case law.
13. Quotes from these awards will be complemented with further references to awards specifically rendered on the basis of the ECT, including the many awards rendered against Spain. The awards against Spain are concerned with the Spanish regulations aimed at incentivizing investment in renewable energy, of which some original features were subsequently retracted. This factual situation is totally different from the one of Uniper, which was never offered any guarantee, but the awards nevertheless contain useful statements of relevant legal standards.
14. This memorandum also analyses the relevant provisions of the ECT in accordance with the principles of treaty interpretation embodied in Article 31 ff. of the Vienna Convention on the Law of Treaties, which include the taking into account of other relevant norms of international law applicable between the parties. In the present context, it is crucial to read and interpret ECT obligations in line with and supportive of the aims of the United Nations Framework Convention on Climate Change ('UNFCCC'), in order to comply with States' international obligations under the Paris Agreement.<sup>9</sup>

## 1. Expropriation and compensation

15. Between May and June 2018, the draft law was subject to an online public consultation.<sup>10</sup> In its submission on the occasion of this consultation, Uniper already made implicit reference to ECT Article 13 on expropriation.<sup>11</sup> In a recent interview with De Telegraaf in September 2019, Uniper CEO Mr. Schoenmakers stated that the energy firm was being "de facto expropriated without compensation" by the Government of the Netherlands because of its new coal phase-out policy.
16. ECT Article 13 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: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.*"
17. ECT Article 13 not only deals with 'expropriation', which is the taking of property by the State, but also with "*measures having effect equivalent to*" expropriation or so-called 'indirect expropriation'. This raises the issue of the application of Article 13 to regulatory measures that

<sup>9</sup> See below, in particular §§26 ff.

<sup>10</sup> Online consultation on the coal phase-out law, <https://www.internetconsultatie.nl/kolencentrales/reacties>.

<sup>11</sup> Uniper written submission to the online consultation on the coal phase-out law, 15 June 2018, <https://www.internetconsultatie.nl/kolencentrales/reactie/b94b88ee-8f41-4d1a-8fdb-09f3d5f7afd8>.



affect a foreign investment. This is the issue of 'regulatory expropriations' and their status under international law.

18. It is generally accepted today that a State's good faith exercise of regulatory powers in the general interest does not qualify as expropriation. This is the so-called "police powers doctrine" (addressed in section 1.1. below). In addition, even where a regulatory measure exceptionally cannot be justified pursuant to the police powers doctrine, for instance because it is discriminatory, it still does not qualify as an expropriation unless a second condition is satisfied, namely that the measure must all but destroy the economic value of the investment (addressed in section 1.2. below). In substance, it is only in exceptional circumstances that a non-discriminatory regulation pursuing a public interest can be qualified as an expropriation because it appears to have a manifestly excessive impact in the light of the aim pursued.<sup>12</sup>

## 1.1 State "police powers"

19. **Principle and Conditions** – According to the OECD, "[i]t is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required."<sup>13</sup>
20. In *Philip Morris v. Uruguay*, the Tribunal recognized and applied this principle in holding that irrespective of their effect on the Claimants' investment, the measures taken by Uruguay (legislation imposing plain packaging of cigarettes) qualified as lawful because they were "a valid exercise of the State's police powers".<sup>14</sup> The *Philip Morris v. Uruguay* Tribunal further considered that "in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate".<sup>15</sup>
21. In *El Paso v. Argentina*, the Tribunal likewise considered on the basis of an extensive analysis of the case law that "a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process", as well as proportionate to the need being addressed.<sup>16</sup>
22. The conditions set out by the OECD and the case law for a legislative measure to qualify as non-expropriatory are manifestly satisfied with respect to the proposed coal phase out legislation.
23. **Legitimate purpose** – First, the proposed legislation constitutes a measure designed to protect legitimate public interests.
24. Generally speaking, measures aimed at the protection of public health and the environment are archetypical of the protection of the general interest.

<sup>12</sup> Given that the potential claim is based on international investment law, the scope of expropriation and compensation under domestic law is excluded from the scope of this opinion.

<sup>13</sup> OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, OECD Working Papers on International Investment, 2004/4, p. 5, n. 10. Emphasis added. Available on the OECD website: [https://www.oecd.org/daf/inv/investment-policy/WP-2004\\_4.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf).

<sup>14</sup> *Philip Morris v. Uruguay*, §287 ff.

<sup>15</sup> Op. cit., §305.

<sup>16</sup> *El Paso v. Argentina*, §240 and §242, quoting from LG&E.

