IN AN ARBITRATION UNDER THE
RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS OF THE

International Centre for Settlement of Investment Disputes

Case No ARB/21/4

Washington, D.C.

between

RWE AG
RWE Eemshaven Holding II BV
(Claimants)

and

The Kingdom of the Netherlands
(Respondent)

CLAIMANTS' MEMORIAL

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18 December 2021

Luther.

Luther Rechtsanwaltsgesellschaft mbH
Gänsemarkt 45, 20354 Hamburg, Germany

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ABBREVIATIONS

CCS	Carbon capture and storage
Claimants	RWE AG and RWE Eemshaven Holding II BV
Eemshaven	Eemshaven power plant
ECT	Energy Charter Treaty, Lisbon, 17 December 1994, UNTS 2080, 95
ETS	Emission Trading System of the European Union
EU	European Union
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, D.C., 18 March 1965, UNTS 575, 159
Respondent	The Kingdom of the Netherlands
RWE	RWE group of companies
RWE AG	RWE AG
RWE Eemshaven	RWE Eemshaven Holding II BV
World Bank	International Bank for Reconstruction and Development

1 As Counsel for the German company RWE AG ("**RWE AG**") and its Dutch subsidiary RWE Eemshaven Holding II BV ("**RWE Eemshaven**" or, collectively with RWE AG, "**Claimants**") we hereby respectfully submit Claimants' Memorial in this ICSID arbitration based on the Energy Charter Treaty ("**ECT**") between Claimants and the Kingdom of the Netherlands ("**the Netherlands**" or "**Respondent**") (jointly the "**Parties**").

2 This Memorial is accompanied by documentary evidence in the form of exhibits (a list of these is attached as **Annex A**) as well as the following expert reports:

- An expert report by Thomas Haug and Bastian Gottschling of NERA Economic Consulting (collectively "NERA") on the non-viability of retrofitting and operating the Eemshaven power plant with 100 % biomass (**C-ER 1**, the **"NERA Report"**)

- A further expert report by Dan Harris and Serena Hesmondhalgh of The Brattle Group Inc (collectively "Brattle") on the quantification of damages Claimants have suffered, as **C-ER 2** (the **"Brattle Report"**);

3 The experts reports are relied upon by Claimants in their entirety and form part of this Memorial.

4 In breach of the ICSID Convention, Respondent has petitioned a German court to declare this arbitration inadmissible. A parallel litigation relating to the Eemshaven and Amer coal-fired power plants before Dutch courts is pending between different parties and based on the European Convention on Human Rights. To increase the efficiency of this arbitration, Claimants in this Memorial anticipate some of the defences raised by Respondent in the Dutch litigation. As they do not know whether and to which extent Respondent will raise those objections in this arbitration, however, Claimants reserve the right to amend and expand their respective argumentation after receipt of the Counter-Memorial.

5 This Memorial is structured as follows: after a short introduction (**A.**), we will set out the factual background of the dispute (**B.**), before explaining why the Arbitral Tribunal has jurisdiction to hear the case (**C.**) and why Respondent has breached its obligations under the Energy Charter Treaty (**D**.). The Memorial then continues with a section explaining the quantification of damages (**E.**), before explaining that Respondent, by seeking to have this arbitration declared inadmissible before German courts, violated the ICSID Convention (**F.**). It concludes with Claimants' prayers for relief (**G.**)

A. SUMMARY OF THE CASE

6 The essential facts of this case have already been set out in the Request for Arbitration (the "**Request**"). For the convenience of the Tribunal, they shall be briefly recapitulated in this summary section. The Exhibits submitted with the Request thus form a part of this Memorial.

7 This dispute relates to Claimants' investment in the 1,560 MW coal-fired power plant Eemshaven ("**Eemshaven**") – a state-of-the-art power plant. The plant is situated in the port of Eemshaven near the city of Groningen in the north of the Netherlands, near the German border:

8 At the time Claimants planned their investment, in the late 2000s, the Netherlands actively and transparently called for investments into new coal-fired power plants. Respondent sought to improve the competitiveness of Dutch businesses by reducing electricity costs. Furthermore, Respondent wanted to ensure the security of energy supply by reducing its dependence on gas imports from and through politically unstable states. In an agreement concluded in 2008, Respondent even promised not to regulate the number or type of power stations.

9 In reliance on the foregoing, Claimants invested over EUR 3 billion in the construction of Eemshaven. Throughout the construction phase, the Netherlands continued to reaffirm its need and desire for coal-fired power plants, that such long-term investments need stable investment conditions, and that CO2 emissions would be regulated exclusively by the European Union's ("**EU**") emissions trading system ("**ETS**"). Eemshaven started operation in 2015. It has valid and irrevocable permits to fire coal to generate electricity, and to emit

CO2 within the framework of the ETS. It had an expected lifetime of at least 40 years, i.e. until 2055 or beyond.

10 The dispute arises out of a radical and unexpected change of governmental policy. From 2002 to 2017, Respondent under consecutive governments had supported the construction and operation of new coal-fired power plants. The governments' undisputed policy was that, under the ETS, it would be up to market participants to choose the most effective technology for electricity generation. Respondent, these consecutive governments confirmed, would not interfere and in particular not ban certain technologies, in particular coal power plants. Even when the Dutch parliament requested the Dutch government (the "**Government**") to review a closure of coal-fired plants, the Government in early 2017 rejected this idea and considered it unnecessary to reach Respondent's climate goals. The Government also considered that forcing coal plants to only fire biomass would not work, as this very likely would never be economical without state subsidies, and as it was unclear whether sufficient biomass would be available in the future.

11 This completely changed after elections in Autumn 2017. The new Government submitted to the Dutch parliament a coal ban law (the "**Coal Ban Law**"). On its face, the bill merely banned coal but would not close down coal power plants. It provided that, after a transition period of ten years, during which Claimants should re-earn the investments into a power plant with a planned 40-year lifetime, Eemshaven could no longer fire coal. Instead, it should fire any other fuel, possibly 100 % biomass, and use the transition period to convert the plants to such fuels. When it was pointed out during the legislative procedure that these assumptions, in particular the conversion to biomass, needed further review and support, Respondent ignored that advice and enacted the Coal Ban Law without changes.

12 That Coal Ban Law entered into force with immediate effect. In substance, it amounts to a coal plant closure act without payment of any compensation. The non-financial compensation in form of the transition period of ten years is evidently insufficient. Respondent does not explain and did not even review whether and how 10 years of operation should help re-earn investments for a plant scheduled for a lifetime of 40 years. Respondent also neither reviewed in advance nor cared whether the plants could be converted to and then operated with another fuel economically. Respondent did this against better knowledge, as it itself had serious doubts about the economics of 100 % biomass operation and had received an expert opinion proving that a 100 % biomass conversion

would be uneconomical. In line with this arbitrary conduct, it repeatedly rejected any responsibility for the fate of Eemshaven after the transition period.

13 As a matter of fact, Respondent's idea that coal power plants such as Eemshaven could be converted to 100 % biomass is not realizable without state support. The marginal costs of biomass are higher than those of gas which makes it extremely unlikely that such plants could ever re-earn the necessary investments, let alone contribute to a damage mitigation. This is shown, *inter alia*, by the NERA Report.[1] Irrespective of this, however, the very same coalition agreement which was the basis for the Coal Ban Law also provided for a phase-out of the existing financial support for co-firing of biomass in coal plants. The Government then even repeatedly declared that not only the financing, but also the use of biomass as such, should be phased out. No reasonable investor will spend hundreds of millions of EUR into a technology the State explicitly opposes.

14 This dispute is neither about climate change and its consequences, nor is it about contesting the need to reduce CO2 emissions to mitigate climate change. Respondent has not directly limited or restricted the CO2 output of Eemshaven. It has not exercised its regulatory power to prescribe new emission requirements, or to withdraw the irrevocable permits which allow Eemshaven to fire coal and emit CO2. Instead of regulating the output, Respondent has decided to bypass existing permits, laws and regulations. It has exercised its sovereign power and enacted the Coal Ban Law which instead regulates the input of the plant: it prohibits Eemshaven to fire coal.

15 Although Eemshaven has been built to fulfil the need seen by the Government, although it complies with all requirements imposed by Respondent, and although it has valid and irrevocable permits to operate as a coal-fired power plant, it may not do what it was built and permitted for. The damage caused to Claimants has been calculated to exceed EUR 1.4 billion, excluding interest.

16 The issue presented to this Tribunal is thus very simple: should investors be compensated if their plants are unexpectedly shut down decades before the end of their lifetime due to a law enacted after the plant started operations?

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[1] **Exhibit CER-0001**: NERA Expert Report, Section 1.2.

17 This is not a political, but a purely legal issue. Claimants do not ask this Tribunal to create law, but merely to apply it. If a State unexpectedly forces an investor to sacrifice its lawful investment for the public benefit, then the State must pay compensation. This is a tenet not only of the Energy Charter Treaty, but of international law in general. And Respondent has not complied with that principle. It has only given back a part of what it took and denied financial compensation under a pretext id knew was neither convincing nor viable. Ultimately, this case is not even about the need to compensate Claimants, which Respondent seems to accept, but about the amount of compensation to be paid.

18 Claimants will demonstrate in this Memorial that the Netherlands violated its obligations under Articles 10 and 13 of the ECT:

- First, by unreasonably interfering with Claimants' investments. While the Coal Ban Law aims to reduce CO2-emissions, it prohibits the firing of coal irrespective of what Eemshaven might do to reduce its CO2 emissions, e.g. installing CCS-technology or co-firing more biomass to reduce to CO2 output to the level of gas plants – which are still allowed to operate. The Coal Ban Law was also enacted in complete disregard of the factual circumstances. Respondent never reviewed whether the transition period would be sufficient (which it isn't) or whether sufficient biomass would be available (which is highly unlikely). Denying Claimants financial compensation by pointing to the possibility to operate the plants with biomass – an alternative Respondent itself had dismissed as unlikely to ever work without subsidies – is even arbitrary.

- Secondly, by indirectly expropriating Claimants' investments without paying compensation. The Coal Ban makes the further operation of Eemshaven with coal impossible. The transition period granted to Eemshaven is merely non-financial compensation which allows it to operate in total only 15 out of 40 years and thus cannot and does not amount to the compensation payable under Art. 13 ECT. The plant cannot be used differently: a conversion to full biomass, as suggested by Respondent, is not economical without State support, which Respondent has cancelled;

- Thirdly, by failing to observe obligations entered into with Claimants' investments. Respondent in a 2008 agreement promised not to determine the number of coal power plants. However, it has done exactly that: by prohibiting coal as a fuel it has

prohibited coal-fired power plants altogether and determined the number of coal plants;

- Fourthly, by not treating Claimants' investments fairly and equitably. With the Coal Ban Law, Respondent enacted a fundamental and radical change of the legal framework of the investment. Respondent for over 15 years advocated the need for new coal-fired power plants and repeatedly confirmed that the CO2 emissions would be regulated by the ETS. Claimants relied on these promises. Respondent's own State Advisory Council in 2017 confirmed that the Coal Ban was not foreseeable before November 2015 – which was after Eemshaven started operations.

- Lastly, by failing to provide most constant protection and security to Claimants' investments. Respondent is obliged to provide not only physical security, but also legal security to investments. Intentionally dismantling the legal framework for an investment, such as Respondent did by enacting the Coal Ban Law, breaches this obligation.

19 Consequently, under international law Respondent is obliged to compensate Claimants for the damage they suffered. Claimants experts from Brattle have calculated this with the amount of [redacted] plus interest.

B. FACTUAL BACKGROUND

I. Introduction

20 The following sections describe the Parties (**II.**) and Eemshaven (**III.**) in more detail. This includes a description of the benefits which Eemshaven brings for Respondent. Respondent itself confirmed that the construction fulfilled a compelling public need.

21 We will then set out the factual background of this arbitration, which is straightforward and simple. Twenty years ago, Respondent was faced with a quagmire similar to today: on the one hand, it needed to reduce its CO2 emissions. On the other hand, it was strained by high energy prices and needed to diversify its energy mix to ensure a stable and affordable energy supply. Electricity was mostly produced by – also at that time – costly gas power plants. The looming dependency on Russian gas was, like today, far from comforting. Respondent tried to solve this dilemma by advocating the need for new, highly efficient coal-fired power plants which should also be able to co-fire biomass. Respondent also repeatedly confirmed that such highly-efficient coal plants would be needed until 2050. It even actively tried to convince investors to build power plants (**IV.**).

22 Respondent early on welcomed Claimants plans and supported them by arranging for the necessary infrastructure. It also explicitly and repeatedly refused to impose additional legal requirements on Eemshaven's CO2 emissions over and above the ETS. It was in that context that Claimants decided to build what Respondent considered necessary: a new highly efficient coal-fired power plant which could co-fire biomass (**V.**).

23 When Claimants had obtained all necessary permits, they took the final investment decision in 2009 (**VI.**). During the whole construction period, Respondent through successive governments confirmed that it would not ban coal plants or put restrictions on the CO2 emissions over and above the ETS. Respondent continued to support the Eemshaven project, and to emphasize the importance of coal-fired power plants for the country's electricity supply (**VII.**). This continued even after the commissioning of the plant in 2015, with the Government in early 2017 rejecting a coal phase-out and even confirming a coal phase-out was not necessary to reach the climate goals (**VIII.**).

24 It was only after the elections in autumn 2017 that the new Government announced its plans for a coal ban, and ensured that this proposal was passed despite heavy criticisms by

operators and state bodies . The Coal Ban Law, as enacted, prohibits Eemshaven from doing for what it has valid permits: to produce electricity by firing coal. The plant cannot be profitably used for anything else, and the Government's idea that the plants could convert to 100 % biomass is completely detached from reality. As a result, the Claimants suffered a damage of approx. EUR 1,4 billion (**IX.**). It bears note that after this arbitration commenced, Respondent deliberately even made a biomass-only future impossible by withdrawing its support for the use of biomass for electricity production (**X.**).

25 In detail:

II. The Parties

1. Claimants

26 RWE AG is a German joint stock company (*Aktiengesellschaft*), organised under the laws of Germany and with its place of incorporation in Essen, Germany.[2] With over 20,000 employees, RWE AG and its subsidiaries ("RWE") are a major power generation company in the European Union ("**EU**"). It is a leading energy supplier in the Netherlands and is also represented in various other European markets as well as in the USA and in Asia. Today, RWE is a leading player of renewable energies worldwide. For a sustainable future, RWE plans to become carbon neutral by 2040.[3]

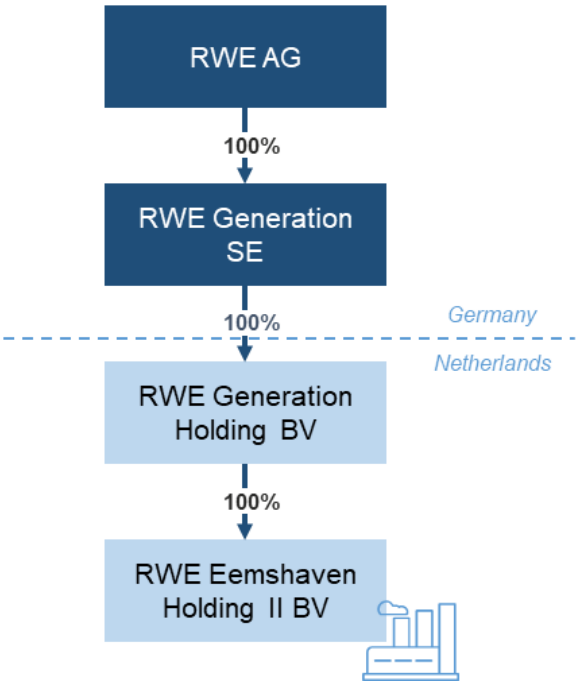
27 RWE's conventional energy business in the Netherlands is conducted through a chain of two wholly-owned subsidiaries, the German RWE Generation SE and the latter's 100 % Dutch subsidiary RWE Generation Holding B.V. RWE Generation Holding B.V., in turn owns 100 % of the shares in RWE Eemshaven.[4] RWE Eemshaven is a Dutch limited liability company (*Besloten vennootschap met beperkte aansprakelijkheid*) with its seat in

[2] **Exhibit C-0001EN+DE**: Excerpts from the Commercial Register for RWE AG. For ease of reading, the name "RWE" will also be used to refer to the Group as whole resp. individual group companies.

[3] To the extent that RWE will then still emit CO2, it will offset it elsewhere in its portfolio.

[4] See list of participations in **Exhibit C-0002**: RWE Annual Report 2019, p. 180.

Geertruidenberg, the Netherlands, and is the direct owner and operating company of Eemshaven.[5]



2. Respondent

(a) Structure of Respondent

28 The Kingdom of the Netherlands is the Respondent in this arbitration. It is a sovereign state. The Kingdom of the Netherlands has approximately 18 million inhabitants and is one of the leading economies in the world. The Kingdom of the Netherlands is regularly ranked among the top 20 countries in GDP per capita worldwide.

29 The Kingdom of the Netherlands consists of four constituent countries: the Netherlands (in Europe) and the three Caribbean islands Aruba, Curacao and Sint Maarten, each with its own constitution, Parliament and government. Its European constituent country consists of 12 provinces. Relations and responsibilities between the four countries and the Kingdom itself is set out in The Charter for the Kingdom of The Netherlands (*Statuut voor het Koninkrijk der Nederlanden*).

[5] **Exhibit C-0003EN**: Commercial Register Excerpt re RWE Eemshaven Holding II BV.

30 The Kingdom of the Netherlands is not a federation. The Kingdom does not have a separate federal government. Furthermore, the institutions of the Kingdom are primarily institutions belonging to the Netherlands. The structure of the Kingdom is, in other words, asymmetrical. Although the Kingdom functions above all four countries, and these countries are equivalent, it is only the Netherlands that often coincides with the Kingdom.

31 The present dispute relates to the European part of the Kingdom of the Netherlands, the Netherlands. Under international law, only the Kingdom of the Netherlands is a sovereign state. Therefore, only the Kingdom has the authority to conclude a treaty.[6] These conventions are binding for all four countries within the Kingdom of the Netherlands, unless otherwise stipulated.[7] Consequently, the Kingdom of the Netherlands is responsible and can be held liable for (legislative) actions of its separate countries such as the Netherlands (including the Coal Ban Law).

32 In this Memorial, insofar as we speak of the "**Government**", we refer to the government of the Netherlands. Further, for reasons of simplicity, we will speak of Respondent also as "**the Netherlands**".

(b) Legislative Procedure

33 The dispute pending before the Tribunal concerns a Dutch law. It seems therefore apposite to briefly familiarize the Tribunal with the legislative procedure.

34 In the Kingdom of the Netherlands, acts can be passed at different levels: by the Kingdom *(*the Kingdom Act, *Rijkswet)*, by the Netherlands (or one of the other countries) (Acts of Parliament), by provinces (the provincial bylaw, *provincial verordening)* and by municipalities (communal bylaw). The Kingdom is competent with regard to matters of the Kingdom, such as foreign affairs, the defence of the Kingdom and Dutch citizenship. The countries independently look after their affairs. Most matters fall within the scope of the countries. The Coal Ban Act is an Act of Parliament applied by the Netherlands, just like the Nature Conservation Act and the Environmental Permitting (General Provisions) Act which are relevant for Eemshaven's permits.

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[6] **Exhibit C-0019**: Charter for the Kingdom of The Netherlands, Art. 3(1)(b).

[7] **Exhibit C-0019**: Charter for the Kingdom of The Netherlands, Art. 24-28.

35 Acts of Parliament of the Netherlands are enacted jointly by the Government and the States General. The Government consists of the King and the Ministers. The Government is distinguished from the cabinet, which consists of all the Ministers and the secretaries of state (*staatssecretarissen*). The King is the Head of State, not of the Government. He cannot act autonomously and needs the cooperation of a Minister or a secretary of state to act as a member of Government. The States General is the Parliament. It is composed of the Lower House[8] (*Tweede Kamer)* and the Upper House, the "Senate" (*Eerste Kamer)*. The Lower House is directly elected by Dutch citizens of 18 years and older. The Upper House is indirectly elected, by the members of the States Provincial after they themselves have been elected by Dutch citizens of 18 years and older.

36 The Government, as well as a member of the Lower House, can initiate an Act of Parliament. Generally, after a legislative proposal is drafted, it has to be sent to the Council of State. The Council of State is an independent advisor to the government and Parliament and has two separate divisions. One is the Advisory division, which advises the government and the Parliament on legislation and governance.[9] The other division is the Administrative Jurisdiction Division, which is the highest general administrative court.[10]

37 After receiving the proposed Act of Parliament with the accompanying explanatory memorandum, the Advisory Board of the Council of State will assess the proposal from a policy, legal, and technical angle. As Claimants will explain further below, this has happened twice in this case. The Advisory Division will focus on the following questions:

> *"Policy analysis*
>
> *Is the problem being addressed one which can or should be solved by legislation?*
>
> *Will the proposed legislation be effective, efficient and balanced as regards costs and benefits?*
>
> *Will it be possible to implement and enforce the proposed legislation and to monitor its effects?*

[8] This is also referred to as the House of Representatives.

[9] **Exhibit C-0020**: Constitution for the Kingdom of the Netherlands, Art. 73.

[10] **Exhibit C-0020**: Constitution for the Kingdom of the Netherlands, Art. 75.

> *Legal issues*
>
> *Is the Bill compatible with higher law: the Constitution, treaties (such as human rights conventions) and European law?*
>
> *Is it in accordance with the principles of democracy and the rule of law?*
>
> *Is it compatible with the principles of good legislation, such as equality before the law, legal certainty, proper legal protection and proportionality?*
>
> *Can it be easily incorporated into the existing legal system?*
>
> *Technical aspects*
>
> *Is the Bill well-drafted from a technical point of view?*
>
> *Does it establish a logical, systematic regime?"*[11]

38 Based on the elements listed above, the Council of State will come to one of four conclusions. Firstly, if it has no comments, it can advise to submit the proposal. Secondly, if it has minor comments, it can advise that these comments be considered when submitting the proposal. Thirdly, if it has more significant comments, it can advise not to submit the proposal unless amendments are made. Lastly, if it has serious objections, it can advise not to submit the proposal at all.

39 The advice of the Council of State is non-binding. The proposer will usually assess the comments of the Council of State in a further report (*nader rapport*), but can always choose to submit the Act unchanged. In the case at hand, the Dutch Government substantially ignored the advice from the Council of State (see below Section **B.IX.2.**).

40 After the Council of State has given its advice, the Act of Parliament can be introduced in the Lower House. If the bill is passed, it is sent to the Upper House. Following the parliamentary debate on the bill, it can be amended (but formally only in the Lower Chamber). If the final version is accepted by the Upper House (the Senate), it is sent to the King. The ratification of the King turns the bill into an Act of Parliament.[12] This enters into

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[11] See Raad van State, *The Council of State*, Article online available at: https://www.raadvanstate.nl/talen/artikel/ (last access: 12 December 2021).

[12] **Exhibit C-0020**: Constitution for the Kingdom of the Netherlands, Art. 87.

force after publication in the State Gazette (*Staatsblad*) on a date mentioned in the Act or a Royal Decree.

III. Eemshaven

1. Introduction

41 This section provides a short description of Claimants' presence in the Netherlands (**2.**). It explains the technical structure of Eemshaven and how it operates (**3.**). As will be demonstrated below, RWE's investment in Eemshaven was based on the obvious need of coal-fired power plants in the Netherland in order to - amongst other things - diversify the present energy sources (fuel mix) and to achieve security of supply (**4.**). As a state-of-the-art power plant with the abilities to co-fire biomass and to be equipped with carbon capture and storage, it is one of the most modern power plants worldwide (**5.**).

2. Claimants presence in the Netherlands

42 RWE is a company of German origin that started more than 120 years ago as a local electricity company in Essen, Germany, under the name *Rheinisch-Westfälisches Elektrizitätswerk*. After the focus shifted in 1900 from local energy supply to large-scale and efficient energy supply, RWE eventually grew into one of the largest players in the German electricity market. After a trip in the 1990s to other sectors (such as the petroleum, waste and construction sectors), RWE started to focus again on its core business: the generation of energy after the liberalisation of the German energy market in 1998. This core business was further strengthened by the merger of RWE with VEW AG (*Vereinigte Elektrizitätswerke Westfalen*).

43 After a simplification of its group structure, in which RWE transferred all power plants to the "new" RWE Power AG, RWE began an extensive expansion programme in 2009. As part of this expansion programme, RWE also took over the Dutch company Essent on 30 September 2009.

44 After the German nuclear phase-out in 2011, RWE decided to consolidate its energy generation activities using traditional or conventional energy sources in Germany, the Netherlands and the United Kingdom into the international company *RWE Generation SE*.

This company is still the – indirect – sole shareholder of the companies owning the Amer power plant (*RWE Generation NL B.V.*) and Eemshaven (*RWE Eemshaven Holding II B.V.*).

45 This restructuring included also the ownership of Eemshaven.

3. Technical Description of Eemshaven

46 Strategically located over an area of 50 ha at the port of Groningen, Eemshaven has a capacity of 1,560 MW and consists of two units (A and B, each with an installed electrical capacity of approx. 800 MW). It is a so called "*ultra-supercritical plant*"[13]. With an electrical efficiency of up to 46 %, the ability to co-fire biomass, and built ready for carbon capture and storage ("**CCS**" and "***capture-ready***", respectively)[14], Eemshaven is one of the world's most modern coal-fired power plants. The power plant plays an important role in supplying the Netherlands with affordable and reliable electricity.

[13] The efficiency of a coal-fired power plant will depend, *inter alia*, on the pressure and temperature of the water used in the boiler. The global average efficiency is 34 %. The Dutch power plants from the 1980s had a efficiency of 37-39 %; those from the 1990s of 41-43 %. Each percentage point improvement in efficiency significantly reduces CO2 emissions from coal power plants by over 2 percentage points. For Eemshaven, this meant a reduction of (46%-37%) x 2 =18 % CO2 compared to the oldest plants. For this see: https://www.ge.com/steam-power/coal-power-plant/usc-ausc (last accessed 14 December 2021) and www.powerengineeringint.com/coal-fired/critical-thinking (last accessed 14 December 2021).

[14] CCS is a technique where CO2 emissions are captured at the source (i.e. the power plant) and then transported (e.g. through pipelines) to a storage side (usually, underground formations such as empty gas fields).

47 A higher level of efficiency means that less fuel is required to generate the same amount of energy, ultimately resulting in lower emissions. Due to a highly efficient power plant process, Eemshaven consumes less hard coal in comparison to conventional coal-fired power plants. This also means that this power plant is considered one of the most eco-friendly coal-fired power plants in the world.[15]

48 The power plant further employs a modern purification and filter systems which makes it also one with the lowest emissions of its type. In addition to its high efficiency, Eemshaven was also planned and constructed to be able to co-fire biomass. Initially, it was permitted to co-fire up to 10 % biomass. This was later increased to 800k tons biomass (approx. 15 % of its capacity)[16] and in 2021 to 1,6 million tons (approx. 30 % of its capacity)[17]. RWE was also committed to build its power plant *capture-ready* to prepare it for a time when CCS would be technological and economical feasible.[18]

49 Due to its high capacity, Eemshaven can produce electricity for more than 2,5 million households in The Netherlands. Furthermore, due to its strategic location close to the Eemshaven port, Eemshaven can continuously be supplied with coal from Panamax ships.[19]

50 The plant was commissioned in 2015.[20] As stated above, the plant until recently co-fired up to 800 kT of biomass (which corresponds to about 15 % of the capacity of Eemshaven). However, the feasibility of co-firing biomass highly depends on receiving a subsidy from the

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[15] See description of Eemshaven power plant on RWE website, being available at: https://benelux.rwe.com/en/locations/eemshaven-power-plant (last access: 14 October 2021 2021); see also **Exhibit C-0021**: Siemens Article, Power for over 2,5 million homes, 2016.

[16] See **Exhibit C-0022**: RWE Letter to the Provincial Executive of Groningen, dated 11 June 2016.

[17] This Permit has only been granted during the time of writing this Submission. It is not yet irrevocable.

[18] **Exhibit C-0023**: Environmental Permit, dated 11 December 2007. This permit prescribes states in Sec. 3.12.3 that CCS needed further research and development and consequently could not yet prescribed as Best Available Technology ("**BAT**"). Instead, the plant would have to be CCS-ready.

[19] **Exhibit C-0021**: Siemens Article, Power for over 2,5 million homes, 2016; See also for more information on Panamax vessels https://en.wikipedia.org/wiki/Panamax (last accessed: 11 December 2021).

[20] See description of Eemshaven power plant on RWE website, being available at: https://benelux.rwe.com/en/locations/eemshaven-power-plant (last access: 14 October 2021).

Dutch government. The 15 % are based on a subsidy scheme, which will expire in 2027. Without this subsidy, producing electricity by firing biomass is not economically feasible.

51 The fuel (coal) will be delivered via ship to the quay. It is unloaded from the ships using an unloading crane and closed grabs and then transported on enclosed mechanical conveyors to the coal loading and storage system, which is equipped with mobile elevators and gantry cranes. The coal can also be transported directly to the coal storage areas. The coal storage fields, which have a paved surface, have a storage capacity of approximately 540,000 tonnes. The maximum coal consumption of the two steam boilers, without biomass, is approximately [redacted] tonnes/day; or [redacted] tonnes/hour. The coal is transported by conveyors from the bunkers to the boilers, where it is ground to dust and blown into the coal fires. The fires are used to produce steam at a temperature of 600°C and a pressure of 276 bars in a closed cycle, which in the turbines of the engine room/turbine house is used to produce electrical energy.

52 After passing the turbines, the steam in the closed cycle is directed to a condenser where it is cooled down and condensed back into pure water, and used again to generate steam. In the condenser, the heat is absorbed by the cooling water system, depending on the operation mode.

53 There are various cooling techniques available for power plants. Commonly used techniques are cooling with air and cooling with water. Cooling with air requires cooling towers (usually approx. 170m height), in which the remaining heat is discharged into the air. Cooling with water requires river water to be extracted, used and then reinserted (at a slightly higher temperature). Eemshaven is cooled directly with seawater, which gives it a distinct advantage over competitor plants situated at perennial rivers which might face cooling water restrictions during heat waves in the summer.

4. Benefit of Eemshaven for the Netherlands

54 As we will show in more detail in Sections **B.IV.** and **B.V.** of this Memorial, Eemshaven was built at the request of the Government. At the beginning of this century, the Netherlands had mainly gas-fired power stations. However, gas was much more expensive than coal, so the Dutch electricity prices were higher than those of the surrounding countries. The Government wanted to ensure competitive electricity prices for its industry and also prevent the Netherlands from becoming dependent on Russian gas. Of course, it was also important

that the cost of electricity to households would fall. The whole of Dutch society would benefit from lower electricity prices. The Government therefore openly invited the construction of new coal-fired power stations. These should be as energy efficient as possible and being able to co-fire biomass and to eventually be equipped with a CCS system, once that technology was sufficiently developed and its use economically feasible.

55 Eemshaven is exactly what the Dutch government wanted. It is one of the most modern coal-fired power plants in Europe, able to co-fire biomass and could in the future be equipped with a CCS system, once that technology is sufficiently developed and its use is economically feasible. Eemshaven thus serves the public interest of the Netherlands in multiple ways. When the permits for Eemshaven were challenged in court in 2010, the Government commissioned an expert report (the "**ECN report**") which described the benefits of the plant as follows:

- Eemshaven contributes to the security of supply and fuel diversification of both the Netherlands and Northwest Europe. This is because the new coal-fired power station will displace more expensive gas plants and thus reduce dependence on natural gas.[21]

- Eemshaven would replace old and inefficient coal-fired plants which would be decommissioned in the future. And its location at the seaside further reduces the risks of cooling water restrictions, thereby increasing the security of supply.[22]

- Eemshaven due to its high efficiency contributes to reducing primary energy consumption (e.g. coal) and to lowering emissions. It is much more efficient than older plants, uses less coal and thus reduces emissions of CO2, NOX and SO2.[23]

[21] **Exhibit C-0024**: Energy Research Centre of the Netherlands, ECN report on Eemshaven coal-fired power stations, December 2010, p. 6.

[22] **Exhibit C-0024**: Energy Research Centre of the Netherlands, ECN report on Eemshaven coal-fired power stations, December 2010, p. 6-7.

[23] **Exhibit C-0024**: Energy Research Centre of the Netherlands, ECN report on Eemshaven coal-fired power stations, December 2010, p. 6-7.

- Eemshaven contributes to the transition to a climate-neutral energy supply by co-firing biomass, thereby helping the state to meet its renewable goals.[24]

- Eemshaven contributes to the affordability of the energy supply in the Netherlands since it displaces older, less efficient plants with higher variable costs.[25]

56 Eemshaven even today still fulfils these public goals and – with respective governmental support – could achieve net-negative CO2 emissions. Assuming it were to be operated with sustainable biomass only – after extensive technical conversion and with a CCS facility - then it would effectively remove CO2 from the atmosphere while producing electricity. That is something [redacted] RWE Power Generation SE, has pointed out [redacted][26] and continues to point out.[27] However, both the installation of CCS and the co-firing of biomass depends on financial assistance of the State to be economically viable. Respondent knows that, but has nevertheless decided to stop its financial support for firing biomass entirely, and until today not provided the necessary financial support for CCS in the electricity sector.

57 There is thus no viable alternative to closing Eemshaven in 2030 (see in more detail Section **E.V.2.**)

5. Environmental Aspects of Eemshaven

58 Eemshaven is not only one of the most modern coal-fired power plants in the world. With its ability to co-fire biomass it is one of the most environmental-friendly coal plants existing.

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[24] **Exhibit C-0024**: Energy Research Centre of the Netherlands, ECN report on Eemshaven coal-fired power stations, December 2010, p. 7-8.

[25] **Exhibit C-0024**: Energy Research Centre of the Netherlands, ECN report on Eemshaven coal-fired power stations, December 2010, p. 8.

[26] See [redacted] "*The Eemshaven power plant could switch to sustainable biomass or make a link with CCS. A combination of the two would even lead to negative CO2 emissions*."

[27] See the interview with [redacted] RWE Generation SE in [redacted]

Besides that, it has the option to install CCS once the technology is ripe and if economically feasible.

(a) Biomass

59 Eemshaven is able to co-fire biomass. Biomass is an umbrella term for all materials consisting of or derived from plants or animals, i.e. organic material.[28] In the context of firing biomass to produce electricity, there is however only one type of biomass suitable for large-scale energy production in coal-fired power stations: that is wood pellets.[29] Wood pellets are created from residual products from forestry and the wood industry, including sawdust, and sustainability requirements imposed by Respondent on the use of such wood pellets are among the strictest in the world. Co-firing wood pellets in a coal-fired power plant is more environmentally friendly than operating it exclusively on coal. This is due to the fact that firing biomass only emits the CO2 which was recently captured from the atmosphere by the growth of the trees it consists of. This CO2 would be released into the atmosphere in any case during the process of natural decomposing. Firing biomass is therefore considered carbon neutral, as the amount of CO2 released into the atmosphere is equivalent to the amount removed. For this reason, the firing of biomass is also not subject to emission certificates under the ETS.[30] The Netherlands imposes sustainability requirements on the biomass used in coal-fired power plants. These are the strictest in the world. Naturally, the biomass used in Eemshaven meets these strict requirements.

60 According to its 2007 Environmental Permit, the technical limit is 30 % biomass co-firing.[31] From 2019 onwards, it co-fired up to 15 % (800K tons of biomass), based on the respective Dutch state aid scheme. Recently, authorities allowed to co-fire up to 30 % (1600K tons) of biomass.

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[28] Environmental Information Agency of the United States (EIA) online available at https://www.eia.gov/energyexplained/biomass/ (last accessed 9 November 2021).

[29] **Exhibit CER-0001**: NERA Expert Report, paras 36, 47, 68 and Appendix C.

[30] **Exhibit C-0027**: Directive 2003/87/EC (as amended), consolidated version of 29 October 2015, Annex IV.

[31] Provincial Executive of the Province of Groningen, Environmental Management Act Permit, granted on 11 December 2007 (in the following "**Environmental Permit**") submitted as **Exhibit C-0023**: Environmental Permit, dated 11 December 2007 p. 12.

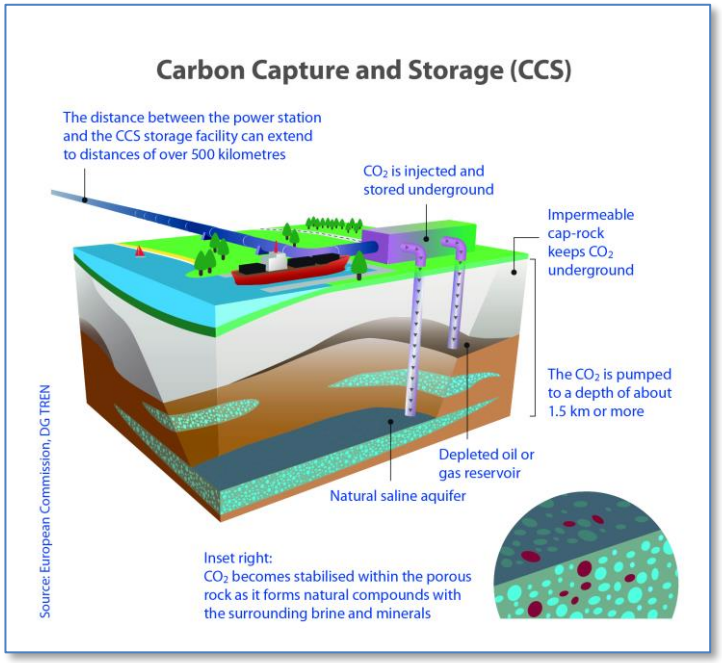
61 In 2013, the Government committed to supporting biomass co-firing in coal power plants of up to 25 PJ in the 2013 Energy Agreement. The government reintroduced subsidies for co-firing biomass in the so-called "SDE+ scheme" for existing and new coal plants in 2015.

62 Eemshaven applied for SDE+ funding in 2016. It was a subsidy, which extends over eight years, i.e. until April 2027, and covers electricity generation from biomass of up to 1,789 GWh per year. Allowing for co-firing required the installation of additional biomass logistics and storage facilities as well as modifications to one coal mill. With the new coalition agreement in October 2017, the SDE+ subsidy scheme for biomass co-firing was discontinued, i.e. the scheme was closed for new applications.[32]

(b) Carbon Capture and Storage

63 Eemshaven has been built "CCS-ready". CCS allows for the removal of CO2 from industrial processes such as conventional electricity generation, the production of steal or concrete. CCS involves a three step process: first, CO2 is separated and captured, it is then compressed and transported through pipelines to a suitable and safe storage site, where it is stored permanently. This technology makes it possible to significantly reduce CO2 emissions at their source. In doing so large quantities of CO2 are prevented from being released in the atmosphere.

[32] See, **Exhibit CER-0001**: NERA Expert Reportpara. 48; **Exhibit C-0028**: Coalition Agreement 2017-2021, Confidence in the future, 10 October 2017 (Official EN), p. 43.



64 In 2007, a discussion on the implementation of CCS for power plants arose. The capture of CO2 itself is an energy intensive and therefore costly process. CCS-technology was not yet fully developed. Accordingly, the Government decided that public support was needed to boost research and demonstration project activities.[33] It planned to "*vigorously promote[d]*" the development of onshore and offshore CCS in the Netherlands.[34]

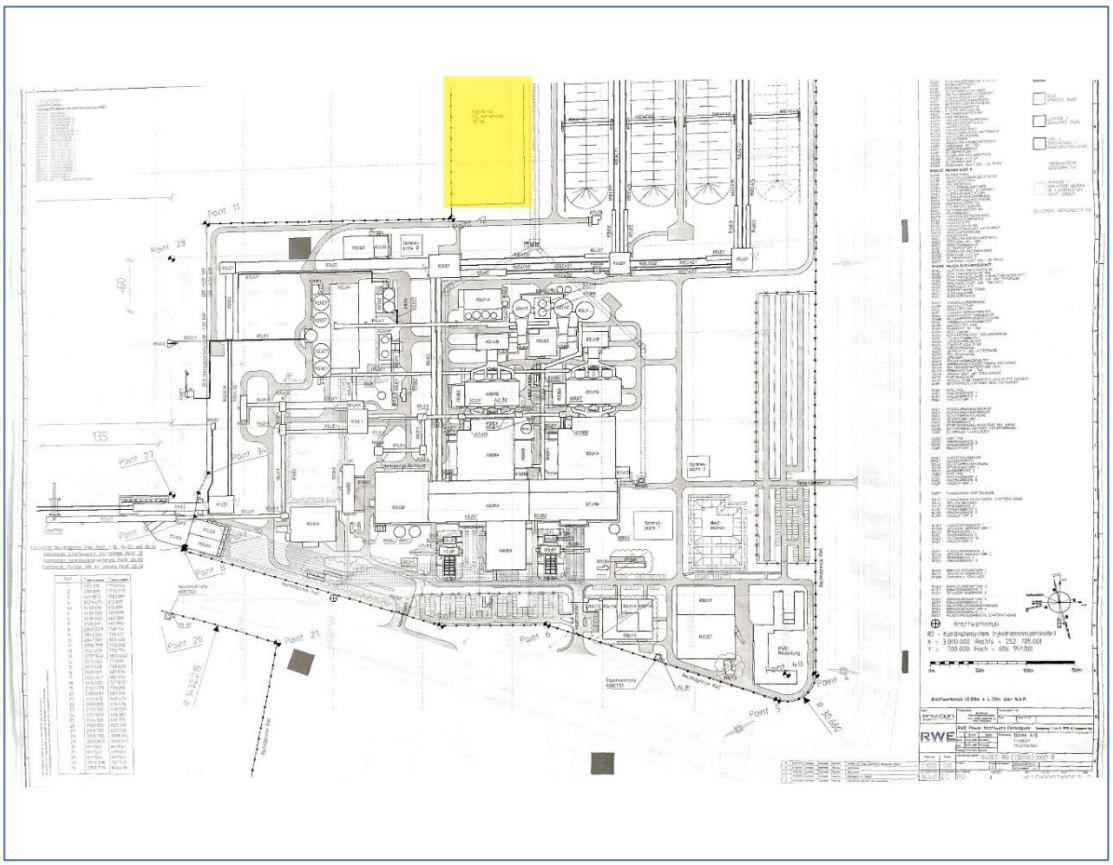
65 In line with the requirements in its Environmental Permit, RWE designed Eemshaven to be installed with CCS technology in the future.[35] RWE built Eemshaven *capture-ready*, i.e. a

[33] **Exhibit C-0029**: Parliamentary Papers II 2006/07, 28 240 and 29 023, no. 77, Letter from the Minister of VROM, 28 June 2007, p. 5; **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 7-8.