25. The climate emergency is the most imminent and most serious threat to humanity. Climate change has potentially devastating consequences and demands urgent and drastic action at international, regional and national level. Climate measures, both to adapt to and to mitigate climate impacts, are thus in the interest of the general public. They are indeed in the vital interest of the country and of humanity and the planet as a whole. For the Netherlands, the sea level rise which is a consequence of climate change, is also a major threat to the country's territory and the security of its inhabitants.<sup>17</sup>
26. The international scientific community has long recognised the need to reduce greenhouse gases emissions to address climate change. In 1992, the United Nations Framework Convention on Climate Change ('UNFCCC') was adopted with the objective to "*stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*".<sup>18</sup> It was complemented by the adoption of the Kyoto Protocol in December 1997, which commits its Parties by setting internationally binding emission reduction targets. The Kyoto Protocol was based on the scientific evidence that global warming is occurring and that it is extremely likely that human-made CO<sub>2</sub> emissions have predominantly caused it. The European Union and its Member States are members to the Kyoto Protocol. This means the Netherlands has to reduce emissions of greenhouse gases as agreed in the Kyoto Protocol.
27. On 12 December 2015, given the emergency of the climate issue, 197 parties (196 States and the European Union) recognized the need to take urgent and significant action by signing the Paris Agreement under the UNFCCC. Under this agreement, parties promised to take urgent climate action to hold global warming well below 2 degrees Celsius (°C) and to make efforts to limit the temperature increase to 1.5°C.<sup>19</sup> In the Climate Act, the Netherlands translated that in an objective of 95% less CO<sub>2</sub> emissions in 2050 and 49% reduction in 2030.
28. At the national level, these vital public welfare issues have also been recognized, among others, in the 2015 Urgenda Climate Case which established the State's legal duty to prevent dangerous climate change. On 24 June 2015, the District Court of The Hague ruled the State must cut its greenhouse gas emissions by at least 25% by the end of 2020, compared to 1990 levels. The ruling required the government to immediately take more effective action on climate change.<sup>20</sup> While the Dutch government appealed the judgement before the *Hoge Raad* and the final ruling is expected on 20 December 2019, the *Procureur-Generaal bij de Hoge Raad* has already opined in favour of the Urgenda ruling.
29. The proposed legislation is thus in manifest compliance with the requirement of a good faith public interest purpose.
30. **Non-Discrimination** – Second, the proposed law is non-discriminatory.
31. In *El Paso v. Argentina*, the Tribunal first considered that for discrimination to exist, a differential treatment must be applied to investors who are in similar situations.<sup>21</sup> Further, the

17 KMNl Nieuwsbericht, "Extreme zeespiegelstijging in de 21e eeuw", <https://www.knmi.nl/over-het-knmi/nieuws/extreme-zeespiegelstijging-in-de-21e-eeuw>.

18 Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC), [https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf).

19 Article 2(1)(a) of the Paris Agreement to the UNFCCC (Paris Agreement), December 12, 2015, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7d&chapter=27&lang=\\_en&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7d&chapter=27&lang=_en&clang=_en).

20 Urgenda Foundation v. State of The Netherlands (Urgenda case), C/09/456689 / HA ZA 13-1396, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7145>; See also <https://www.urgenda.nl/en/themas/climate-case/climate-case-explained/>.

21 *El Paso v. Argentina*, op. cit., § 305.

protection against discrimination in international investment law is against discrimination of *foreign* investors as such,<sup>22</sup> either *de jure* or *de facto* where a measure formally applies to investors of all nationalities but in fact favours local operators over foreign investors.<sup>23</sup> In that respect, the *El Paso* Tribunal considered that “a differential treatment based on the existence of a different factual and legal situation does not breach the BIT’s standard” and approved of the reasoning in the case of *Enron* “which found no discrimination between the different sectors of the economy, although they were indeed treated differently, as there was no “capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors”.<sup>24</sup>

32. In the ECT case of *RREEF v. Spain*, the arbitral tribunal took the same approach to define non-discrimination, albeit in the context of the fair and equitable treatment standard. It considered that the Claimant was entitled to non-discrimination “whether as part of the FET or because the express mention in Article 10(1) ECT”, adding that the principle was clarified by ECT Article 10(1) which states that foreign investors may not be discriminated against, either as compared to national investors or as against the investors of any other third State.<sup>25</sup> It quoted with approval from *Parkerings v. Lithuania* according to which “to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases”.<sup>26</sup> The principle of non-discrimination “requires a State to treat equally what is equal but it does not require a State to treat equally that which is different”.<sup>27</sup>
33. In the present instance, the proposed law entirely satisfies these criteria. It applies to all coal-fired power plants, and to all national and all foreign investors. While it applies to coal-fired plants only, this restriction is objectively justified by the high pollutive nature of coal-fired plants, in particular regarding carbon emissions, as compared to energy production through other means (see below, §38 ff).
34. **Due Process** – Third, the legislative proposal is taken in conformity with due process and rules of good faith.
35. The due process requirement is generally regarded as setting a standard of international law, as illustrated by *El Paso v. Argentina* where the Tribunal referred to arbitrariness as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”,<sup>28</sup> and to “a lack of due process leading to an outcome which offends a sense of judicial propriety”.<sup>29</sup>
36. This requirement is, again, fully complied with in the present instance. Not only is the legislative proposal a good faith initiative to address a generally recognized fundamental issue of general interest. In addition, the issue is being handled according to the highest standards of legislative decisions-making as embodied in the legal system of the Netherlands. There were consultations in 2018 through which Uniper was provided with the opportunity to reply and

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22 Op. cit., § 305.