[34] **Exhibit C-0031**: Energy Report 2008, p. 21, para. 1.5.4. (This exhibit has previously been submitted as exhibit C-0009 (Dutch Original and English translation in a separate document) with the Request for Arbitration. Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

[35] See **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 3.12.3: "*Since this may change in the future, companies should take this into account and make their installations "CO2 capture ready". The forecast amount of CO2 emitted annually by the RWE power plant is between 8,000 and 10,000 kt, depending on the fuel mix. In view of the policy developments regarding carbon capture and storage, according to RWE's application, the new coal power plant to be built will be designed and built "CO2 capture ready".*"

CO2 capture plant could possibly be implemented *"as soon as the technology and infrastructure are economically available"*.[36] Necessary arrangements in the design of the plant itself as well as its facilities were made.



Detailed plan of the Eemshaven power plant. The part highlighted in yellow demonstrates the area reserved for CCS (1,6 ha).

66 RWE kept space for a possible later incorporation of a CCS plant on the grounds of Eemshaven. For the implementation of CCS into a power plant various additional elements such as a heating source, a cooling source, and power supply are needed. Thus, room was reserved in the design of Eemshaven for CO2 separation units (in the north of the plant and south of the coal storage) as well as auxiliary transformers, cables, and pipes.

67 However, this never came to pass. The installation of CCS was always under the condition of further technical development and economic feasibility. CCS could only be prescribed if it qualified as "best available technology". One of the preconditions for that is the technical

[36] **Exhibit C-0032**: RWE Letter from [redacted] to Minister Van der Hoeven, dated 5 April 2007, p.1.

and economic viability. This included the storage of the CO2. Initially, both RWE and the Government preferred an onshore storage in empty gas fields. However, Respondent blocked the development of the planned demonstration onshore project when public protests arose, even though Respondent itself considered this project necessary for the technical development of CCS. However, until today, Respondent has not created the necessary financial and political groundwork for supporting CCS in electricity production.

IV. After the turn of the century, Respondent wanted new coal-fired plants to be built

68 This section describes the background of Claimants' investment. After the turn of the century, Respondent wanted new coal-fired power plants to be built. The existing power plant portfolio was highly dependent on gas-fired power plants. This led to relatively high prices impairing the competitiveness of energy-intensive Dutch companies (**1.**). Respondent was concerned about long-term security of supply. Not only would gas have to be imported from e.g. politically unstable countries such as Russia. Events in California had also shown the consequences of insufficient production capacity (**2.**). Respondent therefore publicly promised to support the construction of new coal-fired plants (**3.**) and actively sought investors (**4.**). New plants would be compatible with climate goals since the upcoming of ETS would regulate the necessary CO2 reductions. (**5.**). Respondent supported the co-firing of biomass in coal plants since this would promote renewable energy (**6.**).

1. The existing power plant portfolio led to high electricity prices which harmed the Dutch industry

69 The state of the Dutch electricity market in the year 2000 is aptly summarized in the International Energy Agency's ("**IEA**") 2000 review of the countries' energy policy.[37] The IEA explained that nearly 60 % of electricity was generated from natural gas, which was the

[37] **Exhibit C-0033**: International Energy Agency, Energy Policies of IEA, Countries the Netherlands 2000 Review, 2000.

highest share in the IEA and perhaps even in the world.[38] This share was forecast to rise even further in the years until 2015.

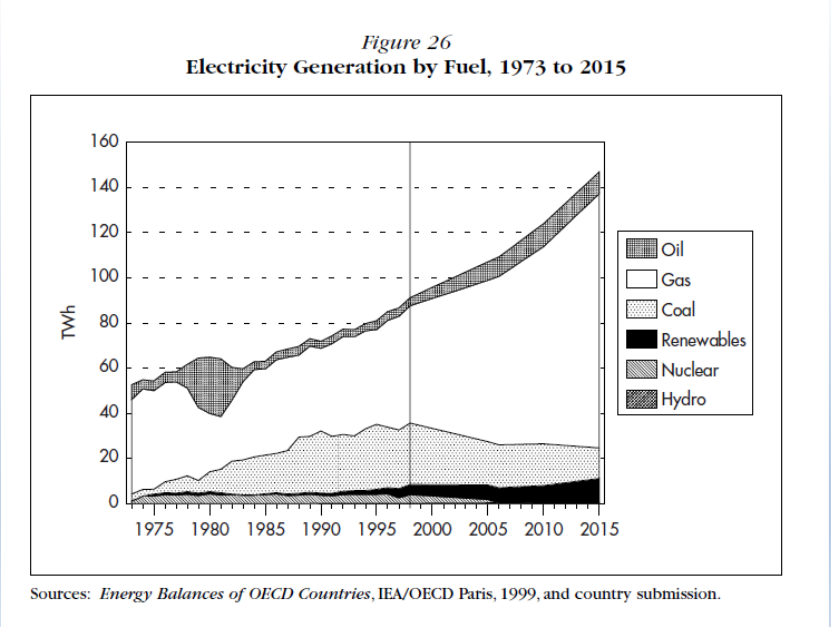


Exhibit C-0033: International Energy Agency, Energy Policies of IEA, Countries the Netherlands 2000 Review, 2000,

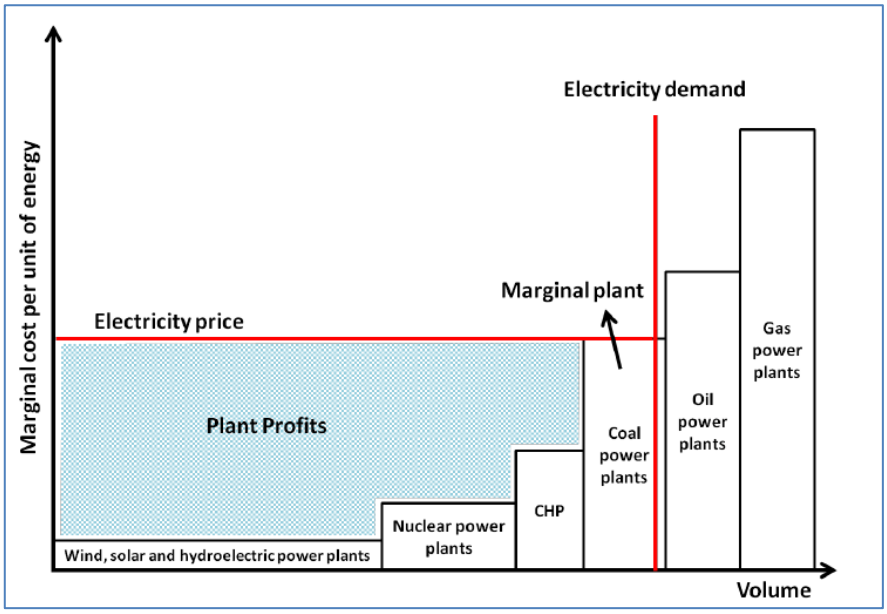
p. 82, figure 26.

70 This heavy focus on gas led to problems for the Dutch economy. The Netherlands experienced an increasing demand for electricity at the beginning of this century. Demand often peaked relative to the available generation capacity and an ever-increasing demand had to be made on the available capacity of the relatively expensive gas-fired power plants, causing the cost of electricity to increase. This was related to the so-called *merit order system* in the deployment of the various modes of electricity generation to meet the demand for it.

71 The *merit order system* determines which types of power plants are deployed in fulfilling the demand for electricity at a given time. It also – ultimately – determines the price for electricity produced by all plants which are deployed. The demand for electricity in the Netherlands could (and can) be met using a diversity of power plants, including electricity generated from coal, wind and solar power, hydropower, nuclear power, waste and gas. The *merit order*

[38] **Exhibit C-0033**: International Energy Agency, Energy Policies of IEA, Countries the Netherlands 2000 Review, 2000, p. 81.

system implies that the generation modality with the lowest marginal cost (i.e. variable costs) is used first: the fuel price, variable operating costs and, for coal and gas plants, also the CO2 price. To this end, power plants periodically make offers to generate electricity. The electricity with the lowest marginal costs is delivered to the grid first:



See graphic at researchgate.net, online available at https://www.researchgate.net/figure/Figure-B1-Merit-order-dispatch-in-electricity-markets_fig13_290391278; (last accessed 15 December 2021)

72 In this system, renewables come first, as their marginal costs are nearly non-existent. They have no fuel costs but only operating costs. In the Dutch merit order then traditionally nuclear and hard coal (in this order) are then added. For peak demand, gas- and oil-fired power plants (if those exist) are added. The electricity price will then be set by the last plant (with the highest marginal costs) added to production. Plants with lower marginal costs than this "margin price", such as nuclear or coal, will thus incur higher profits than gas-fired plants.

73 Imports of electricity can have and indeed had an effect in the Netherlands. Neighbouring countries had a different generation portfolio with lower marginal costs. The Dutch Energy Regulator *DTe* had commissioned a study into the differences in electricity prices between

the Netherlands and neighbouring countries. The report, prepared by *The Brattle Group* and included in the Government's 2002 Energy Report[39], showed the differences:[40]

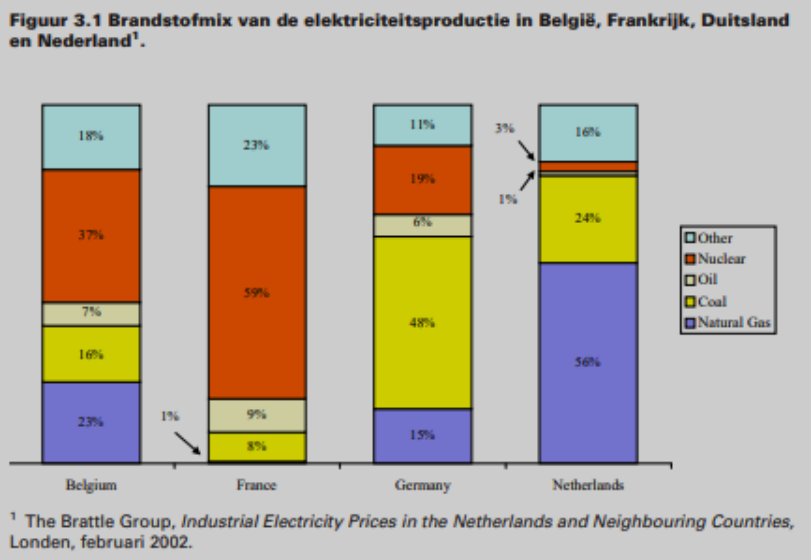


Exhibit C-0035: Energy Report 2002, p. 32, figur 3.1.

74 While the Netherlands had a share of 56 % of electricity produced by gas-fired plants, this amounted to 15 % in Germany, 1 % in France and 23 % in Belgium. Those countries had a much higher share of nuclear and coal, which had lower marginal costs. Although imports from those markets were possible and amounted to up to 20 % of the Dutch demand for electricity,[41] large industrial consumers in the Netherlands were nevertheless found to pay more than their foreign competitors.[42]

75 A 2020 newspaper report put it as follows:

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[39] Under the Dutch Electricity Act, the responsible minister (i.e. the Minister for Economic Affairs) must publish and present to Parliament an Energy Report at least once every four years: "*At least once every four years, Our Minister shall approve an energy report that gives guidelines to government decisions to be taken in the following four years insofar as the interests of the reliable, sustainable, efficient and environmentally sound functioning of the electricity supply must or may be taken into consideration*", see Art. 2.1 of the **Exhibit C-0034**: Dutch Electricity Act 1988.

[40] Parliamentary Papers II 2002/03, 28 241, no. 2, *Energy Report 2002*, (in the following "**Energy Report 2002**") submitted as **Exhibit C-0035**: Energy Report 2002, p. 32,

[41] **Exhibit C-0035**: Energy Report 2002, p. 22.

[42] **Exhibit C-0035**: Energy Report 2002, p. 32.

> *"But perhaps most importantly, heavy industry complained about high electricity prices. The big 'energy guzzlers' were 5 to 25 per cent more expensive than in neighbouring countries.*
>
> *These included the blast furnaces in Velzen (then Corus), chemical plants such as DSM and Dow Chemical, and the power-hungry aluminium smelters in Vlissingen and Delfzijl. Some companies, such as the smelter in Vlissingen, were in dire straits."*[43]

2. Respondent was also concerned about security of supply

76 Respondent was not only faced with a power plant structure which led to higher prices and affected the competitiveness of its heavy industry. It was also concerned about security of supply in the future. That was for mainly three reasons.

77 There was, firstly, a forecast of a sharply rising electricity demand. In its 2000 report, based also on input from Respondent, the International Energy Agency forecast a rise by 75 % from 2000 to 2015:

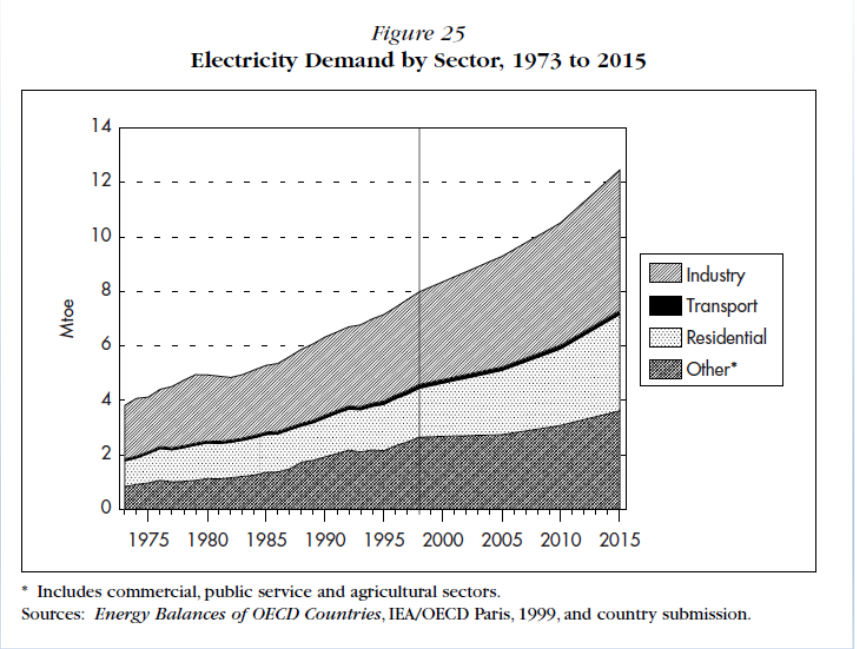

Exhibit C-0033: International Energy Agency, Energy Policies of IEA, Countries the Netherlands 2000 Review, 2000, p. 81, figure 25.

[43] **Exhibit C-0036**: NRC, When the price of electricity outweighed the threat of climate change, 2 February 2020.

78 At the same time, it was uncertain whether the installed capacity would be sufficient since in the newly liberalised electricity market, power plants were no longer built by public entities, but by private actors over which the Government had little control. The Government even considered the possibility of electricity shortages after the year 2007.[44]

79 The second reason was that developments abroad confirmed the Government's concerns about security of supply. In 2001, an electricity crisis had occurred in the U.S. state of California, which had received considerable media attention. In California, the lights had literally gone out because generation capacity could no longer keep up with increased demand for electricity. Investigations showed that for years there had been insufficient investment in generation capacity in California and it had therefore become dependent on electricity from other states. When warm weather there increased the demand for electricity - to run cooling plants and those states could no longer supply electricity to California, electricity supplies there had to be interrupted.

80 This crisis, and the reasons and consequences for it, was closely followed in the Netherlands. In its 2020 review, the Newspaper NRC summarized it as follows:

> "*At the beginning of 2001, California was facing a serious power crisis. In the hot summer of 2003, power plants in the Netherlands and elsewhere in Europe ran short of cooling water. "Do we still have enough installed capacity to keep the lights on in the Netherlands?" is how Wolters summarises the sentiment. Or as Jorritsma wrote:*
>
> *"In wide circles of those involved" there is concern about whether there will be enough power plants in the future.*
>
> *After the terrorist attacks of 11 September 2001, there was also growing unease about the dominance of natural gas in the Netherlands, which made the country dependent on the Middle East and Russia.*"[45]

[44] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, p. 4.

[45] **Exhibit C-0036**: NRC, When the price of electricity outweighed the threat of climate change, 2 February 2020.

81 The issue of security of supply then also became a main topic in the Energy Report 2002[46], and in the 2003 analysis "*Security of Energy Supply*" sent by the Minister of Economic Affairs to Parliament.[47]

82 The third reason why the Government was concerned was that it considered reserves of oil and gas to be located in "*politically sensitive*"[48] and "*politically unstable*"[49] areas. In 2000, already 74 % of Europe's gas imports came from Africa and so-called transition economies. This dependency was scheduled to rise up to 83 % in 2030.[50] This would also make the Netherlands increasingly dependent, also politically, on the Middle East and Russia.

83 That these were valid concerns was indeed confirmed by the gas disputes erupting between Russia and Ukraine over gas supplies from Russia starting in 2005. Europe receives gas that it imports from Russia largely through Ukraine and is thus directly affected if Russia reduces or suspends gas deliveries to Ukraine. This became evident in the winter of 2006 and in 2009 when European countries received less or even no gas deliveries. As is well known, all of this is even more true today, when Ukraine is still and continues to become even more of a geopolitical conflict zone on a daily basis, with gas supplies being part of the conflict.

3. Respondent openly advocated the construction of new highly efficient coal-fired power plants

84 Already in its Energy Report 2002, the Government had outlined that new coal-fired power plants would need to be built. It had been advised that coal was a "*a cheap, widely available and well distributed fossil fuel and can therefore make a good contribution to the security of*

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[46] **Exhibit C-0035**: Energy Report 2002, p. 2 Summary.

[47] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, p. 1.

[48] **Exhibit C-0035**: Energy Report 2002, p. 2.

[49] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, Annex 1, p. 8.

[50] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, Annex 1, p. 9.

supply."[51] Limiting or restricting the use of coal in the interest of reducing CO2 would be at odds with the security of supply and even undesirable.[52] Europe, the Report noted, would depend on the use of fossil energy sources for decades to come.[53]

85 When in May 2003 a new cabinet took office, the new Minister of Economic Affairs Laurens Jan Brinkhorst made it his mission to tackle the apparent problem of energy supply. In various parliamentary papers the Dutch government then openly emphasized the benefits of building new coal-fired power plants.

86 This was first elaborated and explained in a Governmental memorandum on the *Long-Term Vision for Security of Supply*, included as an appendix to a letter which the Minister Brinkhorst sent to parliament on 3 September 2003. In this memorandum, the Government explicitly pointed out the risks of a "*one-sided production park of mainly gas-fired units*" and stressed the importance of building power plants other than gas-fired ones:

> *"The investment climate in the Netherlands has led to a one-sided production park of mainly gas-fired units. The risks of this are an increasing dependence over time on possibly politically unstable countries, a limited spread of the price risk and partly as a result of this an increase in the price of electricity when oil prices are high. This led to higher production costs for the electricity production companies and has a negative effect on the overall competitive position of Dutch businesses. There was also a higher price level for all consumers and other customers.*
>
> […]
>
> *The construction of non-gas-fired units can contribute to limiting the risks associated with the current predominantly gas-fired production park."*[54] (emphasis added)

87 The fuel mix of power plants had to be broadened by investing more in generation capacity other than gas-fired plants, being coal-fired plants:

> "• *More room for investment in domestic energy production.*

[51] **Exhibit C-0035**: Energy Report 2002, p. 12.

[52] **Exhibit C-0035**: Energy Report 2002, p. 12/13.

[53] **Exhibit C-0035**: Energy Report 2002, p. 46.

[54] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, Annex 1, p.11.

> *By broadening the fuel mix of power plants, the Netherlands will be more in line with other countries in the European Union and the abovementioned risks will be reduced. It will also reduce the dependence on politically less stable regions. More investments in units that are not dependent on gas offer a solution to this. If entrepreneurs in the Netherlands want to invest in coal-fired power plants, they should not be unintentionally prevented from doing so.*"[55] (emphasis added)

88 In response to parliamentary questions, Minister Brinkhorst confirmed on 10 July 2004, that he welcomed new coal-fired power plants and again pointed to their economic benefits:

> "*I am positive about the building of a new coal-fired power plant. This fits within the energy policy, but the condition is that it must fit within the environmental policy of this government. With regard to energy policy, the construction of a new coal-fired power plant contributes to the security of supply: more new capacity becomes available and older (less efficient) power plants are deployed mainly during peaks in demand. For the long term, it is also good to avoid having a one-sided gas-fired production park. The construction of a new coal-fired power plant also contributes to economic efficiency: there will be a greater supply of relatively cheap electricity. That is good for consumers and for the competitive position of Dutch industry.*"[56] (emphasis added)

89 In its Energy Report 2005, the Government made it part of its official energy policy agenda to further and promote investments into new coal-fired plants:

> *"The electricity producers want to expand the existing coal-fired capacity. The cabinet considers this realistic and, in consultation with the energy companies, will map out the preconditions for investments in coal-fired power plants and remove obstacles where possible. Partly due to the presence of the port of Rotterdam, our country has very favourable conditions in which to invest.*"[57]

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[55] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, Annex 1, p. 12-13.

[56] **Exhibit C-0038**: Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions askeds by members of Parliament and answers given by the government..

[57] **Exhibit C-0039**: Energy Report 2005, Now for Later, p. 43. (This exhibit has previously been submitted as exhibit C-0007 (Dutch Original and English translation in a separate document) with the Request for Arbitration. Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

4. The Government actively seeks investors in new coal-fired power plants

90 The Government did not only set out its policy of opening new coal-fired power stations in parliamentary papers and policy documents. In the years 2004 and 2005 it also actively tried to attract and convince market parties who would be prepared to invest in new coal-fired power stations, both among large electricity consumers - industry - and among the energy companies.

91 For example, on 10 June 2004, one day after Minister Brinkhorst sent the memorandum on *Security of Energy Supply* to the Lower House, a top civil servant of his Ministry addressed the meeting of the association of large-scale consumers of energy and water VEMW. The report by *Energeia*, a news magazine for the energy sector, shows that the Ministry's Director-General of Energy Mr. Lankhorst spoke of a "*need*" to build coal-fired power plants. He announced that the Netherlands had eight sites available for a total of 6,000 MW of generating capacity:

> "*It is very important that the Netherlands does not just have gas-fired power plants. There are good opportunities and there is also a need to build coal-fired power plants. The Netherlands has eight locations where these can be built, offering room for a total of 6,000 MW of coal-fired generation."*
>
> *Gertjan Lankhorst, Director-General for Energy of Economic Affairs, made this statement on Thursday during the annual meeting of the Association of Large-Volume Users (VEMW), the interest group for large-scale consumers of energy and water. Lankhorst made a clear case for the building of coal-fired power plants, just as he had done earlier during a meeting at energy company Nuon."* [58]
> (emphasis added)

92 Mr. Lankhorst further pointed out that the Netherlands was "*ideally positioned*" for coal-fired power plants:

> *"The Netherlands is an exporter of gas and even oil products. Why can the same not apply to electricity?", Lankhorst wonders. The Netherlands is "ideally positioned" for the construction of a coal-fired power plant. There are ports where*

[58] **Exhibit C-0040**: Energeia, Lankhorst The Netherlands ideally positioned for the building of a coal-fired power plant, 10 June 2004

> *coal can be brought in, there is the availability of* cooling water and the distance to the customer is small."[59] (emphasis added)

93 For Mr. Lankhorst, it was also logical that new coal-fired power plants would be built in the Netherlands and not in Germany. Coal then would not first be transported to Germany to be converted into electricity that then was exported back to the Netherlands. The report in *Energeia* says the following:

> *"Lankhorst cited a quote from Johannes Verwer, director of Eon Benelux. He once said that he found it strange that coal is transported via Dutch ports to Germany, thrown into the boilers of power plants there, after which the generated electricity is exported back to the Netherlands."*[60]

94 The Dutch financial newspaper *Financieele Dagblad* ("**FD**") also reported on Mr. Lankhorst's speech, which was given on the Minister's behalf:

> "*The Dutch government pleads for the building of a new coal-fired power plant. This should prevent an impending electricity shortage in 2008. Moreover, a larger supply will lead to lower prices on the liberalised electricity market.*
>
> *It is very important for the Netherlands that not only gas-fired power plants are built. "There are certainly opportunities for coal-fired power plants too," said top official Gert Jan Lankhorst of the Ministry of Economic Affairs yesterday at the annual meeting of the Association of Large-Volume Users, VEMW. Lankhorst replaced Brinkhorst, who was actually scheduled to speak at the meeting."*[61] (emphasis added)

95 As this *FD* report shows, Mr Lankhorst's speech was taken as an "*opening*" by the Ministry of Economic Affairs and the energy companies were certainly interested in building new coal-fired power plants:

> *"The industry is interested in the construction. "Why should we first transport coal that arrives at the Maasvlakte to Germany? This is a great opening for Economic Affairs," says Jannes Verwer, director of Eon Benelux. "As an investor we weigh*

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[59] **Exhibit C-0040**: Energeia, Lankhorst The Netherlands ideally positioned for the building of a coal-fired power plant, 10 June 2004

[60] **Exhibit C-0040**: Energeia, Lankhorst The Netherlands ideally positioned for the building of a coal-fired power plant, 10 June 2004

[61] **Exhibit C-0041**: Het Financieele Dagblad, Brinkhorst pleads for building of new coal-fired power plant, 10 June 2004.

> *up the pros and cons at a European level. The Netherlands is important as a place of establishment.'"*[62] (emphasis added)

96 The State Secretary of the Ministry for the Environment ("**VROM**"), Pieter van Geel, shared this view. At a meeting of the trade association of energy companies, *EnergieNed*, on 25 May 2005, he welcomed new coal-fired power stations. The newspaper *Trouw* of 26 May 2005 reported as follows on Mr van Geel's speech:

> *""Clean coal-fired power stations are a realistic option for the future," the State Secretary said yesterday at a conference of energy umbrella organisation EnergieNed in Scheveningen. According to Van Geel, coal, like nuclear energy, will play an "essential role" during the transition to a truly sustainable* energy system."[63]

97 In 2005, it became even more clear how much the Dutch government wanted to encourage the construction of new coal-fired power plants. Minister Brinkhorst took the initiative to bring together large electricity consumers and energy companies. Large industrial companies such as Corus (Hoogovens), Akzo Nobel and DSM were considering investing in their 'own' coal-fired power station with the aim of jointly purchasing electricity at lower prices. Minister Brinkhorst initiated discussions about a long-term supply contract for cheap electricity between this "*power consortium*" and the energy companies that could build and operate a new coal-fired power plant. In his letter to the Lower House dated 7 October 2005, Minister Brinkhorst reported on this to the House.[64] He also arranged for a negotiator to be appointed who would negotiate with the energy companies on behalf of the large-scale consumers. The newspaper's *NRC "Reconstruction*" of 1 February 2020 mentions this:

> *"In October 2005, Brinkhorst arranged for nine major electricity consumers to unite under the leadership of former Hoogovens top executive Fokko van Duyne. He would negotiate with energy companies on a long-term contract for the large-scale users with a single power plant. This did not necessarily have to be a new coal-*

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[62] **Exhibit C-0041**: Het Financieele Dagblad, Brinkhorst pleads for building of new coal-fired power plant, 10 June 2004.

[63] **Exhibit C-0042**: Trouw, Van Geel sees future for 'clean coal', 26 May 2005, p. 2.

[64] **Exhibit C-0043**: Parliamentary Papers II 2005_06, 30 300 XIII, no. 8, Letter from Minister for Economic Affairs, 7 October 2005, p. 1.

> *fired power plant, but all parties aimed for it and that is what happened. Electricity sales were guaranteed.*"[65]

98 One of the energy companies that spoke to the power consortium was RWE. However, it did not reach an agreement with the consortium and RWE decided to build a power plant on its own. Eventually, a supply contract came about between the power consortium and EON, now Uniper, which would build a new coal-fired power plant on the Maasvlakte.

99 In any case, the Government's call to build new coal plants had "gotten through" to the energy companies, as was already evident from the reactions to the speeches of top official Lankhorst in 2004 and State Secretary van Geel in 2005. Starting in 2005, several energy companies explored the construction of new coal-fired power plants. At the end of 2005, Belgium's Electrabel (now: Engie) announced its intention to build two new gas plants and a coal and biomass plant on the Maasvlakte. German EON (now: Uniper) and Dutch Nuon (now: Vattenfall) also announced their intention to build new coal plants.[66]

100 RWE also explored the possibilities from the end of 2005 and announced its intention to build a new coal plant in the Netherlands in the spring of 2006 (see below Section **B.V.**).

5. Respondent considers new coal plants compatible with its climate goals due to the upcoming Emissions Trading System (ETS)

101 Respondent considered new coal plants to be compatible with its climate goals due to the upcoming European Emissions Trading System ("**ETS**").

[65] **Exhibit C-0036**: NRC, When the price of electricity outweighed the threat of climate change, 2 February 2020, p. E.10/E11.

[66] **Exhibit C-0044**: Het Financieele Dagblad, Battle erupts on the electricity market, 21 November 2005.

102 Respondent's climate goals were primarily shaped by its need to implement the 1997 Kyoto Protocol.[67] Respondent signed the Kyoto Protocol on 29 April 1998 and ratified it on 31 May 2002.[68] The Protocol itself entered into force on 16 February 2005.

103 As the full name indicates, the Kyoto Protocol was concluded before the background of the 1992 United Nations Framework Convention on Climate Change ("**UNFCCC**").[69] In essence, the Kyoto Protocol gave the UNFCCC teeth: where the UNFCCC had merely obliged Contracting States to adopt policies and measures on mitigation, and to report periodically about their emissions, the Kyoto Protocol in Article 3(1) obliged certain of the Contracting States to reduce their greenhouse gas emissions, including CO2, in the period 2008-2012 by at least 5 % compared to 1990:

> "*1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.*"

104 In Annex B, the EU agreed to a total emissions reduction of 8 %, meaning that its greenhouse gas emissions should not exceed 92 % of its 1990 levels. This overall reduction target was distributed between the Member States of the EU, and the Netherlands agreed to a reduction by 6 %.

105 Coal-fired power plants have an average lifetime of over 40 years. Thus, their CO2 emissions have an influence on the total CO2 emissions of a State for a long time. The Government was fully aware of this, as evidenced by this passage in the *Long-Term Vision*

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[67] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, available in the UN languages at https://unfccc.int/documents/2409 (last accessed: 14 December 2021).

[68] See list of Contracting States, available at https://unfccc.int/node/61126 (last accessed: 14 December 2021).

[69] United Nations Framework Convention on Climate Change, entered into force on 21 March 1994, available at https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change (last accessed: 14 December 2021).

for Security of Supply, where the importance of clarity for investors on environmental requirements is discussed:

> "*At present, there are no formal obstacles to investments in coal units, but in practice the investments are not getting off the ground. A prerequisite for companies is that long-term certainty is provided regarding the environmental regulatory framework and its preconditions. The main environmental requirements that apply or will apply to these units are derived from European and other international policies. For the long term (relevant because the life span of a new coal-fired power plant certainly extends to around 2040), the ambitions for the development of the most important emissions are indicated in the National Environmental Policy Plan 4 (2002).*"[70] (emphasis added)

106 The Government did not consider this to be a problem. Minister Brinkhorst, in his answer to parliamentary questions on 10 July 2004, pointed out that new coal plants would also contribute to making the Dutch energy supply more sustainable. First and foremost, the new coal-fired power stations would be more efficient than existing plants (thereby saving CO2):

> *"Technological developments in recent years have greatly improved the efficiency of coal-fired power plants and limited their negative environmental impact."*[71] (emphasis added)

107 In response to the question whether new coal-fired power stations were compatible with climate policy, Minister Brinkhorst pointed to the upcoming system of European emissions trading and explicitly confirmed this:

> "*I do not see any contradiction between the construction of a new coalfired power plant and the transition to a sustainable energy economy. Coal-fired power plants produce an important part of the electricity in Europe and in the Netherlands and I am convinced that coal will continue to play an important role in our energy supply in the medium term. Within a well-functioning system of CO2 emission trading, a price is attached to CO2 emissions. With the hard CO2 emissions cap for companies covered by emissions trading (i.e., 112 Mtonnes/year for the years 2008-2012), we know for sure that we will achieve the climate targets. From a*

[70] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, Annex 1, pp. 11-12.

[71] **Exhibit C-0038**: Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions askeds by members of Parliament and answers given by the government..

> *CO2 point of view, I then have no objection to new coal-fired power plants.*"[72] (emphasis added)

108 The ETS is a 'cap and trade' system. It caps the total volume of GHG emissions from installations and (today also aircraft operators). The system allows trading of emission allowances so that the total emissions stay within the cap and the least-cost measures can be taken up to reduce emissions. The EU considers that the trading approach helps to combat climate change in a cost-effective and economically efficient manner. It allows a set environmental outcome to be achieved at lowest costs. Trading allows companies in the system to determine what the least-cost option is for them to meet a fixed cap. The carbon price is then set by the market through trading and based on a wide range of factors.

109 Thus, the Government would leave it to the market to determine how electricity could be produced most efficiently, with the CO2-price ensuring that most efficient plants prosper. In 2004, when Minister Brinkhorst answered parliamentary questions as outlined above, the details about the ETS in the third phase still had to be agreed on.[73] In the aforementioned memorandum on *Security of Energy Supply*, Minister Brinkhorst described the Dutch objective. The bottom line was that in the third phase, in 2013-2020, emission rights should no longer be allocated at the national level, but at the European level, with a single CO2 ceiling for the entire EU:

> *"1. As far as CO2 emissions trading is concerned, I expect that with the adoption of the first allocation plan and the start of the first trading period on 1 January 2005, uncertainty (which, incidentally, exists just as much in other EU Member States) will be partially removed. For the period after 2012 I am committed to a European CO2 emissions ceiling and European allocation per sector, instead of national ceilings and national allocation. This will certainly not be easy, but it*

[72] **Exhibit C-0038**: Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions askeds by members of Parliament and answers given by the government..

[73] The EU ETS framework system operates in trading phases. In phase 1 (2005-2007) a price for carbon, free trade in emission allowances across the EU, and the infrastructure needed to monitor, report and verify emissions from the businesses covered was established. In phase 2 (2008-2012), *inter alia*, lower caps on allowances (some 6.5 % lower compared to 2005) were introduced and some countries held auctions. In phase 3 (2013-2020) a single, EU-wide cap on emissions in place of the previous system of national caps was implemented. Targets in phase 4 (2021-2030) were now changed to ensure emissions reductions in support of the EU's 2030 emissions reduction target (of -40 % relative to 1990 level) and as part of the EU's contribution to the Paris Agreement. (See https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en last accessed on 14 December 2021).

> *contributes significantly to the creation of a level playing field in Europe.*"[74] (emphasis added)

and:

> *"For the post-Kyoto period (2012 onwards), I argue for a European CO2 emissions ceiling instead of separate national emissions ceilings. This will prevent national industrial policy from being conducted at the expense of climate policy. This approach will contribute to strengthening the European economy as a whole because it will make investments where they are most efficient.*"[75] (emphasis added)

110 The memorandum thus emphasized that for the sake of a *level playing field*, ETS should also be the *only* instrument to realize climate policy and reduction of CO2. The Minister therefore emphasized that other instruments and obligations such as "*disproportionate taxation*" and "*price caps*" should be avoided:

> "*A good investment climate is an essential prerequisite for the many investments in production capacity that will be needed in Europe in the coming decades. I want to contribute to making it attractive for capital providers to invest in the electricity sector in Europe as well. It is not desirable for certain Member States to favour investors through, for example, protective structures or improper subsidies.* Measures that make the investment climate worse than that of other Member States, such as disproportionate taxation, price caps or a lack of a level playing field in emissions trading, must also be avoided*. Harmonisation of differences in regulation, consistency and stability of regulation from Brussels and a European perspective in policy development are of great importance. An example of the latter is a European approach to climate policy.*"[76] (emphasis added)

111 In its Energy Report 2005, the Government also addressed CO2 capture and storage. It was also clear to the Government that CCS as a technique had yet to be fully developed. However, the Government saw good opportunities here for the Netherlands and was therefore keen for this technique to be developed. The Energy Report 2005 pointed to the

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[74] **Exhibit C-0045**: Parliamentary Papers II 2003/04, 29 023, no. 4, Letter from the Minister of Economic Affairs, 9 June 2004, p. 6.

[75] **Exhibit C-0045**: Parliamentary Papers II 2003/04, 29 023, no. 4, Letter from the Minister of Economic Affairs, 9 June 2004, p. 24.

[76] **Exhibit C-0045**: Parliamentary Papers II 2003/04, 29 023, no. 4, Letter from the Minister of Economic Affairs, 9 June 2004, p. 24.

empty gas fields that could be used for the underground storage of CO2 and wanted to develop that potential. In this context, the Energy Report 2005 spoke of "*clean fossil*":

> *"In addition to the usual emission reduction techniques, the capture and subsequent storage of CO2 plays a major role in clean fossil fuels because of the great potential for the Netherlands. With its gas fields, the Netherlands has enormous potential for the underground storage of CO2 compared to neighbouring countries. It is important that carbon storage in empty gas fields can actually take place in the future. In consultation with the sector we shall therefore examine how the future availability can be secured. We want to develop a joint vision and approach aimed at the future use of the Dutch storage capacity."*[77]

112 Respondent was fully aware that new coal-fired power plants would have a lifetime of approx. 40 - 45 years:

> "*A coal-fired power plant that is built now has a life span until around 2050. Around that time, this power plant may no longer emit CO2. This is something that initiators should be fully aware of when deciding on new coal-fired power plants. It is possible that a decision on carbon capture and storage will have to be taken within 10 years of the power plant becoming operational*."[78]

113 The Government did not consider CCS to be inevitable, but rather that a decision on CCS "*will have to be taken*" within 10 years of the plant's commissioning. As regards Eemshaven, that would mean 2025. The reason for that is evident: since the ETS would lead to Europewide shrinking CO2-budgets, plants might have to decide for themselves to install CCS in order to continue operating. The Coal Ban Law, however, has rendered such a decision superfluous: no coal can be fired even with CCS.

6. Respondent supported co-firing of biomass since it would promote renewable energy

114 In addition to being more efficient, and thereby emitting less CO2 per MW than older and less efficient plants, the CO2 emissions of the new coal-fired power plants could be further reduced. This could be achieved by co-firing CO2 neutral biomass.[79] The new coal-fired

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[77] **Exhibit C-0039**: Energy Report 2005, Now for Later, p. 47.

[78] **Exhibit C-0039**: Energy Report 2005, Now for Later, p. 27.

[79] In the ETS, the emission factor for biomass is set to zero. Thus, a plant firing biomass does not need emission certificates for the biomass used.

power stations would thus be able to supply renewable energy and increase the share of renewable energy in the electricity supply. According to Minister Brinkhorst:

> *"It sounds paradoxical, but a new coal-fired power plant can also contribute to the promotion of sustainable energy. A new coal-fired power plant is also partly a potential biomass power plant because the co-firing of biomass is possible in a coal-fired power plant."*[80]

115 New coal plants would not only help meeting Respondent's climate targets, but also its obligations to increase the share of renewable energy. Already after having signed the Kyoto Protocol in 1999, Respondent considered the implications arising out of the need for CO2 reduction for the existing coal-fired power plants. When an implementation memorandum led to questions by Parliament whether the Government wanted to close down coal plants, the Government saw the need to explicitly refute that. In response, the Government made clear that it did not want to close existing coal plants:

> *"It is not the cabinet's intention to close down power plants."*[81]

and:

> "*It is not the cabinet's intention to close down coal-fired power plants*."[82]

116 Instead, the Government aimed at reaching agreements with power plant owners to co-fire biomass in the plants:

> "*The cabinet wants to reach an agreement with the owners of coal-fired power plants (on a voluntary basis) to reduce the emissions of these power plants to the level of natural gas combustion. One way of doing this is to use extra biomass in these power plants. This serves two purposes. The CO2 emissions from the power plants are reduced and a contribution is made towards achieving the goals*

[80] **Exhibit C-0038**: Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions askeds by members of Parliament and answers given by the government.