23 Op. cit., § 309 ff.

24 Op. cit., § 315.

25 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, § 429.

26 Op. cit., § 430.

27 Op. cit., §431.

28 *El Paso v. Argentina*, §319.

29 Op. cit., § 357, quoting *Loewen v. United States*.

defend their case.<sup>30</sup> The law was presented to the Dutch Council of State issued a positive opinion on 19 March 2019, stating that the proposed coal phase-out was an appropriate measure.<sup>31</sup> The law will be adopted following standard parliamentary proceedings in accordance with the Dutch Constitution.

37. **Proportionality** – Fourth, the proposed coal ban for energy production is a proportionate measure for reducing CO2 emissions in order to achieve climate goals.
38. According to the expert group ClimateAnalytics, because coal is the most carbon intensive fossil fuel, global coal use in electricity generation must fall by 80% below 2010 levels by 2030 in order to meet the objectives of the Paris Agreement. Phasing it out from the electricity sector is the single most important step to achieve the emissions reductions needed to limit global warming to 1.5°C. Since most emissions from coal are in the electricity sector and technologies that can replace coal already exist, is a relatively cheap and easy option to reduce emissions. Climate Analytics research shows OECD nations should end coal use entirely by 2030, and all coal-fired power stations must be shut by 2040 at the latest.<sup>32</sup>
39. This is also recognised at the intergovernmental level. On the timetable of 2018 United Nations Intergovernmental Panel on Climate Change ('IPCC') report, there are now only 11 years left on the clock to take decisive action to completely transform our energy systems in order to avert catastrophic climate change.<sup>33</sup> By 2030, we must collectively reduce global greenhouse gas emissions by 45% and we must reach net zero by mid-century. The burning of coal for power is the most significant source of greenhouse gases and a rapid phase-out of coal is necessary to meet climate goals.
40. Likewise, the Powering Past Coal Alliance ('PPCA'), a global alliance of national and sub-national governments, businesses and organisations working to advance the transition away from unabated coal power generation, recognises that in order to achieve the Paris targets, *"shifting away from coal power generation is essential for clean air; healthy communities; sustainable economic growth; and a safe climate. (...) Our commitment to working together is informed by science-based benchmarks that show that EU and OECD countries must phase out unabated coal-fired electricity generation no later than 2030, with the rest of the world no later than 2050 to limit global warming and the impacts of climate change."*<sup>34</sup> The Netherlands, Germany, and Finland are members of the PPCA.
41. Furthermore, the proposed Dutch coal phase-out law is precisely in line with the call of investors managing over \$35 trillion, to phase out coal power in the EU by 2030.<sup>35</sup> Investors managing \$11.5 trillion have also expressly called on European power utilities, specifically including Fortum, to rapidly eliminate coal use by no later than 2030.<sup>36</sup> They also underlined that achieving Paris goals is *"vital to those with a fiduciary responsibility for other people's long-term investments"*. These shareholders include many of Uniper's and Fortum's largest

30 Online consultation on the coal phase-out law, op. cit. See also Uniper's written submission, op. cit.

31 Opinion of the Dutch Council of State on the coal phase-out law, March 2019, <https://www.raadvanstate.nl/@114491/w18-18-0317-iv/>.

32 Climate Analytics, "Coal Phase-Out", <https://climateanalytics.org/briefings/coal-phase-out/> and <https://climateanalytics.org/publications/2019/coal-phase-out-insights-from-the-ipcc-special-report-on-15c-and-global-trends-since-2015/>; See also E3G, "Accelerating Coal Phase-Out", [https://www.e3g.org/docs/Accelerating\\_Coal\\_Phase\\_Out\\_-\\_the\\_OECD\\_context\\_18\\_09\\_17.pdf](https://www.e3g.org/docs/Accelerating_Coal_Phase_Out_-_the_OECD_context_18_09_17.pdf).

33 Intergovernmental Panel on Climate Change (IPCC), 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty', 2018.

34 Powering Past Coal Alliance (PPCA), <https://poweringpastcoal.org/about>.

35 The Investor Agenda, "Briefing Paper on the 2018 Global Investor Statement to Governments on Climate Change", page 7, <https://theinvestoragenda.org/wp-content/uploads/2019/06/GISGCC-briefing-paper-FINAL.pdf>.

36 Financial Times, "Power companies must accelerate decarbonisation and support ambitious climate policy", <https://www.ft.com/content/8d80c8e4-02f7-11e9-99df-6183d3002ee1>.



shareholders. In other words, the Dutch Government is simply doing what global institutional investors are asking it to, and the law would simply force Uniper to do what global institutional investors are asking it to do anyway.