[81] **Exhibit C-0046**: Parliamentary Papers II 1999/00, 26 603, no. 4, List of Questions and Answers, 22 October 1999, p. 33.

[82] **Exhibit C-0046**: Parliamentary Papers II 1999/00, 26 603, no. 4, List of Questions and Answers, 22 October 1999, p. 33.

> *for sustainable energy. It is by no means the cabinet's intention to close down coal-fired power plants.*"[83] (emphasis added)

117 This was repeated and confirmed in a subsequent Framework Policy Agreement of August 2000, which states that the Government would support coal plant operators to fire biomass in their plants:

> "*With due observance of national and European regulations, the government will continue to stimulate the use of biomass with fiscal, financial or other instruments to the extent and for the duration necessary to enable the use of biomass – as referred to in this framework policy agreement – in an economically responsible manner*."[84]

118 In 2001, the EU adopted Directive 2001/77/EC which was aimed at *"promot[ing] an increase in the contribution of renewable energy sources to electricity production"*.[85] For Respondent, the national indicative target for electricity produced from renewable energy source ("**RES**") in the gross national electricity consumption by 2010 was set at 9 %.[86] As biomass is considered to be a renewable energy source,[87] energy generated from the combustion of biomass is included in the share of renewable energy sources.

119 Biomass was and is more expensive and contains less energy than coal. The co-firing of biomass is therefore uneconomic without a scheme to compensate for its additional costs, the so-called 'uneconomic top'. The 2002 Coal Agreement between the Dutch government and power plant operators therefore included a special tax exemption. It and provided that changes in the Government policy on the use of biomass would not be part of the normal

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[83] **Exhibit C-0046**: Parliamentary Papers II 1999/00, 26 603, no. 4, List of Questions and Answers, 22 October 1999, p. 37.

[84] **Exhibit C-0047**: Framework Policy Agreement on coal-fired power stations and CO2 reduction, p. 4. The Framework Policy Agreement on coal-fired power stations and CO2 reduction is a voluntary agreements between the government and the owners of coal-fired power stations in the Netherlands.

[85] **Exhibit C-0048**: Directive 2001/77/EC of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, Article 1. It was in 2009 replaced by Directive 2009/28/EC.

[86] **Exhibit C-0048**: Directive 2001/77/EC of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, Annex.

[87] **Exhibit C-0049**: Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently, Article 2 lit. (a).

business risk of operators. They would be compensated for changes which reduced their rate of return below 12 %.[88]

120 The tax exemption was replaced in 2003 by a subsidy scheme. The Government continued to support the co-firing of biomass during the whole construction period of Eemshaven, and even during the first two years of operation. It was only after the 2017 elections that the new Government then did not only decide to phase-out coal plants, but simultaneously ended the support scheme for co-firing of biomass.[89]

7. Summary

121 When Claimants considered expansion into the Netherlands, they were faced with a very clear situation: Respondent, through the official Energy Reports and statements by Ministers, publicly declared it needed and wanted new coal-fired power plants to be built, and was actively seeking investors. Since Respondent considered that its climate goals would be achieved by the ETS, Respondent also declared that new coal plants would be compatible with its own climate goals. This position was consistently repeated until 2017. Irrespective of that, Respondent would support co-firing of biomass to further reduce emissions and reach its renewable energy goals.

V. Respondent welcome Claimants' decision to build a new coal-fired plant, supports it and confirms its policy of non-intervention

1. Introduction

122 At the general RWE Annual Meeting in April 2006, RWE announced its intention to build a coal-fired power plant in the Netherlands with the ability to co-fire biomass. At that time it was still unclear whether the plant would be built in Rotterdam or at Eemshaven. RWE

[88] **Exhibit C-0050**: Covenant on coal-fired Power Plants and CO2 Reduction, 24 April 2002, Art. 10(2).

[89] Claimants will therefore only receive subsidies under the SDE+ scheme which were already approved prior to this decision. These subsidy decisions will expire in 2027.

informed both the Government and provincial authorities about its plans, e.g. at a presentation to the province of Groningen on 22 April 2006.[90]

123 Only shortly after that even, the Government confirmed its policy of supporting coal-fired plants in Parliament (**2.**). Respondent also specifically supported Claimants with the Eemshaven project by arranging the deepening of the waterways (to ensure delivery by ship) and the expansion of the grid connection (to ensure that electricity could be fed into the grid) (**3.**).

124 When a new government came into power in 2007, it confirmed and continued the policy regarding coal plants: these were considered very welcome and Respondent would not subject them to disadvantages with respect to its CO2 emissions since the ETS system would take care of that (**4.**). This was then also reflected in the new Energy Report (**5.**) and included in the 2008 Energy Sector Agreement between the Government and the Energy Sector (**6.**).

2. Respondent confirms its policy on coal-fired power plants

125 Not two months after RWE had announced its intentions, the Dutch Government in a discussion in the Lower House confirmed its previous policy on coal-fired power plants. These were welcome and would not be subjected to discriminatory measures. Given the existing technical problems, CCS would not be made mandatory but would need to be developed first. Given that emissions trading would regulate the price of CO2, the Government also considered it unnecessary to make co-firing of biomass mandatory.

126 Minister of Economic Affairs Brinkhorst and State Secretary Van Geel explained that due to their higher efficiency, the new plants would force older power plants to close down. In Minister Brinkhorst's words:

> *"A new coal-fired power plant would be a welcome expansion of the Netherlands' capacity to generate electricity. Moreover, a coal-fired power plant would increase the stability of energy prices and contribute to the modernisation of coal-fired*

[90] See **Exhibit C-0051**: RWE Presentation Power Plant Project in the Netherlands – Provincie Groningen, [redacted], dated 25 April 2006, slide 10.

> *power plants in Europe. After all, coal-fired power plants with low efficiency will be the first to close their doors in the future."*[91] (emphasis added)

127 The Minister and the State Secretary pointed out that the new coal-fired power stations should be as efficient as possible and emit as little CO2 as possible. However, the Government would not take measures to "*exclude certain techniques*" with regard to coal-fired power plants, because such measures were legally untenable:

> *"Coal-fired power plants must meet current environmental requirements. These requirements will most likely be tightened in the future. This applies in particular to the emission ceilings for SO2, NOx and particulate matter. In addition, the government will not take any measures that discriminate on the basis of technique in order to exclude certain techniques in advance. Such measures are not legally tenable. For that matter, the proposals made so far use such modern technology that it is not to be expected that these (stricter) environmental requirements will lead to problems*."[92] (emphasis added)

128 Minister Brinkhorst explicitly stated that CCS would not be made mandatory:

> *"Of course, this requires that such plants be as efficient as possible and emit as little CO2 as possible. However, for technical, economic and policy reasons, it is undesirable to mandate underground carbon storage at this time.*"[93]

129 The Minister explained that the technology for CCS had yet to be developed and mandating CCS would result in a doubling of the price of electricity:

> *"There is no experience with underground storage of carbon from coal-fired power plants, so it is unclear whether this form of storage is technically feasible. Moreover, the technology for capturing CO2 fumes is still under investigation. This also applies to the storage itself, for which only small-scale tests are being carried out at the moment. Moreover, the management and responsibility of underground carbon storage has not yet been worked out. All in all, mandatory underground*

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[91] **Exhibit C-0052**: Parliamentary Papers II 2005/06, 28 240 / 28 982, no. 50, Report of a Written Consultation, 8 August 2006p. 13.

[92] **Exhibit C-0052**: Parliamentary Papers II 2005/06, 28 240 / 28 982, no. 50, Report of a Written Consultation, 8 August 2006, p. 16.

[93] **Exhibit C-0052**: Parliamentary Papers II 2005/06, 28 240 / 28 982, no. 50, Report of a Written Consultation, 8 August 2006, p. 13.

> *storage would lead to a doubling of the price of the electricity supplied by this power plant."*[94]

130 Furthermore, the State Secretary noted that CCS could not be prescribed as the technology needed to be developed first, and admitted that the necessary pilot demonstration projects would need to be "*strongly supported*" by the government:

> "*At present, there is no adequately tested technology for underground carbon storage available. Therefore, the government cannot oblige a coal-fired power plant to do so. However, it can be considered whether it is possible to prepare the power plant to be built as far as possible for underground storage. This form of storage requires a lot of space and this can already be taken into account when planning the construction. Incidentally, this will have to be decided because after 2012, a very substantial reduction of CO2 emissions will be necessary, see the scenarios of the ECN (Energy Research Centre of the Netherlands). However, it is not possible to use CO2 emission trading to impose requirements that would prevent the construction of a coal-fired power plant on the second Maasvlakte. Furthermore, the carbon storage pilots will have to be strongly supported.*"[95] (emphasis added)

131 As it is apparent from these statements, it was clear to the Government that it would have to make a (major) effort to develop CCS as a technology.

132 Any future application of CCS would therefore not be mandatory. The same was true for co-firing of biomass. There would be no obligation on coal-fired power stations to co-fire at least 50% biomass in order to reduce CO2 emissions, or any other percentage:

> "*You ask whether I am prepared to ensure that coal-fired power plants co-fire at least 50% biomass in order to bring CO2 emissions to an acceptable level. This is not necessary because the emission allocation available to Dutch companies is based on achieving the Kyoto target. Further reduction requirements for one or a few emitters at this moment will only result in more CO2 emission allocation elsewhere.*"[96]

133 Minister Brinkhorst also recognized that co-firing biomass was not economically viable. He did not consider subsidies necessary, because the prices of CO2 emission rights might rise

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[94] **Exhibit C-0052**: Parliamentary Papers II 2005/06, 28 240 / 28 982, no. 50, Report of a Written Consultation, 8 August 2006, p. 13.

[95] **Exhibit C-0052**: Parliamentary Papers II 2005/06, 28 240 / 28 982, no. 50, Report of a Written Consultation, 8 August 2006, p. 16.

[96] **Exhibit C-0053**: Parliamentary Papers II 2005/06, 29 023, no. 28, Letter from the Minister of Economic Affairs, 26 June 2006, p. 8.

and the prices of biomass might fall. It would be up to the energy companies to decide whether they would co-fire CO2 neutral biomass, so that they would need fewer CO2 emission rights.[97]

3. Respondent supported Eemshaven by providing the necessary infrastructure

134 Respondent also actively supported the development of Eemshaven by ensuring that the necessary infrastructure was provided. Claimants had early on identified two main problems: the deepening of the waterway to and within the port of Eemshaven (to ensure access by large ocean-going vessels) and the expansion of the electricity grid capacity to ensure access for Eemshaven.

(a) Deepening of waterways and harbour of Eemshaven

135 To ensure economic viability of the power plant, it was of great importance for RWE to ensure that the harbour and the waterway to Eemshaven would be made suitable for large ocean-going transport vessels (Panamax vessels) transporting coal to the power plant. For this, Respondent early on promised its support.

136 On 26 October 2006 in a meeting with Mr van Geel, Secretary of State for Environment, the new CEO of RWE [redacted] discussed, *inter alia*, the deepening of the waterway. During that discussion, Mr van Geel confirmed that "*the Dutch government decided to deepen the waterway to Eemshaven and that it is virtually certain that this will eventually take place*."[98]

137 Next to the deepening of the waterway through the Wadden Sea[99], RWE considered it necessary to also deepen the Eemshaven sea harbour (harbour extension). For both, individual permits were required. However, those permits could not be applied for by RWE itself. Thus, the permit for the deepening of the harbour were requested by the Harbour

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[97] **Exhibit C-0053**: Parliamentary Papers II 2005/06, 29 023, no. 28, Letter from the Minister of Economic Affairs, 26 June 2006, p. 8.

[98] **Exhibit C-0054**: Notes of meetings [redacted] with Van Geel, Verkeer & Waterstaat, Wijn of 26 October 2006, p.1.

[99] The Wadden Sea is a zone which extends along the coasts of Denmark, Germany and the Netherlands in the south-eastern part of the North Sea at the coast of north-western continental Europe. It is the largest tidal flats system in the world and listed by UNESCO as World Heritage.

Authorities and the permit for the deepening of the waterway were requested by Rijkswaterstaat being the responsible authority for traffic.[100] This evidences that the State did not only welcome Claimants' investment, but actively undertook steps to assist in the realization.

138 Both the deepening of the waterway and the deepening of the port were ultimately authorized and then realized.

(b) Respondent supported the necessary grid access

139 Respondent furthermore supported the project by ensuring the necessary grid access. The grid at Eemshaven had not enough free capacity, and sufficient access was decisive for the project.

140 On 13 December 2006, [redacted] of RWE AG (later [redacted]) emphasised towards Mr J.G.M. Alders, the Queen's Commissioner[101] of the Province of Groningen, that transport capacity of the grid was an important issue for RWE. He also explained that RWE would have a conversation with TenneT (the State-owned grid operator) in January 2007 regarding the (expansion of the) available transport capacity from Eemshaven to Zwolle,[102] a municipality at a central location in the north-eastern part of the Netherlands and an important grid junction.

141 On 5 April 2007, RWE's [redacted] sent a letter to the newly elected Minister of Economic Affairs, Maria van der Hoeven, to also inform her of RWE's plans to build a power plant in Eemshaven. He emphasised again that this plant would be build *capture-ready* but pointed out that the realisation of CCS would require governmental support. CCS needed to become legally, technically and economically viable before companies could make use of it.

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[100] At the time RWE made its final investment decision in spring 2009, the process of obtaining those permits was still in process. However, the permits were estimated to be granted before commissioning of Eemshaven, which turned out to be correct.

[101] A "Queen's Commissioner" (*Commissaris van de Koningin*) or whenever the reigning monarch is a male a King's Commissioner (*Commissaris van de Koning*) is the head of a province in the Netherlands, who is chairman of the respective province and the *Gedeputeerde Staten* (the executive branch), but only has a right to vote in the latter. (See https://en-academic.com/dic.nsf/enwiki/882045 last accessed on 14 December 2021).

[102] **Exhibit C-0055**: RWE letter from [redacted] to J.G.M. Alders dated 13 December 2006.

Furthermore, he requested support from the Government with regards to the necessary grid connection and the allocation of CO2 certificates:

> "*We have had several discussions with TenneT, the Office of Energy Regulation and your Ministry to get more certainty about how this power station in Eemshaven can be connected to the power grid. At the moment, limited capacity is available and a strengthening of the network in the Northern Netherlands is necessary. TenneT is capable of realising this capacity expansion, but active cooperation by your Ministry is a necessary condition. In addition, clarity with regard to CO2 allocation for 'newcomers' is also a critical factor. As one of the largest foreign investors in the Dutch energy sector, we hope to be able to count on your support or at least to obtain sufficient certainty about these factors in time.*"[103] (emphasis added)

142 RWE's approach bore fruits very soon. Only one month after [redacted] letter to the Minister of Economic Affairs was sent, TenneT had received the necessary governmental permission and declared that it would be investing EUR 85 million in a temporary expansion to connect Eemshaven to the high-voltage grid. A press article stressed the relevance of the decision for the Eemshaven project and for the whole Province of Groningen:

> "*German company RWE can build a coal-fired power plant in the Eemshaven.*
>
> […]
>
> *"I don't care how it's done," said director Harm Post of the Groningen Seaports port authority, "as long as RWE can get on the network."*
>
> […]
>
> *RWE's arrival is expected to give a boost to regional employment. The province of Groningen feared that the lack of capacity would cause important new companies wanting to settle in the north to move to other parts of the* Netherlands. Post: "Eemshaven could soon make the difference for our region.""[104] (emphasis added)

143 The Government provided the requested support to RWE in its process to secure sufficient capacity from TenneT. In October 2008 the connection to the electricity network was finally ensured via an agreement with TenneT.

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[103] **Exhibit C-0032**: RWE Letter from [redacted] to Minister Van der Hoeven, dated 5 April 2007.

[104] **Exhibit C-0056**: Dagblad van het Noorden, Still room on electricity network for RWE power plant, 8 May 2007.

4. A new Government confirms that CO2 emissions should only be regulated by the ETS

144 After elections, a new Government came into power in February 2007. It affirmed the previous Governments policy on coal-fired power plants.

(a) Coal-fired plants were welcome and considered compatible with climate policy

145 The new Government also considered new and modern coal-fired power plants compatible with climate policy through the ETS. In its third phase, from 2013, the ETS would allocate CO2 emission rights at the European level and include a European CO2 cap. In her letter to Parliament of 28 June 2007, the new Minister for the Environment Cramer articulated this as follows:

> *"As regards the period after 2012, the European Commission is currently working on a revision of the European trading system. The Netherlands and other Member States are arguing for more harmonisation and allocation of rights at the European level, with an emission ceiling for each sector, including the electricity sector. In the proposed situation, each Member State will transfer part of its national emission allowance to Europe. All European power plants will then be allocated allowances from the joint emission allowance, whereby it makes no difference where power plants are located as far as CO2 is concerned. After all, the number of allowances made available for these power plants is absorbed within the European ceiling.*
>
> *As a result, it no longer weighs on the aims of Dutch climate policy. This does not alter the fact that the power plants must collectively contribute to the European climate objectives."*[105] (emphasis added)

146 Energy companies would indeed have to pay for CO2 emission rights, which would encourage them to limit CO2 emissions:

> "*The producers of the coalfired power plants that may be built know that they have to deal with a system in which the emission of CO2 has a price. The aim is to change the existing CO2 emission trading system in a European context so that as much as possible is auctioned. The first sector in which allowances will preferably be auctioned for 100% is the energy sector. The coal-fired power plants will probably not be commissioned before 2011 or 2012. They will therefore be*

[105] **Exhibit C-0029**: Parliamentary Papers II 2006/07, 28 240 and 29 023, no. 77, Letter from the Minister of VROM, 28 June 2007, p. 5.

> *covered by this modified European emissions trading system. This will encourage producers to reduce CO2 emissions.*"[106] (emphasis added)

147 Minister Cramer also pointed out that the new coal-fired power plants would push older plants abroad out of business because of their high efficiency and the Netherlands' favourable location by the sea. The new coal-fired power plants would be able to bring in coal by ocean-going vessels at low cost and use ever-supplied seawater as cooling water. The new coal plants would also replace imported electricity and thus also contribute to making the electricity supply more sustainable.[107]

(b) The Government did not plan any CO2 measures over and above ETS

148 Like the former Minister Brinkhorst and State Secretary Van Geel, Minister Cramer also emphasized that she would not impose additional obligations in the area of CO2 emissions than having sufficient CO2 emission rights.

149 In a consultation with the Lower House on 3 July 2007, Minister Cramer noted that the government considered this "*essential*" for the sake of a *level playing field* for coal-fired power plants in the Netherlands, even if it meant that there would be more plants than there were at the time:

> *"This will encourage producers to reduce CO2 emissions. The cabinet considers harmonisation and allocation of allowances at the European level essential, because this creates a level playing field. It is possible that there will be more power plants in a few years' time than there are now.*
>
> *If there is a European emissions trading system, this will not be a problem. After all, there will be a CO2 ceiling set at European level*."[108] (emphasis added)

150 In an interview in *NRC* on 27 September 2007, Minister Cramer also left no room for a misunderstanding on this point:

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[106] **Exhibit C-0057**: Parliamentary Papers II 2006/07, 28 240, no. 86, Report of a Written Consultation, 8 August 2007, p. 6.

[107] **Exhibit C-0029**: Parliamentary Papers II 2006/07, 28 240 and 29 023, no. 77, Letter from the Minister of VROM, 28 June 2007, p. 3.

[108] **Exhibit C-0057**: Parliamentary Papers II 2006/07, 28 240, no. 86, Report of a Written Consultation, 8 August 2007, p. 6.

> *"I am not going to make anything compulsory when it comes to carbon dioxide emissions. Because I believe in the future system of emissions trading."* [109] (emphasis added)

151 In doing so, the Government reaffirmed that any future application of CCS or co-firing of biomass would therefore not be mandatory, as Minister Brinkhorst had already made clear. This is also understandable. If it were made mandatory (which would have been not possible at that time since it was not yet developed), the new power stations would be subject to stricter rules in the Netherlands than elsewhere in Europe. This would put them in a competitive disadvantage. An important intended effect of opening the new coal-fired power stations - the reduction of the price of electricity for the benefit of Dutch industry and consumers - would be nullified.