42. It follows that the ten years transition period accorded to companies under the Dutch coal phase-out legislation is the most that can be accorded within the window of 11 years left to try and avert catastrophic climate change. This suffices to establish the proportionality of the measure as indeed an essential one, if not the only possible one, to attain the essential public welfare objective.
43. The proportionality requirement is all the more clearly met as the proposed legislation does not oblige relevant undertakings to radically terminate their activities. Rather, they are required to terminate the use of coal, without prejudice to the possibility to reconvert their coal-fired plants so as to use other energy sources.
44. Importantly, the coal phase-out law is established in line with the polluter-pays principle ('PPP') as set out notably in the Treaty on the Functioning of the European Union (Article 191(2) TFEU). The PPP is the commonly accepted principle that the costs of measures to deal with pollution should be borne by those who produce it to prevent damage to human health or the environment. It was first mentioned in the recommendation of the OECD of 26th May 1972, and was one of the internationally recognised cornerstones of environment policy even before it was enshrined in the Treaty of the European Communities in 1987.
45. **Conclusion** – Considering the above, the proposed law does not qualify as an expropriation. It is a mere lawful exercise of regulatory powers. It can be lawfully enacted without any compensation being due under the ECT to Uniper.

## 1.2 The effect on the investment

46. **Principle** – Where, in exceptional circumstances, a regulatory measure does not qualify as a lawful exercise of state police powers (e.g. because it is discriminatory or manifestly arbitrary or disproportionate), there is still an *additional* condition to be met for the measure to qualify as an expropriation. That additional condition is concerned with the effect of the measure on the foreign investor's investment. The required effect has been described differently by different tribunals and may also vary depending on the text of the applicable treaty. There is, however, general agreement that the threshold is a high one, meaning that the effect must be very severe for a measure to qualify as an expropriation.
47. The *El Paso* Tribunal thus reasoned that “[i]f general regulations are unreasonable, i.e. arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investors' property rights”.<sup>37</sup> The same is true pursuant to ECT Article 13, which refers to indirect expropriation as “measures having effect equivalent to” nationalisation or expropriation. In the ECT case of *Mamidoil v. Albania*, the Tribunal thus stated that indirect expropriation covers measures depriving the investor of one or more attributes of ownership,

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<sup>37</sup> *El Paso v. Argentina*, §241.

namely the use and enjoyment of the property, control and possession, and disposal and alienation.<sup>38</sup> At least one of the essential components of property must have disappeared.<sup>39</sup>

48. According to the tribunal in *Philip Morris v. Uruguay*, for a regulatory measure to qualify as an indirect expropriation, the State's measures should “amount to a ‘substantial deprivation’ of its value, use or enjoyment”.<sup>40</sup> While “substantial deprivation” is a vague notion, there is authority for the view that for an indirect expropriation to take place, the investor must “lose control” over its investment or that its economic rights have been “paralyzed or destroyed”.<sup>41</sup> Again, awards rendered pursuant to the ECT are to the same effect. In the ECT case of *Blusun v. Italy*, the Tribunal thus referred to the “careful formulation” in *Electrabel v. Hungary*, stating that for an indirect expropriation to take place, the effect should be “materially the same as if its investment (...) had been nationalised or directly expropriated”, i.e. the investment “lost all significant economic value”.<sup>42</sup>
49. It is also clear that the prejudice suffered by the investor must have been caused by – in the terms of ECT Article 13, be the effect of – the host State measures complained of. In *Fireman's Fund v. Mexico*, the Claimant had invested in a bank which was in a fragile financial situation, and argued that Mexico had taken measures which destroyed the value of its investment. The Tribunal considered that the actual cause of the losses was that the investment had been a risky one and that the risks had materialized.<sup>43</sup> Along the same lines, it has been stated in a famous arbitral award that investment treaties “are not insurance policies against bad business judgments”.<sup>44</sup>
50. **Application** – In the present instance, there is no evidence that these conditions would be satisfied, to the contrary.
51. First, as concerns MPP3, the proposed law does not purport to terminate its coal-fired operation at birth or shortly thereafter. The law will only start kicking in 2030. By this time, Uniper says it will have written off half of the initial investment.<sup>45</sup> However, *irrespective of the proposed law*, current and future write-offs may be well below what Uniper asserts, and Uniper may never recover its initial investment.<sup>46</sup>
52. Engie has itself indicated that it recently sold four coal power plants, including its Rotterdam plant which is similar to MPP3, for around €200 million. This is an open market valuation which indicates that even after accounting for the possibility of compensation, these power plants have lost most of their value.<sup>47</sup>
53. It is therefore highly unlikely MPP3 would have any remaining economic value and would be profitable post-2030. The economic value of coal-fired plants in the Netherlands is expected

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38 Mamidoil Jetoil Greek Petroleum Products Société Anonyme SA v. Albania, ICSID case number ARB/11/24, award, 30 March 2015, §§568-570; El Paso v. Argentina, §245 ff.