(c) CCS not market ready and needs to be developed

152 The new Government also affirmed that CCS still had to be developed and subsequently made profitable. Minister Cramer herself pointed out that the technology was not yet "*market-ready*" and that "*significant efficiency improvements and cost reductions*" were needed:

> *"Carbon Capture and Storage (usually abbreviated as CCS) is not yet market-ready or commercially available. There is industrial experience with the components of CCS but not on the scale required and not yet integrated into the whole chain from capture to storage. In addition, significant efficiency improvements and cost reductions in the technology are necessary and possible."*[110] (emphasis added)

153 The new Government thus continued the energy policy of its predecessors: new coal plants were necessary and welcome. They were considered compatible with Respondent's climate goals since under the ETS, the total number of emissions certificates would be limited. Market forces, together with a shrinking number or certificates, would ensure that coal-plants would co-fire biomass. CCS was not yet market ready and needed further development.

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[109] **Exhibit C-0058**: NRC, "My plans are not soft", 27 September 2007.

[110] **Exhibit C-0029**: Parliamentary Papers II 2006/07, 28 240 and 29 023, no. 77, Letter from the Minister of VROM, 28 June 2007, p. 5.

5. The Energy Report 2008 confirmed that coal would continue to play an important role in the Dutch energy sector for many decades to come

154 We have explained above in Section **B.IV.** that Respondent in 2004/2005 actively encouraged the construction of new coal-fired power plants and considered the ETS the appropriate method to enforce CO2 reductions. Respondent continued this policy also after Claimants had announced their intention to build Eemshaven. This became apparent in the Energy Report 2008, with which the Dutch government announced its energy policy intention for the coming years.

(a) The Energy Report 2008 confirms the important role of coal plants until 2050

155 In the report, the Government expected coal to continue to play an important role in the country's energy mix even in 2050:

> "*In 2050, the Netherlands will still have a relatively large number of gas-fired power plants, but these will also burn other (green) gases besides natural gas. Coal and nuclear energy are part of the energy mix.*"[111]

156 The Energy Report 2008 described three different scenarios for the Dutch energy supply market in 2050. In all of them, electricity generated via coal-firing plays an important role. Thus, the Netherlands could be:

(1) Europe's "Powerhouse" with many coal- and gas-fired power plants;[112]

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[111] **Exhibit C-0031**: Energy Report 2008, p. 11.

[112] **Exhibit C-0031**: Energy Report 2008, p. 12: "*The first vision is that of the Netherlands as Powerhouse of Europe. Due to the Netherlands' coastal location, coal can be easily transported and sufficient cooling water is available. Many coal-fired power plants will be built in the Netherlands. The gas infrastructure is also being expanded into a gas roundabout, with a number of large gas-fired power plants. By opting for coal gasification, the flexibility of the system is increased. The Netherlands supplies base load capacity to neighbouring countries, which have to provide for their own peak capacity. The seaports are investing in coal handling capacity, and TenneT is investing with foreign partners in expanding network capacity to transport power to the hinterland. Industry, and in particular the energy-intensive industry, is thus served at its beck and call. It is possible to 'green' this picture. The Netherlands would play an exemplary role in carbon capture and storage and their co-firing of biomass, and would continue to develop its onshore and offshore wind farms.".*

(2) Europe's "Flex worker", focussing on peak-load demand by providing electricity from gas-fired power plants whose electricity output can be quickly altered;[113] or

(3) a "Smart Energy City", running mainly on small-scale local power plants.[114]

157 The Government expressly did not choose any particular option but would leave this to market participants by merely providing an appropriate regulatory framework:

> "*The cabinet does not choose one of these visions, but promotes and regulates in such a way that market parties can shape the future electricity supply.*"[115]

> "*Preconditions for the development of the first line of thought (*powerhouse*) are a good investment climate for large-scale electricity production, further integration of electricity markets, enlargement and streamlining of procedures for infrastructure projects, a clear framework for large-scale carbon storage and clear sustainability criteria for biomass. All these preconditions are elaborated on in this report.*"[116] (emphasis added)

158 Accordingly, the report also stated repeatedly the expectation that electricity from coal would *"play an important role in the coming decades"*:

> "*Electricity generated from natural gas, coal and nuclear energy will continue to play an important role in the coming decades. With a view to the reliability and affordability of the electricity supply, a balanced fuel mix in an integrated Northwest European market must be sought. The cabinet sets stringent environmental requirements and stimulates the application of the most efficient techniques. Together with investors and other parties, carbon capture and storage will be vigorously promoted through pilot projects and the creation of a clear legal framework.*"[117] (emphasis added)

159 The report also again emphasised the benefits of coal for the security of supply and expressly calls for new coal-fired or nuclear power plants:

> "*Coal is abundant and widely distributed worldwide. At current coal consumption levels, proven and commercially viable reserves alone can meet global demand*

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[113] **Exhibit C-0031**: Energy Report 2008, p. 12.

[114] **Exhibit C-0031**: Energy Report 2008, p. 12.

[115] **Exhibit C-0031**: Energy Report 2008, p. 13.

[116] **Exhibit C-0031**: Energy Report 2008, p. 13.

[117] **Exhibit C-0031**: Energy Report 2008, p. 21.

> *for the next 160 to 200 years. In addition, there are still large reserves of hard-to-extract coal worldwide. These reserves can meet the current demand for coal more than 1000 times over.*"[118]

160 It also considered the Netherlands to have "*a good location climate for coal-fired power plants*"[119] and anticipated a growth of coal-fired power plants over the coming years.[120] It took note of five projects for new coal-fired power plants and stated that the "*total additional 3,250 MW is involved*":

> *"For potential investors in coal-fired power plants, the Netherlands is attractive, especially because of our coastal locations such as the Maasvlakte and the Eems estuary, where coal can be delivered by sea and where there is sufficient cooling water. This is also the reason why 5 parties have plans to build a coal plant in the Netherlands. In total, an extra 3,250 MW is involved*."[121] (emphasis added)

(b) The Government confirms it would not ban coal plants

161 In reply to parliamentary questions about the Energy Report 2008, Minister Van der Hoeven also explicitly confirmed that the Government did not make a choice for or against electricity generation technologies, and would not do so in the future either, not in the near future and not with regard to the electricity supply in 2050. The forms of electricity supply should instead be the result of investment decisions by market participants and the behaviour of consumers, Minister Van der Hoeven said on 29 September 2008:

> "*The cabinet is setting targets and preconditions, encouraging the development of clean and smart technologies and discouraging the use of outdated and dirty technologies. It is up to market parties to choose technologies and invest within that framework. The cabinet is not making any choices about specific technologies now, nor will it do so in the near future. The electricity supply in 2050 is not the result of a choice made by this cabinet, but will be the result of investment decisions made by entrepreneurs and consumer behaviour.*"[122] (emphasis added)

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[118] **Exhibit C-0031**: Energy Report 2008, p. 30.

[119] **Exhibit C-0031**: Energy Report 2008, p. 64.

[120] **Exhibit C-0031**: Energy Report 2008p. 85.

[121] **Exhibit C-0031**: Energy Report 2008, p. 85.

[122] **Exhibit C-0059**: Parliamentary Papers II 2008/09, 31 510, no. 2, Of Questions and Answers, 29 September 2008, p. 2. (This exhibit has previously been submitted as exhibit C-0010 (Dutch Original and English translation in a separate document) with the Request for Arbitration.

162 Minister van der Hoeven noted that the Government had to deal with liberalised energy market with predominantly private parties.[123] The Government would not impose "*national rules and bans*" because that would ignore the "*international nature of the energy issue and uncertainties about future technological and other developments*"[124]. Finally, Minister Van der Hoeven emphasized to the importance of a stable investment climate, with rules that do not keep changing:

> "*A good and stable investment climate involves, first and foremost, clear rules for all energy options that do not keep changing, so investors can make a realistic assessment of the risks they run during the lifetime of these energy options. These rules must not make investment in certain techniques impossible, but they must ensure that any negative (environmental) effects are minimised.*"[125] (emphasis added)

163 That policy of non-intervention was then reaffirmed in the 2008 Energy Sector Agreement.

6. The 2008 Energy Sector Agreement accepts RWE's plans to build Eemshaven

164 As already mentioned in the Request for Arbitration,[126] RWE's plans regarding Eemshaven were also subsequently included in the 2008 Energy Sector Agreement. The 2008 Energy Sector Agreement is a binding agreement in the energy sector, concluded in October 2008 between the Netherlands and – among others – Energie-Nederland, the Dutch business association of energy companies (including RWE). Respondent does not deny the status of this report in the pending domestic litigation.

165 The Agreement consists of a preamble, a main body summarising agreements on different aspects such as wind at sea, wind on land, solar PV, biomass or CCS, and two annexes.

Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

[123] **Exhibit C-0059**: Parliamentary Papers II 2008/09, 31 510, no. 2, Of Questions and Answers, 29 September 2008, p. 8.

[124] **Exhibit C-0059**: Parliamentary Papers II 2008/09, 31 510, no. 2, Of Questions and Answers, 29 September 2008, p. 13.

[125] **Exhibit C-0059**: Parliamentary Papers II 2008/09, 31 510, no. 2, Of Questions and Answers, 29 September 2008, p. 16.

[126] Request for Arbitration, lit. 23 et seqq.

Annex 1 repeats and expands the individual agreements reached, while Annex 2 describes investment plans of the energy sector to match the agreements.

166 The Energy Agreement serves, *inter alia*, to implement the 2007 "Clean and Efficient Work"-programme of the Dutch Government. The energy sector agreed, however, that the targets set in that work programme can only be achieved, if, *inter alia*:

> " - *The ambitious goals are inextricably linked to an appropriate and stable investment climate and a corresponding willingness to invest on the part of the sector.*
>
> - *There is a regulatory framework for infrastructure that provides clarity in advance about how research and investment will be efficiently carried out and financed.*"[127]

167 As explained, the Annex contains the individual agreements reached. There are general agreements (Article 2 of Annex 1) and agreements on specific issues such as biomass or CCS.

168 Article 2.2.1 records a promise by Respondent which reflects the pre-existing policy intention that it would not prohibit certain electricity generation technologies,[128] but applied it specifically to coal-fired power plants:

> "*2.2.1 When shaping government policy, the central government shall not use measures that would force the number or type of (coal)-fired power plants to be determined; in addition, the central government shall offer the market an investment perspective for 2020 and beyond.*" (emphasis added)

169 As regards CCS, in Article 7 of the Energy Sector Agreement 2008, the parties agreed that the implementation of CCS in power plants would require that

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[127] Energy Sector Agreement 2008-2020, Covenant between central government and energy branches within the framework of the Clean and Economical Work Programme, 28 October 2008 submitted as **Exhibit C-0060**: Energy Sector Agreement 2008-2020, 28 October 2008, Whereas Section, Bulletpoint Nr. 11. (This exhibit has previously been submitted as exhibit C-0011 (Dutch Original and English translation in a separate document) with the Request for Arbitration. Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

[128] See above Section **B.V.5.(b)**.

- the technology is successfully scaled up and used in demonstration projects (7.3.1);
- legal instruments make it possible to apply CCS effectively (7.3.2);
- the necessary infrastructure is available or can be realised (7.3.4);
- sufficient private and public funding is available (7.3.5)
- a national framework exists regulating responsibility and liability for storage and transport; (7.3.6)
- and sufficient public support exists (7.3.7)

170 The Agreement then contains efforts-obligations for both sides, i.e. the energy sector and the central government, to achieve these requirements and, e.g. to "*endeavour to ensure*" that, if CCS was sufficiently developed by 2015, can be introduced by 2020 (Article 7.4.7).

171 Annex 2, which also forms an integral part of the 2008 Sector Agreement, gives an overview of "*the investment readiness*" of the energy sector including an overview of plans for investments of energy companies such as RWE. This includes RWE's plans for Eemshaven:

> "*In that respect, RWE is willing to make a significant investment of €2 billion in the Province of Groningen for the construction of a high efficiency coal & biomass-fired power plant with a capacity of 1600MW in Eemshaven ('Eemshaven power plant').*"[129]

172 Moreover, the Annex also demonstrates RWE's efforts to increase the use of biomass and its endeavours to improve the application of CCS technology, as long as it is economically feasible. RWE expressly stated in the 2008 Energy Sector Agreement that

> "*RWE aims to promote the available CCS technology through the above-mentioned developments in such a way that large-scale carbon capture can be realized in Eemshaven before 2020 by means of a so-called 'first train'. RWE expects to be able to demonstrate this capture in 2015 and to implement capture on a sufficient scale around 2020,* ***provided the technological development is so advanced that capture is economically feasible without disproportionate energy loss***."[130] (emphasis added)

[129] **Exhibit C-0060**: Energy Sector Agreement 2008-2020, 28 October 2008, Annex 2, part "RWE", Section "Sustainable Strategy".

[130] **Exhibit C-0060**: Energy Sector Agreement 2008-2020, 28 October 2008, Annex 2, part "RWE", Section "CCS".

173 According to Section 8.2 of the Energy Sector Agreement, Annex 2 does not create either rights or obligations. This must be taken together with the fact that Annex 1 is aimed at the energy sector and contains mainly best-efforts obligations of the energy sector to cause its members to achieve a result.

7. Summary

174 Respondent did continue its support for new coal-fired power plants after Claimants had announced their intention to build Eemshaven. It did not only assist and support the specific project by ensuring that necessary infrastructure works such as the deepening of the port and the grid connection were carried out. Respondent also confirmed twice – first in the official Energy Report 2008 and then in the Energy Sector Agreement – that it would not make a choice for or against a certain technology such as coal-fired power plants. Respondent instead relied on the ETS to ensure that CO2 reductions would be implemented in a cost-efficient manner. This was clearly inspired by Respondent's consideration that the Netherlands, with its coastline, was an ideal location for coal-fired power plants.

VI. Claimants took their final investment decision once all relevant permits were granted.

175 RWE would take a final investment decision only once it had obtained all necessary permits for the construction of the plant. The preparation process for the permits started as early as 2006 (**1.**). Further permits (such as the Emission Permit) were only required for the operation of the power plant and were successively applied for when necessary. By the end of 2008, RWE had obtained all necessary permits for the construction. Not all of them were final and irrevocable, but RWE's legal advisers confirmed that the risk that the project would need to be abandoned was considered low. RWE then indeed took its final investment decision in early 2009 (**2.**).

1. The preparation for the permit application procedure started as early as 2006

176 When RWE took its final investment decision in 2009, it had obtained all the permits that were necessary for the construction of the plant. RWE had achieved broad political support

for its project, especially in the province of Groningen.[131] However, as the permits could be – and were – challenged in objection and appeal proceedings (see below), the permits were not yet irrevocable at the time of the investment decision. A permit against which an appeal or objection is filed, will not become irrevocable until the Council of State (in case of an appeal) or the issuing authority (in case of an objection) has decided on the appeal or the objection in last instance. Nevertheless, RWE's legal advisors from [redacted] conducted a risk assessment and concluded that the probability of risks occurring that could cause the project to be abandoned was low.[132] In particular, they did not identify any risk of a coal ban.

177 Only four permits became heavily disputed, and the procedure for only two of them are of interest here – the Environmental Permit and the Nature Conservation Permit, which shall be briefly explained here.

(a) Starting Memo and Environmental Impact Assessment

178 Already on 19 April 2006 (just after RWE's general annual meeting on 13 April 2006), RWE submitted its starting memorandum to the Province of South Holland and the Province of Groningen (hereafter "**Starting Memo**"). The Starting Memo is a public non-binding documentation of interest and the mandatory first step in the licensing process for a power plant. With this, RWE began its preparation for the Environmental Impact Assessment (hereafter "**EIA**"), which is a formal requirement for the permit application process.

179 Then, in January 2007, RWE submitted the EIA to the Province of Groningen in preparation for the application of the necessary permits. As a precondition to receive the Environmental Permit, the EIA was also made available to the public at a public information evening.

180 According to the EIA, RWE wanted to build its new power plant to

- to meet the growth in demand for electricity

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[131] **Exhibit C-0061**: RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, para. 2; RWE AG, **Exhibit C-0062**: RWE AG, Excerpt of the Minutes of the Board Meeting dated 17 March 2009.

[132] **Exhibit C-0061**: RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, Annex 1, Section A.

- and to be able to offer an economically/socially responsible electricity price.

The following considerations also play a role:

- fuel diversification

- use of low-emission

- use of climate-neutral biomass with age-related emissions

- preparation for carbon capture."[133]

181 The EIA emphasised that RWE's planned state-of-the-art power plant would contribute to the security of supply, less dependence on gas as a fuel, and lower electricity prices that would improve the competitive position of the Dutch industry.[134] In short, RWE planned to build what the Government wanted. The EIA also stated that the co-firing of biomass would depend on its technical and economic feasibility as well as that the plant would be built *capture-ready*.[135] However, the EIA also already stressed that the CCS method had not yet been "*proven on a large scale*"[136] and that concluded that "*CO2 separation is not a realistic option at present*"[137]. This was accepted by the authority and included in the Environmental Permit.

(b) Environmental Permit

182 On 11 December 2007, RWE's Environmental Permit (the "**Environmental Permit**") to establish and operate a 1600MW electricity generation facility was issued:

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[133] **Exhibit C-0063**: KEMA, Environmental Impact Assessment – RWE-Centrale-Eemshaven, December 2006, p. 5; Section "Justification power plant".

[134] **Exhibit C-0063**: KEMA, Environmental Impact Assessment – RWE-Centrale-Eemshaven, December 2006, p. 3.

[135] **Exhibit C-0063**: KEMA, Environmental Impact Assessment – RWE-Centrale-Eemshaven, December 2006, pp. 1.1 and 2.15.

[136] **Exhibit C-0063**: KEMA, Environmental Impact Assessment – RWE-Centrale-Eemshaven, December 2006, p. 4.74.

[137] **Exhibit C-0063**: KEMA, Environmental Impact Assessment – RWE-Centrale-Eemshaven, December 2006, p. 4.75.

> *"5. DECISION*
>
> *5.1 Permit*
>
> *In view of the Environmental Management Act and the aforementioned considerations, we decide to grant RWE the requested permit for the Eemshaven site to establish and operate a facility for the production of electricity, in accordance with the application and the accompanying documents.*
>
> *We attach the attached regulations to the permit.*
>
> *5.2 Permit deadline*
>
> *The permit is granted for an indefinite period."*[138] (emphasis added)

183 The permit concludes in Section 2.4.3 that "[w]*e* have evaluated the EIA together with the additions and find the EIA acceptable. In our opinion, the EIA provides sufficient justification for the choice of the proposed activity in relation to the alternatives."[139] The permit further clarifies that "[i]n granting this permit, we have taken into account all the effects that the activity may have on the environment."[140] The issuing authority further confirmed that RWE's choice for a powder-coal-fired power station with co-firing of biomass was made on well-motivated grounds in the EIA. It reiterated that the choice of the proposed and requested pulverised coal-fired power plant with co-firing of 10 % biomass was well-considered and well-founded.[141]

184 The permit is granted for an indefinite period.[142]

185 Regarding the emission of CO2, the permit explicitly refers to the upcoming emissions trading system and states that

> "*CO2 emission trading started in the Netherlands on 1 January 2005. A number of industries and all facilities with combustion plants with a thermal capacity greater than 20 MW are covered by the CO2 Emission Trading Decree. This*

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[138] **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 5.1-5.2.

[139] **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 2.4.3.

[140] **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 4.1.

[141] For a detailed explanation see **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 2.4.2. The limit of 10 % was later modified to 15 %.

[142] See **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 5.2.

> *decree should lead to a reduction in greenhouse gas emissions in the Netherlands and, indirectly, to energy savings."*[143]

186 As regards CCS-technology, the Environmental Permit considers that CCS was not sufficiently developed, thus did not constitute a BAT[144] and therefore could not be prescribed:

> *"For the time being, CO2 capture cannot be enforced by means of the Environmental Act permit because these activities have not yet been sufficiently developed and can therefore not yet be regarded as BAT (best available technology)."*[145]

187 The Environmental Permit specifically mentions that the Government had supported the granting of permits. It cites a letter written by Minister Cramer (then being the Minister of the Environment) to the Lower House as follows:

> "*Minister Cramer does not oppose the granting of permits for the intended construction of new coal power plants. She argues that with a view to a reliable and stable energy supply, fossil fuels such as coal play an unmistakable role in the energy sector's fuel mix. She does, however, impose strict conditions on the construction of such plants in the field of energy efficiency and emissions. Minister Cramer (Ministry of Housing, Spatial Planning and the Environment (VROM)) wrote this in a letter (reference: Kvl2007062287) to the Lower House at the end of June 2007. The Minister indicated that she did not have the option of blocking the granting of permits. She also wrote that the construction of new (coal) power plants would not affect the cabinet's efforts in the field of energy conservation and renewable energy. The new power plants will partly replace the old power plants. They will also partly replace the import of electricity. In recent years, the Netherlands has imported power, with emissions occurring elsewhere*. [146] (emphasis added)

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[143] **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 3.12.2.