39 El Paso v. Argentina, §245 ff.

40 Philip Morris v. Uruguay, §192.

41 El Paso v. Argentina, §246 ff. with further references.

42 Blusun v. Italy, §398, referring to Electrabel v. Italy. Emphasis added.

43 Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/01, award, 15 January 2008, §§185 ff., notably §186 and § 199.

44 Maffezini v. Spain, Case No. ARB/97/7, Award of 13 November 2000, 16 ICSID Rev-FILJ 248 (2001), § 64.

45 De Telegraaf, op. cit.

46 The Institute for Energy Economics and Financial Analysis (IEEFA), “The Dutch Coal Mistake”, November 2016, [http://ieefa.org/wp-content/uploads/2016/11/The-Dutch-Coal-Mistake\\_November-2016.pdf](http://ieefa.org/wp-content/uploads/2016/11/The-Dutch-Coal-Mistake_November-2016.pdf); IEEFA, “Update: RWE, Uniper risk prolonging Dutch coal mistakes via compensation strategy”, 22 March 2019, <http://ieefa.org/ieefa-update-rwe-uniper-risk-prolonging-dutch-coal-mistakes-via-compensation-strategy/>; See also Spring Associates, Greenpeace Report, <http://www.greenpeace.nl/Global/nederland/2016/Persberichten/Rapport%20waarde%20kolencentrales.pdf>.

47 Engie press release, <https://www.engie.com/en/journalists/press-releases/sell-german-dutch-coal-assets/>.

to further decrease dramatically because of the further growth of sustainable energy and the concomitant rise of CO<sub>2</sub> prices, especially with the introduction of a CO<sub>2</sub>-tax as currently proposed by the Dutch Government. As it happens, MPP3 is rapidly becoming unprofitable due to evolutions on the energy market. A recent investigation revealed that the MPP3 turned out to be loss-making in 2019: “*coal and CO<sub>2</sub> emissions were more expensive than expected, while revenues were lower*”.<sup>48</sup>

54. This is in line with a general trend. According to a recent research by Carbon Tracker, a think-tank which investigates the impact of climate change on financial markets, 76% of European coal-fired power stations are currently loss-making. Not only increasing environmental regulations, but also changes in societal norms and consumer behaviour, rising fuel costs, low gas prices, and fierce competition from renewable energies are increasingly making coal-fired power operate at a loss.<sup>49</sup>
55. As revealed by the recent investigation, Energy companies that decided in 2008 to build new power stations in the Netherlands, including Uniper, made various wrong assumptions and poor estimates. They estimated the electricity prices to be 36 to 70% more than the actual price. They acted on the baseless assumption that they would benefit from free allocation of CO<sub>2</sub> emissions allowances from the Dutch government.<sup>50</sup>
56. In light of the above, it appears that it is rather the market forces that result in a substantial deprivation of Uniper's “*value, use or enjoyment*”, than the Dutch coal phase-out law.
57. Second, as mentioned earlier, only the burning of coal will be prohibited as of 1 January 2030, meaning that Uniper could invest in alternative energy infrastructure at the site of MPP3, such as renewables, electricity storage solutions, and other low carbon technologies that will be required in a Paris compliant energy system. Uniper considers switching to other energy sources to be economically unviable. However, it does not evidence that the switch is less viable than coal-firing energy production as it evolves due to the changing market conditions.
58. In a recent study, the Institute for Energy Economics and Financial Analysis ('IEEFA') shows how European utilities that have focused heavily on renewables have outperformed the most carbon-intensive utilities, in terms of earnings and share price.<sup>51</sup>
59. It follows that the condition of a “substantial effect” is lacking in two respects: *first* because the evolving legal framework around large combustion plants and other developments in the European electricity market will make coal generated electricity unprofitable long before 2030, irrespective of the proposed law, and *second*, because the proposed law does not require Uniper to close but allows it to convert to non-coal-fired production.

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48 Follow The Money, “Uniper Kolencentrale Maasvlakte”, [https://www.ftm.nl/artikelen/uniper-kolencentrale-maasvlakte?utm\\_medium=social&utm\\_campaign=sharebuttonnietleden&utm\\_source=mail\\_](https://www.ftm.nl/artikelen/uniper-kolencentrale-maasvlakte?utm_medium=social&utm_campaign=sharebuttonnietleden&utm_source=mail_)

49 Carbon Tracker, “Apocalypse Now”, 24 October 2019, <https://www.carbontracker.org/reports/apocalypse-now/>.

50 Follow the Money, op. cit., gained insight into a confidential memo from 2006 regarding the allocation of free CO<sub>2</sub> rights to the new power plants and had access to a business case prepared in 2010 in the hands of one of the coal-fired power stations.