[144] **Exhibit C-0064**: Environmental Permitting Act, Art. 2.14(1)(c)(1) (previously Art. 8.10 **Exhibit C-0065**: Environmental Management Act). The current definition of BAT is to be found in the Industrial Emissions Directive 2010/75/EU (recast). According to it definition no. 10, BAT is defined as the "*most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques*", requiring that the technique is "*developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages*".

[145] See **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, p. 62, Section 3.12.3.

[146] **Exhibit C-0023**: Environmental Permit, dated 11 December 2007, Section 3.3.1.

(c) Nature Conservation Permit

188 A Nature Conservation Permit is needed when performing certain activities ("projects"). This is the case for projects (whether inside or outside Natura 2000 areas) that may have significant adverse effects on the quality of natural habitats, or habitats of species present in Natura 2000 areas.[147] The Wadden Sea (near Eems) is one of the Natura 2000 areas.[148]

189 The assessment must be based on (ecological) research and scientific data. The permit will, in principle, be granted if the assessment ensures that the Natura 2000 areas will not be adversely affected. If this cannot be ensured, the permit will only be granted if

i. there are no alternatives available;

ii. the project serves a compelling reason of public interest; and

iii. compensation is realised for the loss of nature.

190 RWE applied for a permit under the Nature Conservation Act on 19 December 2007. As the assessment concluded that the coal power plant Eemshaven would result in damage to, *inter alia*, the Wadden Sea, the three criteria mentioned above needed to be fulfilled. The permit confirmed that compelling reasons of public interest existed:

> "***Imperative reasons of overriding public interest***
>
> *The construction of a pulverised coal-fired power plant, supplemented by biofuels, fits within government policy on energy availability based on multiple and different sources other than natural gas and oil alone. I consider the reduction of dependence through diversification to be of great public interest, also in light of global economic and political developments.*
>
> *I also consider it of overriding public interest that there is sufficient and affordable energy generation in the* Netherlands.
>
> *The initiative also fits within government policy to achieve economic efficiency through market forces (liberalisation). I also consider the construction of a new power plant important because of the possibility of taking measures and/or installing technological facilities for carbon capture during gasification at the same time as the construction of the power plant. The carbon capture measures are not*

[147] **Exhibit C-0066**: Nature Conservation Act, Art. 2.7(2).

[148] For further information on the Natura 2000 areas see, *inter alia*, https://en.wikipedia.org/wiki/Natura_2000 (last accessed 14 December 2021).

> *part of the application and are not subject to assessment in the context of this permit application.*[149]

191 During the permit proceedings, NGO's such as Greenpeace also raised objections against the planned power plant. One of those objections was that the CO2 emissions would lead to a rising sea level (and thus harm the Wadden Sea).[150] This was rejected by the authority as being irrelevant in the permit procedure:

> "*Response: I am aware of the concern about climate change as a result of CO2emissions. However, climate change is a global problem and up until now science has not been able to establish a direct relationship between individual company emissions and the effects that climate change may have. Measures are being taken at both international and national level to reduce CO2 emissions. It is not the intention of the Nature Conservation Act 1998 to address this issue through this permit procedure. The aim is to ensure that actions or projects do not lead to (further) damage to protected natural values. Since climate change is partly the result of natural developments and partly of human actions on a global scale, I do not consider it my authority to refuse a permit on these grounds.*"[151]

192 The Nature Conservation Permit was then granted on 14 August 2008:[152]

> "*Decision*
>
> *The appropriate assessment carried out by you as referred to in Section 19f Nature Conservation Act 1998, and the accompanying reports and documents, has provided the certainty that based on the best available information there is no reasonable scientific doubt that the construction, the commissioning, the keeping in operation and the regular maintenance of a power plant for the purpose of generating electricity in the Eemshaven industrial area, in conjunction with other projects in and around Eemshaven, in view of the relevant conservation objectives of the area and subject to the restrictions and conditions set out below, including mitigating measures:*
>
> *A. will have no significant and no negative impact on the natural characteristics of the Natura 2000 sites of the Ameland Dunes, the Schiermonnikoog Dunes and the Wadden Sea as a result of acidifying and/or eutrophying deposition.*

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[149] **Exhibit C-0067**: Nature Conservation Permit, 14 August 2008, pp.37-38.

[150] **Exhibit C-0067**: Nature Conservation Permit, 14 August 2008, pp. 44/45.

[151] **Exhibit C-0067**: Nature Conservation Permit, 14 August 2008, p. 45.

[152] The permit was subsequently challenged in court and annulled for formalities. RWE applied for a new amended nature conservation permit, which was granted and in 2015 finally confirmed by the courts.

> *B. will not have any significant, but may have negative effects (other than those referred to under A) on the natural characteristics of the Natura 2000 sites: Ameland Dunes, Terschelling Dunes, North Sea coastal zone*
>
> *C. will have a partly potential and partly certain adverse effect (other than described under A) on the natural characteristics of the Natura 2000 area of the Wadden Sea.*
>
> *Despite this partly potential and partly certain impact, I am of the opinion that it is still possible to grant a permit. This is in view of the mitigating measures, the conditions attached to the permit and the cited imperative reason of major public importance and in the absence of alternative technologies and locations for the realisation of the intended activity that facilitates this interest.*"[153]

(d) By the end of 2008, Respondent had obtained all necessary licenses

193 By the end of 2008, RWE obtained all necessary permits for the construction of Eemshaven. Additional permits such as the CO2-permit were only required for its commissioning, i.e. the start of its operation, and therefore only needed to be applied for at a later stage. The network contract had been concluded in October 2008 and the leasehold agreement with Groningen Seaports – for the area of the power plant - signed on 17 December 2008.[154]

2. Final investment decision in 2009

194 RWE took its final investment decision on 16 March 2009.[155] As explained, RWE had obtained all necessary permits for the construction of the power plant.

195 RWE closely monitors the risk associated with power plant projects from the outset. At the time of the March 2009 board decision, RWE considered there to exist risks concerning permit procedures inter alia from lawsuits by NGOs. While not all permits were yet

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[153] **Exhibit C-0067**: Nature Conservation Permit, 14 August 2008, p. 3 "Decision".

[154] **Exhibit C-0061**: RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, Section 2.

[155] **Exhibit C-0061**: RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, pdf p.1: "*The Board of RWE Power AG adopts the final construction decision concerning the hard coal double block unit at the Eemshaven location with project budget for the erection in the amount of [redacted], start of commercial operation of Block A on [redacted] and an initial organisation with [redacted] full-time equivalent members of staff on site. Mobilisation of the main construction activities will be starting from [redacted].*"

irrevocable, RWE assessed, based in part on legal advice received, that the risks were limited and that the permits ultimately would become irrevocable in the years after the decision. That assessment was correct as Eemshaven finally obtained irrevocable permits. Neither RWE nor its lawyers had identified any risks of a later coal ban.

196 The challenges against the Environmental Management were ultimately unsuccessful. The challenges against the Nature Conservation Permit initially were successful. Although the State procured and submitted the ECN Expert opinion (see Section **B.III.4**), to demonstrate the overriding public interest, the first Nature Conservation Permit was on 24 August 2011 partially annulled for formal reasons. RWE had to apply for a new permit which ultimately was issued and also became irrevocable.

VII. During the whole construction time, Respondent supported the project and repeatedly emphasized the importance of coal-fired power plants

197 We have explained above that Respondent had supported the construction of new coal-fired plants both before and after RWE had announced its intention to do so. It arranged for the improvement of waterways and the grid connection to ensure RWE would choose Eemshaven as a site for its plant, and make the realisation possible.

198 Respondent continued this constructive and supportive conduct during the whole construction period. It confirmed that it would not impose any national restrictions on CO2 emissions since these were regulated by the ETS. The Dutch government blocked or removed obstacles which would have impaired the operation of new coal plants. This included rejecting the legislative proposal for a "coal tax" (**1.**). And when public resistance against a CCS demonstration project led the Government to withdraw its support for CCS, it confirmed that CCS would not be a requirement for the operation of coal plants (**2.**).

199 In the Energy Report 2011, the Dutch Government confirmed the position taken already in the Energy Report 2005 and 2008. Europe would remain dependent on fossil fuels for a long time, with a substantial part coming from coal-fired power plants. It highlighted the need for stable, long-term investment conditions (**3.**). In 2013, the Government, various NGO's and business associations, including Energie-Nederland (which had also concluded the 2008 agreement) concluded a further agreement (**4.**). With regard to coal fired-power plants, this 2013 agreement noted that fossil fuels would continue to be an important part of energy consumption in the period up to 2050.

200 With the new coal-fired power plants due to start operation in the following years, the energy companies active in the Dutch market (including RWE) therefore agreed to the early closure of five coal-fired power plants build in the 1980s by 2016/2017 (**5.**). This included Amer8, one of Claimants' older coal-fired power plants.

1. Respondent's government reaffirms it will not impose restrictions on coal plants over and above emissions trading

201 In 2010, the Dutch parliament debated a bill introduced by the then-opposition parties, aimed at taxing CO2 emissions from coal-fired power stations with a special, national tax. The idea was that until CO2 emission rights under the ETS were allocated at the European level by auction from 2013 onwards, CO2 emissions would be taxed via a national levy. This tax would have to be set so high that building new coal plants without CCS would be unattractive. This in itself was curious, because CCS as a technology had yet to be developed. It would therefore have amounted to closing existing coal-fired power plants and not being able to build the new ones. The lost electricity generation would have to be replaced entirely by gas-fired power plants.

202 In a letter dated 20 May 2010, as part of this parliamentary debate, the Government advised against the bill. It pointed out that CCS was not yet available as a technology and would not be available in 2013 either. The closure of existing coal-fired power stations and the failure to build new coal-fired power stations would not square with Government policy, which was precisely to increase the use of coal for electricity production in order to reduce dependence on (foreign) gas:

> "*4. The intended entry into force of the private member's legislative proposal is 1 January 2013. At that time, large-scale deployment of CCS will not yet be possible, making it very difficult for coal-fired power stations to stay below the550 g/kWh threshold. Most of the options mentioned by the sponsor to reduce CO2 emissions therefore boil down in practice to closing existing coal-fired power stations, refraining from new construction or switching to natural gas as fuel. This is not in line with the cabinet's view that no form of energy generation should be excluded in advance*."[156]

[156] **Exhibit C-0068**: Parliamentary Papers II 2009/10, 31 362, no. 12, Letter from the Minister of Finance, 20 May 2010, p. 3.

203 Minister De Jager (Finance Minister at the time) reaffirmed in his letter to the Lower House of 20 May 2010 that ETS with a European CO2 cap remained the instrument to regulate and reduce CO2 emissions in a cost-effective, economic way:

> "*1. The aim of the ETS is to ensure that on a European scale, emission reductions take place where possible at the lowest cost. The legislative proposal disregards this and forces both existing and new coal-fired power stations to take CO2 reduction measures or accept substantially higher tax costs without it being clear that such measures are the most cost-effective way to reduce CO2 emissions.*"[157] (emphasis added)

204 The Minister also, in full alignment with the policy of the last years, noted that precisely because ETS was the instrument to limit CO2 emissions, the bill would not lead to lower CO2 emissions at the European level. Rather, limiting CO2 emissions in the Netherlands would result in higher CO2 emissions elsewhere:

> "*The initiative legislative proposal will not lead to a decrease in total greenhouse gas emissions in Europe until at least 2020, because the emissions ceiling resulting from the ETS has already been set until 2020. Lower emissions in the Netherlands as a result of measures relating to coal-fired power stations will therefore lead to higher emissions elsewhere.*"[158] (emphasis added)

205 So again in 2010, the Government confirmed that it considered the ETS to be the only acceptable restriction on the CO2 emissions of coal-fired power plants.

2. Government stops onshore CCS demonstration projects

206 It has been explained above that the Government early on considered CCS projects to be necessary for the long-term operation of coal plants. It was fully aware that the first technology was far from mature, and that demonstration projects, which would need to be built, would have to be supported by the Government. The Government considered empty on-shore gas fields in Groningen perfect (a). However, when public protests against that project rose, the Government stopped its support for on-shore CCS (b). It then considered

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[157] **Exhibit C-0068**: Parliamentary Papers II 2009/10, 31 362, no. 12, Letter from the Minister of Finance, 20 May 2010, pp. 2-3.

[158] **Exhibit C-0068**: Parliamentary Papers II 2009/10, 31 362, no. 12, Letter from the Minister of Finance, 20 May 2010, p. 3.

that the reduction of CO2 would be achieved by the Emissions Trading System and that the lack of CCS would not impair the new plants (c).

(a) Development of CCS requires demonstration projects necessary

207 As explained above, the Government initially considered that the CCS-technology was not market ready and needed to be developed. Consequently, the Environmental Permit explicitly refuses to prescribe CCS as best available technology. Only once the technology was mature and economically feasible, it was expected that plants could – and due to rising ETS prices very likely would – start to adopt it.

208 Both operators and the Government concurred that the realization of CCS demonstration projects was "*crucial*" for the development of CCS. For example, Ministers Cramer and Van der Hoeven informed the Lower House by letter of 23 June 2009 as follows:

> "*These demonstration projects must be operational by 2015 at the latest. This will allow experience to be gained with the preparation and actual application of CCS in practice. This practical experience is crucial for further reducing the costs of CCS and for realising an integrated approach to the carbon capture, transport and storage chain. The expectation is that CCS will develop into a cost-effective reduction measure. This will lay the foundation for a further industry-wide rollout.*"[159] (emphasis added)

209 The Ministers reaffirmed that the Government should support the CCS demonstration projects to be realized and set clear framework conditions. The demonstration projects would involve investments of hundreds of millions of euros. These would come in part from EU subsidy schemes, in part from the Dutch government, and in part from the participating (energy) companies. The investment decisions had to be taken in the short term so that the projects could be operational by 2015. Ministers van der Hoeven and Cramer in their letter to the Lower House dated 23 June 2009:

> "*The cabinet's objective of having large-scale demonstration projects operational by 2015 makes it necessary for companies to take very large investment decisions in the coming years (at least several hundred million euros per project).*

[159] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 1.

> *Companies can only take these decisions if there is* sufficient clarity about the preconditions."[160] (emphasis added)

210 Storage of CO2 in empty gas fields was explicitly mentioned by the Ministers as an opportunity for the Netherlands. According to research by *Royal Haskoning*, this was even considered the "*safest option*" worldwide, as the Ministers noted:

> "*In 2006 Royal Haskoning conducted a study commissioned by governments and companies into the possibilities for carbon storage in the Dutch underground (off and onshore). The study concluded that the Dutch underground is suitable for the safe underground storage of large quantities of CO2, mainly due to the presence of empty gas fields. Worldwide, empty gas fields are also considered the safest option for carbon storage.*"[161] (emphasis added)

211 Ministers Van der Hoeven and Cramer also reaffirmed the Government's expectation that with a rising price for CO2 emission rights, application of CCS could become economically feasible.[162]

212 The Ministers added that if the price of CO2 emission allowances did not rise, the cabinet would consider other measures to "*stimulate large-scale deployment of CCS*"[163]. However, this would not be allowed to disrupt the European *level playing field* of Dutch coal-fired power plants. Ministers van der Hoeven and Cramer:

> "*For coal-fired power plants in particular, as very large emitters of CO2, our aim is that – one way or the other – all coal-fired power plants currently under construction and those yet to be built will implement CCS as soon as possible, immediately after the end of the demonstration phase. The cabinet is already in talks with the sector concerned about this. It goes without saying that the level*

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[160] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 3. Footnote reference after "*at least several hundred million euros per project*" to Annex 3 to this letter omitted.

[161] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 3. Footnote reference to reference Royal Haskoning report and Intergovernmental Panel on Climate Change omitted.

[162] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 7.

[163] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 7.

> *playing field for companies will be an important consideration in this respect*."[164] (emphasis added)

213 The Ministers also recognized that, in any case, the cost of CCS had to come down first:

> "*However, before CCS can be cost-effectively applied by companies, the costs of the technology must be further reduced*."[165]

214 RWE and the Dutch company Gasunie (among others) therefore worked out their plans for onshore CCS in empty gas fields in more detail, including for subsidy applications, in consultation with the Government. This is also apparent from a letter from Ministers van der Hoeven and Cramer to the Lower House dated 18 November 2009 in which these informed the House about CCS plans.[166]

(b) New Government stops support of onshore CCS after public protests

215 After an election in 2010, however, the new Government changed its mind about CCS when the first, small-scale CCS demonstration project met with public protest. This was a project in which CO2 from a Shell refinery was to be stored in an empty gas field under a residential area in Barendrecht. Minister van der Hoeven had marked this demonstration project as an "*essential step*", as a prelude to larger-scale demonstration projects in the northern Netherlands such as the one planned by RWE.[167] After all, CO2 would also be stored in empty gas fields.

216 The protest was reason for the then new Government Minister Verhagen to write to the Lower House on 4 November 2010 and inform the House it about the termination of the project:

> "*The total lack of local support and the fact that due to the above mentioned developments, the project in Barendrecht is no longer essential for the*

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[164] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 7.

[165] **Exhibit C-0030**: Parliamentary Papers II 2008/09, 31 510, no. 36, Letter from the Ministers of Economic Affairs and of VROM, 23 June 2009, p. 7.

[166] **Exhibit C-0069**: Parliamentary Papers II 2009/10, 31 209, no. 103, Letter from the Ministers of Economic Affairs and of VROM, 18 November 2009, p. 51.

[167] **Exhibit C-0070**: Parliamentary Papers II 2009/10, 31 510, no. 39, Letter from the Minister of Economic Affairs, 24 November 2010, p. 1.

> *development of CCS in the Netherlands, made me decide to no longer pursue carbon storage in Barendrecht. I will therefore halt the procedure for the preparation of an inclusion plan, the modification of the zoning plan that will make carbon storage possible. In the coming period, I will ensure, together with the parties involved, that the project is brought to a careful conclusion.*"[168]

217 Despite the fact that, according to independent studies, CO2 storage could take place safely, the Government stopped the Barendrecht demonstration project due to a lack of support from society. Because of the delay that had now occurred, this project would also no longer be essential, according to Minister Verhagen.

218 Shortly thereafter, the Government completely halted the development of CCS with storage of CO2 under land (i.e. onshore) and with it all CCS demonstration projects aimed at this. On 14 February 2011, Minister Verhagen wrote to the Dutch Parliament that during a working visit to Groningen he had discussed the "*usefulness and necessity*"[169] of storing CO2 in empty gas fields there. It had become clear to him that the population and local authorities were very doubtful about this:

> "*The government has always indicated that local support also plays a role in the decision-making process concerning carbon storage. In 2007, several energy companies and the province of Groningen took the initiative to store CO2 in empty gas fields under land. The government and a majority of this House were, in principle, positive towards these plans: the Wiegman motion requesting the government to investigate the acceleration of a large-scale demonstration project involving carbon storage under land in the North-Netherlands received support from a large majority in Parliament on 26 January 2010.*
>
> *However, the plans aroused considerable public debate. That is why I took the initiative, during my working visit to Groningen on 3 February, to talk to all stakeholders about the usefulness and necessity of CCS in the north. These discussions revealed to me that citizens, civil society organisations and local and regional administrators have serious doubts about carbon storage in their immediate surroundings.*"[170] (emphasis added)

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[168] **Exhibit C-0071**: Parliamentary Papers II 2009/10, 28 982, no. 113, Letter from the Minister for Economic Affairs, Agriculture and Innovation, 4 November 2010, p. 2.

[169] **Exhibit C-0072**: Parliamentary Papers II 2010/11, 31 510, no. 44, Letter from the Minister for Economic Affairs, Agriculture and Innovation, 14 February 2011, p. 2.

[170] **Exhibit C-0072**: Parliamentary Papers II 2010/11, 31 510, no. 44, Letter from the Minister for Economic Affairs, Agriculture and Innovation, 14 February 2011, p. 2.2 (footnote omitted).