51 IEEFA Report, “PGE must abandon plans for a new lignite mine”, October 2019, [https://ieefa.org/wp-content/uploads/2019/10/PGE-Must-Abandon-Plans-for-a-New-Lignite-Mine\\_October-2019.pdf](https://ieefa.org/wp-content/uploads/2019/10/PGE-Must-Abandon-Plans-for-a-New-Lignite-Mine_October-2019.pdf).



## 1.3 Conclusion

60. It follows that Uniper and Fortum's claim that the proposed legislation amounts to an (indirect) expropriation warranting compensation under the ECT would not be sustained on the merits:

- The proposed legislation constitutes a good faith, non-discriminatory and proportionate exercise of the State's regulatory powers (or 'police powers') for the protection of the general interest. As such, no compensation is due under the ECT, even if the proposed legislation would totally destroy the investment. This is already the end of the matter.
- In addition, even if – for argument's sake – the proposed legislation did not qualify as a lawful exercise of regulatory powers, there would still be a second condition to be met for the measure to qualify as an indirect expropriation warranting compensation. This condition is that the measure should virtually deprive the investor of the economic value of his investment. Again, this is not the case, including for the following reasons: *first*, it is highly unlikely that MPP3 would have any remaining economic value and would be profitable post-2030 in the light of evolving market conditions and the poor investment decision made in 2007-2008; *second*, Uniper can avoid closing MPP3 by converting the plant and switching to other energy sources. In the circumstances, the proposed law is not Uniper's loss but its salvation.
- Companies are responsible for their investment decisions. As set out in numerous investment arbitrations to date, "*Bilateral Investment Treaties are not insurance policies against bad business judgments*".<sup>52</sup> The ECT is not intended to protect poor business decisions resulting from the inability to appropriately predict and plan for risk.

## 2. Fair and equitable treatment

61. Uniper's controlling shareholder Fortum reports that "*The International Energy Charter Treaty protects the rights of companies in the event of unilateral regulatory changes (...)*".<sup>53</sup> This statement implicitly refers to ECT Article 10 (1) and more specifically to the standard of fair and equitable treatment (FET).

62. **ECT Article 10 (1), Scope** – ECT Article 10 (1) reads as follows: "*Each Contracting Party shall (...) 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 (...) 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 (...)*."

63. ECT Article 10 (1) expressly consecrates the FET standard but it is not limited thereto. It also refers to "*stable, equitable, favourable and transparent conditions*" and also contains an undertaking not to "*impair by unreasonable or discriminatory measures*". However, the FET standard as it is now interpreted by international investment tribunals itself comprises references to unreasonableness, non-discrimination, stability, etc. It follows that, as stated in *Novenergia v. Spain* and many other ECT awards, the references to stable conditions, etc.,

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<sup>52</sup> Maffezini v. Spain, Case No. ARB/97/7, Award of 13 November 2000, 16 ICSID Rev-FILJ 248 (2001), para. 64.

<sup>53</sup> Fortum, "7 things to know about Fortum's UNniper acquisition", op. cit.

are not standalone obligations. They are included in the FET standard and therefore require no separate assessment.<sup>54</sup>

64. **Requirements of FET** – In *Philip Morris*, the Tribunal considered by reference to other arbitral awards that the standard of fair and equitable treatment comprises the following principles: transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith.<sup>55</sup> The Tribunal further considered that FET prohibits behaviour that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).<sup>56</sup>
65. **Legitimate Expectations, Legal Stability** – First of all, the FET is one of the most relied upon clauses in the ECT because it is also understood by ECT Tribunals<sup>57</sup> to include a protection of investors' legitimate expectations. However, the protection of legitimate expectations as manifestations of the standard of fair and equitable treatment does not deprive host States of their right to adapt their legal system to changing circumstances.
66. The *Philip Morris* Tribunal considered it was “*common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to ... adapt its legal system to changing circumstances*” and that legislative changes are not prevented “*if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment “outside of the acceptable margin of change”*.”<sup>58</sup>
67. The *Philip Morris* Tribunal referred with approval to the case of *EDF v. Romania* and similar statements in *El Paso v. Argentina*, where it was stated that “[e]xcept where specific promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework”.<sup>59</sup> The Tribunal further considered that provisions “*of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law*”.<sup>60</sup>
68. ECT cases are to the same effect. In *Blusun v. Italy*, for example, the Tribunal thus recalled by reference to the case law that “[T]ribunals have so far declined to sanctify laws as promises. For example, [...] the tribunal in *Charanne* was clear: under international law ... in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest.”<sup>61</sup>
69. Absent a specific commitment, the FET standard may protect investors against constant and chaotic changes in the legislation, but nothing more. In the ECT case of *SolEs Badajoz v. Spain*,<sup>62</sup> the Tribunal referred to a series of ECT cases (*Charanne*, *Atnin*, *Blusun*, and *Eiser*)

54 *Novenergia v. Spain*, §646, referring to *Isolux*, *Plama* and *Eiser*.

55 Op. cit., §320 ff.

56 Op. cit., §§321-323.

57 See *Blusun v. Italy* and others quoted in paragraph 61 below.

58 Op. cit., §§422-423.

59 Op. cit., §424. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, award, 31 October 2011, § 350.

60 *Philip Morris v. Uruguay*, Op. cit., §426.

61 *Blusun S.A., Jean-Pierre Lecorrier & Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, award, 27 December 2016, §367.

62 *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, award, 31 July 2019, § 318.

to the effect that investors have a legitimate expectation that legislative changes will not be made “*unreasonably, contrary to the public interest or in a disproportionate manner*” and that “*the proportionality requirement is fulfilled inasmuch as the modifications are not random or unnecessary, provided that they do not suddenly and unexpectedly remove the essential features of the regulatory framework in place*”.<sup>63</sup>

70. In the present instance, the position taken by the Dutch Government as presented by Uniper's CEO Mr. Schoenmakers does not at all meet the threshold for a specific undertaking triggering legitimate expectations.
71. According to Mr. Schoenmakers, the company agreed to build MPP3 in 2007, after several meeting and discussions with the Government.<sup>64</sup> Mr. Schoenmakers mentioned “*the receptiveness of the Dutch government for such an investment that led to the construction of this power plant*”.<sup>65</sup> In a statement concerning its acquisition of Uniper, Fortum similarly reported that “[t]he investment decision on the plant was made in 2007 with cooperation from the Netherlands government at the time.”<sup>66</sup>
72. The question is whether the statements or positions from the Dutch Government at the time have any legal effects in the light of the FET standard's requirements as set out hereabove.
73. Mr. Schoenmakers admits that there was no invitation letter (“*er is geen briefje waar het verzoek op staat*”).<sup>67</sup> Mr. Schoenmakers also acknowledged to *De Telegraaf*: “*I will not say that at that time the government explicitly asked us to build a new coal-fired power station. But those conversations have convinced us*”. Uniper thus recognizes that there was no specific request or undertaking on the part of the Netherlands. All that remains are alleged ‘general expressions’ without any legal effect.
74. **Expectations for Specific Industries** – In any event, such general expressions on the part of the Dutch government cannot have raised any expectations at the time of making the investment that the government would not take measures aimed at reducing, and eventually preventing, CO2 emissions, quite the opposite.
75. Applying the legitimate expectations test to measures aimed at combatting tobacco consumption, the *Philip Morris* Tribunal reasoned that “*Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed*” and that “*On the contrary, in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation*”.<sup>68</sup> The tribunal finally rejected the Claimants’ position on the basis, amongst others, that the measures had been implemented for the purpose of protecting public health and that the connection between that objective and the utility of the measures was recognized notably by the WHO.<sup>69</sup>

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63 Op. cit., §§316-317. See also *Blusun S.A., Jean-Pierre Lecorcier & Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, award, 27 December 2016, §319.5; *SolEs Badajoz v. Spain*, §308.

64 *De Telegraaf*, op. cit.

65 Studio Energie podcast, op. cit.

66 Fortum, “7 things to know about Fortum's Uniper acquisition”, op. cit.

67 Studio Energie, op. cit.

68 Op. cit., §429-430.

69 Op. cit., §391.

76. In the present case, there certainly was no legitimate expectation on the part of the industry that no new and more onerous and stringent regulations would be imposed on coal-fired energy plants and on CO<sub>2</sub> emissions, whether in the form of this particular measure or another.
77. As already underlined, there is a scientific consensus on climate change and the need to reduce greenhouse gases emissions since the 1990s (see above §§26-27). The EU and Netherlands' obligations under the Kyoto Protocol to reduce emissions of greenhouse gases were already well established by the time Uniper purportedly formed its expectations with respect to the construction of MPP3. For e.g., the EU emissions trading system (EU ETS), the cornerstone of the EU's strategy for fighting climate change, has been in operation since 2005.<sup>70</sup>
78. The Netherlands' international climate obligations form part of the legal and regulatory framework in which Uniper sought to, and is required to, operate its coal-fired power plant. Major fossil fuel companies have been aware of their contribution to anthropogenic climate change at the latest since the UNFCCC and Kyoto Protocol, which was a long time before Uniper's investment decision in 2007.
79. **Expectations in Specific Countries** – Along the same lines, the *El Paso v. Argentina* Tribunal referred to a previous decision in *Methanex* to the effect that “*an investor cannot pretend to have legitimate expectations of stability of environmental regulations in a State such as California, where concern for the protection of the environment and of sustainable development are high*”, noting that Methanex “*entered a political economy in which it was widely known ... that ... institutions ..., operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically sensitive electorate, continuously monitored*” the relevant issues.<sup>71</sup>
80. In the same manner, the broader socio-political context of the Netherlands is also particularly relevant for assessing the legitimacy and reasonableness of expectations of Uniper allegations. Concerns related to climate change and environmental protection have always been high in the Netherlands Uniper knew or should notably have known that the Netherlands is particularly at risk with climate change consequences. Of all environmental issues, climate change with the ensuing sea level rise poses an enormous threat to the Low Countries, that is, to the territorial integrity of the country and the physical safety of its inhabitants.<sup>72</sup>
81. Moreover, when the company made their initial investment in 2007-2008, there were already strong societal and political discussions and concerns about climate change in the Netherlands.
82. In 2005, an Energy Report from the Minister of Economic Affairs submitted to the Parliament in July 2005 stated that “*Coal plants that are currently built will have a lifetime until roughly 2050. Around this time coal plants are not allowed to emit any CO<sub>2</sub>, developers should be*

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70 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.

71 *El Paso v. Argentina*, §361.

72 KMNI Nieuwsbericht, op. cit.

*aware of this.*"<sup>73</sup> In 2009, the Dutch Parliament adopted a resolution that coal-fired power plants should reduce their emissions to the level of gas plants (meaning a 50% reduction).<sup>74</sup>

83. The Dutch Government always made clear that emission reduction measures would be necessary for the continuation of the activities of coal-fired power plants.<sup>75</sup> The Minister of Environment and the Ministry of Economic Affairs also clearly indicated in 2007 that new power plants could not expect to emit unlimited CO<sub>2</sub> during their full lifespan, and that they should anticipate limiting CO<sub>2</sub> emissions at their own expenses. The construction of new coal plants was conditioned on emissions trading with a European ceiling for the power plants, a significant use of biomass and the application of carbon capture storage (CCS).<sup>76</sup> The environmental permits of the MPP3 and other plants also included references to the government ambitions to reduce CO<sub>2</sub> emissions.<sup>77</sup>

84. The owners of the power plants promised carbon capture storage and co-firing of biomass, on the condition that they would receive billions of euros in subsidies.<sup>78</sup> The agreement between the Dutch Government, E.ON and Electrabel (now Uniper and Engie) regarding the development of CCS took shape with the ROAD Project, a joint research and development project in the Rotterdam Harbour. The project would start in 2015 – but because of the disappointing CO<sub>2</sub> prices under ETS (in 2016: 6 EUR against the projected 30 EUR) there was a huge gap in the budget. In 2016, E.ON and Electrabel had contributed 50 million each to the project, the Dutch Government contributed 150 million and the EU 180 million. The project was abandoned in 2017 by Engie and Uniper.<sup>79</sup> To fill the gap, the Dutch government explored the possibilities of CO<sub>2</sub> storage in another gasfield and request investments from Norway, Germany and France.<sup>80</sup> The Dutch government then continued the project by itself, but currently ROAD is essentially mothballed until new money is available.<sup>81</sup>

85. **Conclusion** – In light of the above, Uniper cannot rely on ECT Article 10 (1) and the fair and equitable treatment standard to claim compensation:

- It is well-established that these international norms do not guarantee that legislation will remain unchanged. They protect legitimate expectations arising from specific promises or guarantees. They protect investors against wholly arbitrary changes in the law. But beyond that, investors must accept and indeed expect that States remain free to enact and amend their regulations.
- In the present instance, no promises were made and no guarantees were given to Uniper.

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73 Cited in Legal Memo for Greenpeace, Van der Biesen Klooststra Advocaten, 29 April 2016, § 4, <http://www.greenpeace.nl/Global/nederland/image/2017/Klimaat%20en%20energie/kolenexit/Bondine%20Klooststra%20-%20Beperking%20van%20CO2-uitstoot%20van%20kolencentrales.pdf>. This legal memo is about introducing CO<sub>2</sub> reducing measures to the three new generation coal plants and whether (1) these would be compatible with ETS and EU Directive Industrial Emissions, and (2) whether the companies are entitled to compensation. Although not directly related to the Dutch coal phase-out law, it provides relevant information on the evolution of the Dutch climate policies.

74 Motion of 3 November 2009, <https://zoek.officielebekendmakingen.nl/kst-32123-XIII-38.html>

75 Legal Memo for Greenpeace, op. cit.

76 Questions asked by members of the Chamber, with answers given by the Government, 20 July 2007, <https://zoek.officielebekendmakingen.nl/ah-tk-20062007-2001.html>.

77 Legal Memo for Greenpeace, op. cit., §§ 15-18.

78 Ibid.

79 Port of Rotterdam, "ROAD project to be cancelled, CCS to continue", <https://www.portofrotterdam.com/en/news-and-press-releases/road-project-to-be-cancelled-ccs-to-continue>.

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- In addition, the changes in the law are not in any way arbitrary. To the opposite, they are in conformity with what Uniper should have expected ever since 2007.

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