219 Minister Verhagen further wrote that in the Government's view, storage of CO2 under land was not necessary either, CO2 could also be stored offshore under the sea.[171] The Minister concluded his letter with the statement that he "*will only cooperate with demonstration projects for subsea storage.*"[172]

220 This stood in stark contrast to the previous policy under which the Government had always supported storage of CO2 under land. Already in the Energy Report 2005, storage of CO2 in empty gas fields was seen as an opportunity for the successful application of CCS.[173] The Government had taken the initiative in the 2008 Energy Sector Agreement to reach voluntary agreements on the development of CCS via demonstration projects. This did not exclude onshore CCS and the Government knew that the CCS demonstration projects for which plans existed were almost all aimed at onshore CCS. In fact, in their letter to the Lower House of 18 November 2009, Ministers van der Hoeven and Cramer had called CCS in empty onshore gas fields in Groningen a "*logical and necessary*" choice.[174]

221 All of that came to an end in 2011, as the Government changed its mind due to protests in society. In fact, the Government did not even try to find a different solution. It simply blew off all onshore CCS projects, i.e. under land.

222 The CCS demonstration project that RWE wanted to develop with Gasunie for the storage of CO2 in empty gas fields in Groningen foundered due to circumstances beyond RWE's control. Converting the planned demonstration project into an undersea CCS project was also no longer possible in time for the required subsidy application. Apart from that, CCS under the sea would also be more expensive than CCS on land and would therefore require more subsidies. Moreover, it was foreseen that transporting CO2 from Eemshaven to (and possibly storing it under) the Wadden Sea would be technically complex, would result in energy loss and would not be feasible (legally, too) in the foreseeable future, partly in view

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[171] **Exhibit C-0072**: Parliamentary Papers II 2010/11, 31 510, no. 44, Letter from the Minister for Economic Affairs, Agriculture and Innovation, 14 February 2011, p. 2.

[172] **Exhibit C-0072**: Parliamentary Papers II 2010/11, 31 510, no. 44, Letter from the Minister for Economic Affairs, Agriculture and Innovation, 14 February 2011, p. 2.

[173] **Exhibit C-0039**: Energy Report 2005, Now for Later, p. 47.

[174] **Exhibit C-0069**: Parliamentary Papers II 2009/10, 31 209, no. 103, Letter from the Ministers of Economic Affairs and of VROM, 18 November 2009, p. 5.

of the Wadden Sea's status as a protected nature reserve and the permits that have to be obtained in that context.

223 Ultimately, not a single demonstration project for CCS at coal-fired power plants was realized in the Netherlands.

(c) Government considers CCS unnecessary since CO2 emissions were governed by ETS

224 The Dutch government was fully aware that with the cancellation of CCS under land, it became virtually impossible to apply CCS. It did not consider this objectionable. The Government was asked by the Lower House whether scrapping CCS meant that co-firing biomass was the only way to reduce CO2 emissions:

> "*Now that the cabinet has decided not to allow CO2 storage on land, it will be much more difficult, if not impossible, for coal-fired power plants to apply CCS on a large scale. Does the cabinet agree with the PvdA group that this de facto means that the only option left to reduce CO2 is the co-firing of biomass, as the previous cabinet also stated? If not, why not? If so, in what way will the cabinet give concrete form to this?*"[175] (emphasis added)

225 Minister Verhagen apparently did not consider CCS important anymore. He referred to ETS as an instrument to achieve the goals for CO2 reduction. For biomass, the Minister saw a role in achieving the targets for increasing the share of renewable energy:

> "*No, the European ETS system is intended for C02 reduction. Co-firing is important for the objective of sustainable energy*."[176]

226 Furthermore, the Government assumed that demonstration projects for CO2 storage at sea could only come about with European subsidies and not otherwise, because it would not be economically feasible:

> "*Mr Van Vliet (PVV) asked whether the additional costs resulting from my decision to permit only subsea CO2 storage will be passed on to electricity consumers. CCS is not yet profitable in this demonstration phase, which is why the companies*

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[175] **Exhibit C-0073**: Parliamentary Papers II 2010/11, 32 645 28 982, no. 2, Report of a Written Consultation, 28 March 2011, p. 70.

[176] **Exhibit C-0073**: Parliamentary Papers II 2010/11, 32 645 28 982, no. 2, Report of a Written Consultation, 28 March 2011, p. 70.

> *want their project proposals to be eligible for EU subsidy. I expect that companies which do not receive European subsidies will abandon their projects at this stage. After all, in that case, they will have to charge their customers the substantial costs of such a large-scale project and will therefore price themselves out of the market in comparison with other energy suppliers who limit their CO2 emissions in cheaper ways.*"[177] (emphasis added)

(d) Summary

227 As this shows, the Government continued its policy to support new coal-fired power plants. The Government for years had emphasized that it would not impose any restrictions on CO2 emissions above and beyond the ETS. It had also emphasized that CCS would be an option for coal plants which those would implement voluntarily once the technology was mature and economically feasible.

228 Consequently, when the Government abolished the realisation of on-shore CCS due to public protests, it also explicitly pointed out that this would not have any impact on coal-fired plants. By this, it confirmed that it did not consider CCS as mandatory.

3. The Energy Report 2011 further confirmed the stable long-term perspective for coal plants

229 On 10 June 2011, the Government presented the Energy Report 2011 to the Lower House. The Energy Report 2011 followed on from the Energy Reports 2008 and 2005.

230 The Government's aim was to make the energy supply more sustainable. Fossil fuels and modern, efficient power stations generating electricity with those fuels, including coal-fired power stations, remained necessary for that purpose. According to the Cabinet, the aim was to achieve "*a balanced energy mix of green and grey energy* " because conventional energy sources would "*for the foreseeable future*" still provide "*the majority of energy demand*".[178]

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[177] **Exhibit C-0074**: Parliamentary Papers II 2010/11, 28 982 / 31 239, no. 118, Letter from the Minister for Economic Affairs, Agriculture and Innovation, 5 April 2011, pp. 8-9.

[178] Parliamentary Papers II 2010/11, 31 510, no. 45, Energy Report 2011 submitted as **Exhibit C-0075**: Energy Report 2011, p. 25. (This exhibit has previously been submitted as exhibit C-0012 (Dutch Original and English translation in a separate document) with the Request for Arbitration. Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

231 Under EU law, the Netherlands had to reach a 14 % share of renewable energy in 2020. In addition, the Government used an "*indicative*" and "*not binding*" target of 20 % energy savings by 2020.[179] According to the Energy Report 2011, the most important instrument for achieving the aforementioned 14 % share of renewable energy in 2020 was the new *Stimulating Sustainable Energy*+ subsidy scheme ('**SDE+ scheme'**). In the Energy Report 2011, however, the Government no longer wished to open up this subsidy scheme to co-firing and biomass firing. Instead, the Government wanted to make co-firing *compulsory* for coal-fired power stations and to consult with the energy sector on how to go about it:

> "*One of the cheapest options for renewable energy in the Netherlands is the co-firing of biomass in coal-fired power plants. The current co-firing is mainly based on MEP subsidies. The MEP subsidies are due to expire in the coming years. Under the SDE and SDE+, co-firing is not eligible for subsidy. Co-firing of biomass in coal-fired power plants must continue even after the MEP subsidies expire. Providing new subsidies to coal-fired power plants is not an option for the cabinet. Therefore, the cabinet wants to make co-firing of biomass in coal-fired power plants compulsory. The way in which this will be done will be discussed with the energy sector, including the introduction of a supplier obligation in the long term.*"[180] (emphasis added)

232 In spite of that, there has never been an obligation for coal plants to co-fire biomass. Contrary to what was envisaged in the Energy Report 2011, the SDE+ scheme was later in fact opened up to the use of biomass in coal-fired power stations. This was related to the agreements between the Government, the energy sector and a large number of civil society organisations in the Energy Agreement 2013 (see Section **B.VII.4.** below).

233 On CCS, the Energy Report 2011 confirmed that the Government would only give its consent to demonstration projects for storage of CO2 under the sea. The Energy Report 2011 further mentioned that the Government would encourage application of CCS at existing and new coal-fired power plants, however, in fact only little Government support for CCS was expressed. The Energy Report 2011 only mentioned that CCS "*seems inevitable in the long term*."

> "*In the long term, the use of carbon capture and storage (Carbon Capture and Storage, CCS) seems unavoidable. The cabinet is therefore promoting the development of CCS to ensure that, if necessary, CCS can be deployed on an*

[179] **Exhibit C-0075**: Energy Report 2011, pp. 16-17.

[180] **Exhibit C-0075**: Energy Report 2011, p. 22.

> *industry-wide scale by the energy production sector and industrial sectors that emit large quantities of CO2.*
>
> [...]
>
> *The cabinet will only grant permission for demonstration projects involving subsea storage. Based on current estimates, this will suffice, certainly in the* medium term. *It goes without saying that safety comes first. The cabinet will not make any spatial reservation for a CCS demonstration project on land*."[181] (emphasis added)

234 The Energy Report 2011 still saw an important role for coal-fired power plants "*for the time being,*" which would provide a "*substantial part*" of Europe's electricity supply.[182] The Energy Report 2011 also mentioned that coal was "*still in plentiful supply*" worldwide.[183] Moreover, the Energy Report 2011 mentioned at the same time that renewable and conventional energy goes "*hand in hand*" together[184] and again the report confirmed that ETS remained the instrument to achieve the climate targets for CO2 reduction at the European level. For the new coal-fired power plants to be built, the energy companies could choose whether they would buy CO2 emission rights - which would be auctioned in the third phase of ETS, starting in 2013 - or take reduction measures such as CCS. Thus, the role of coal plants was not dependent on CCS:

> "*The ETS system sets a European ceiling on the amount of CO2 emissions allowed. This ceiling determines the maximum number of emission rights in circulation within the EU and thus the total emissions of all participants. The participating companies themselves can choose between buying emission allowances or taking reduction measures. In this way, participating companies can meet the target in the most economically efficient way. This will be a combination of an increasing share of renewable energy, energy savings, nuclear energy and carbon capture and storage. The (geographical) distribution of actual emissions is not relevant within this system. Participants in the ETS are the energy sector and large industry. This means that the ETS covers over 40% of European emissions. From 2013 onwards the emission allowances for the energy sector will be auctioned by the governments.*"[185] (emphasis added)

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[181] **Exhibit C-0075**: Energy Report 2011, pp. 24-25.

[182] **Exhibit C-0075**: Energy Report 2011, p. 29.

[183] **Exhibit C-0075**: Energy Report 2011, p. 29.

[184] **Exhibit C-0075**: Energy Report 2011, p. 33.

[185] **Exhibit C-0075**: Energy Report 2011, p. 31.

235 The Energy Report 2011 again emphasized - as did previous Energy Reports - that the Netherlands' favourable location by the sea made it an attractive location for electricity generation, including coal-fired power plants, with the Netherlands becoming an exporter of electricity:

> "*In addition, the Netherlands has cooling water, a good energy infrastructure and good ports for the supply of fuels. This is why market parties are already seeing the Netherlands as a good location for coal, gas and nuclear power plants. If this development continues, the Netherlands will become a net exporter of electricity*."[186] (emphasis added)

236 This was in line with the vision of the Netherlands as the "*Powerhouse of Europe*" from the Energy Report 2008 (see Section **B.V.5.** above). Furthermore, the Energy Report 2011 mentioned that fossil fuels and thus also the existing and new coal-fired power plants would provide "*necessary reserve capacity*" for the times when renewable energy would not be available, "for *instance* at times when *there is no* wind."[187]

237 In short, in the Energy Report 2011 coal-fired power plants continued to play an important role for the Government. These were considered necessary for the security of the Dutch electricity supply. By co-firing biomass, coal-fired power stations would contribute to achieving the CO2 reduction targets and the targets for the share of renewable energy. Further agreements on this were made in the Energy Agreement 2013.

4. The Energy Agreement 2013 confirmed that the Government would not impose unexpected restrictions on coal-fired plants

238 On 6 September 2013, the *Energy Agreement for Sustainable Growth* ("**Energy Agreement 2013**") was concluded between the State, local governments and a large number of civil society organizations, including the industry association of Dutch energy companies, Energie Nederland, and the environmental movement including Greenpeace, the World Wildlife Fund, Natuur & Milieu and Milieudefensie.[188]

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[186] **Exhibit C-0075**: Energy Report 2011, p. 32.

[187] **Exhibit C-0075**: Energy Report 2011, p. 33.

[188] **Exhibit C-0076**: Energy Agreement 2013. (This exhibit has previously been submitted as exhibit C-00013 (Dutch Original and English translation in a separate document) with the Request for

239 The goal of the Energy Agreement 2013 was to conclude a long-term comprehensive agreement to achieve the Dutch target of 14 % renewable energy by 2020 and 16 % by 2023, with the underlying goal of a climate-neutral energy supply by 2050.[189]

240 The Energy Agreement 2013 reaffirmed that, until 2050, fossil fuels, including for electricity generation in the new coal-fired power plants, would account for a significant portion of energy use:

> "*Fossil fuels will still be an important part of energy use in the period up to 2050, even though the agreement targets an 80-95% reduction in CO2 emissions by 2050, and a 16% share of renewable generation by 2023.*"[190]

241 To increase the share of renewable energy, the Government would subsidize the use of biomass in newly built coal-fired power plants and existing coal-fired power plants from the 1990s through the SDE+ scheme, with a maximum of 25 PJ per year:

> "*The parties agree that the stimulation of biomass in coal-fired power plants will not exceed 25 PJ. This government stimulation of large-scale use of biomass will be limited to the new coal-fired power plants and the power plants built in the 1990s.13. In consultation, it will be worked out in more detail how the restriction to 25 PJ biomass, the manner of support and the possible use of a tender procedure can be implemented in the SDE+.*"[191] (emphasis added)

242 It was also agreed that the Government, energy sector and environmental organizations would draw up further sustainability requirements that biomass would have to meet.[192]

Arbitration. Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

[189] **Exhibit C-0076**: Energy Agreement 2013, p. 67.

[190] **Exhibit C-0076**: Energy Agreement 2013, p. 97.

[191] **Exhibit C-0076**: Energy Agreement 2013, pp. 73, 74. Footnote reference omitted.

[192] In the years 2013-2015, these sustainability requirements were actually established. These include requirements for carbon debt and sustainable forest management, to ensure that biomass that is co-fired is actually carbon neutral and sustainable. These sustainability requirements are laid down in legislation and regulations. Compliance is monitored by the government under the SDE+ scheme which, in accordance with the Energy Agreement 2013, has been opened to subsidize co-firing of biomass. This concerns a so-called 'unprofitable top' subsidy. Biomass was and is more expensive than coal and leads to a lower efficiency than achievable with coal. The co-firing of biomass is therefore uneconomic without a scheme to

243 On CCS, the Energy Agreement 2013 stipulated, on the one hand, that it would be inevitable in "*the long term*". This is to be understood in the light of how the ETS works: with less emissions certificates every year, prices would be rising and power plants by mere economics be forced to either install CCS or shut down due to lack of certificates. The Energy Agreement 2013 stipulated that CCS *could be* applied to gas and coal-fired power plants. The Government would, on the other hand, take the initiative to come up with a long-term vision:

> "*To achieve a fully sustainable energy supply in the long term, the carbon capture, storage (CCS) and use will be inevitable. CCS can be applied in industry and also in gas & coal-fired power plants. The government will take the initiative to develop a long-term vision on the position of CCS in the transition to a fully sustainable energy supply. The government will also examine how the elements of this agreement can be used to realise a demonstration project.*"[193] (emphasis added)

244 However, it did not develop this long-term vision, at least not with respect to power plants. As of today, Respondent only supports CCS in industrial processes, but not in the electricity sector.

5. RWE agrees to closure of old power plants in reliance on the Government's promise not to impose unexpected restrictions

245 As part of the Energy Agreement 2013, the power companies agreed to close five existing coal-fired power plants from the 1980s early in 2016 and 2017, when the new coal plants would have started operation:

> "*As part of the transition to a sustainable energy supply, and in conjunction with the agreements on renewable energy in pillars 2 and 3, the parties agree that the capacity of the 1980s coal-fired power plants in the Netherlands will be phased out. In concrete terms, this means that three coal-fired power plants will be closed by 1 January 2016. The closure of the two remaining power plants (Maasvlakte I and II) will follow on 1 July 2017.*"[194] (emphasis added)

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compensate for its additional costs. RWE has actually started co-firing biomass at Eemshaven from 2019. It has obtained a subsidy decision for this until 2027.

[193] **Exhibit C-0076**: Energy Agreement 2013, p. 98.

[194] **Exhibit C-0076**: Energy Agreement 2013, p. 97.

246 In return for that early closure, the Government promised to reintroduce the temporarily abolished exemption from tax on the use of coal for electricity generation:

> *"If the 1980s coal-fired power plants are closed down at the specified times, the exemption for electricity production in the coal tax will be reintroduced as of 1 January 2016*."[195]

247 Respondent proposed in a letter dated 2 July 2014 to RWE' subsidiary Essent to impose efficiency requirements for coal-fired power plants which these coal-fired power plants would not be able to meet. The power companies would then effectively have to close them. The Government asked the operators to agree to that solution:

> "*With the coming into being of the Energy Agreement for Sustainable Growth, more than forty social organisations and the government have committed themselves to broadly supported agreements on energy saving, sustainable energy production, clean technology and climate policy. As part of the Energy Agreement, we are looking for an alternative solution to the agreement on the 1980s coal-fired power plants that fully respects the competition framework. The starting point for this exercise is that the original agreement in the Energy Agreement about closing the coal-fired power plants no longer exists. We then examined whether, and if so which, additional environmental requirements could be set for electricity generation using coal to do justice to the goals of the Energy Agreement.*
>
> *In consultation with the Ministry of Infrastructure and Environment, I have concluded that the solution may lie in imposing efficiency requirements on coal-fired power plants. In this letter I will explain how this measure can be implemented. I will conclude with a (technical) question concerning the details of the envisaged efficiency standard. I also express the expectation that you will be able to agree to this solution*."[196] (emphasis added)

248 RWE responded by letter dated 24 July 2014. In this letter, RWE agreed to the proposed way forward and, that it would forego financial compensation for the early closure of the Amer8 unit, under certain conditions, namely:

- That the efficiency requirement would be formulated in such a way that it would relate exclusively to that unit and would be a one-off efficiency requirement;

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[195] **Exhibit C-0076**: Energy Agreement 2013, p. 98.

[196] **Exhibit C-0077**: Letter from Ministry of Economy to RWE dated 2 July 2014

- That the exemption from the tax on coal would be permanently reintroduced as of 1 January 2016, and if and to the extent that these measures would remain unchanged in the future;

- And that no further restrictive measures would be taken that would "*significantly*" complicate its electricity production.[197]

249 This was a reminder to the Government that it should not take any measures which would determine the number of coal plants in the Netherlands (with the exception of Amer8), as it had promised in the 2008 Energy Sector Agreement. When the Government finally introduced the efficiency requirements, the Explanatory Memorandum explained that it was "*done in close consultation with each of the companies involved*".[198]

250 RWE was entitled to trust that no restrictive measures would be taken with respect to its electricity production: neither with respect to Amer9, nor with respect to Eemshaven. In particular, they were entitled to trust that no early closure of these plants would be enforced by a legal ban on the use of coal for electricity production as now with the Coal Ban Law.

251 On 18 December 2015, RWE took the Amer8 unit off the grid and closed it. This plant had been commissioned in 1980. On 1 January 2016, the new efficiency requirement took effect and the Government reintroduced the exemption from the tax on coal for electricity procedure. The Amer 9 unit that is also part of the Amer power plant, from 1993, is still in operation but not part of this arbitration. RWE had acquired the Amer plant through its acquisition of Essent in 2009.[199]

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[197] **Exhibit C-0078**: Essent Letter from [redacted], [redacted]Essent, to the Ministry of Economic Affairs dated 24 July 2014. At the time of writing, Eemshaven was owned by subsidiary of Essent, which in turn was an RWE subsidiary.

[198] **Exhibit C-0079**: Decision of 13 October 2015 amending the Environmental Management (Efficiency) Decree p. 8.

[199] RWE acquired the energy company Essent on 30 September 2009 from Dutch municipalities and provinces that had owned it until then. RWE paid a purchase price of [redacted]. The governments involved therefore received substantial sums of money depending on their package of Essent shares. For example, the Province of Noord-Brabant, as one of the major shareholders, received billions. Many municipalities received [redacted].

VIII. After Eemshaven had been commissioned, the Government continued to confirm the need for the new coal plants

252 RWE commissioned Eemshaven commercially in the first half of 2015. Eemshaven Unit A was commissioned on 31 January 2015 and unit B on 6 May 2015.

253 On 24 June 2015, the Hague District Court in the famous *Urgenda* case ordered Respondent to ensure that by 2020, the Dutch CO2 emissions were at least 25 % lower than in 1990.[200] The Government appealed the judgement.

254 While only a few months later the Dutch parliament passed a motion to investigate a coal-phase out (**1.**), this did not lead the Government to change its policy, at least regarding existing coal plants. In the following year, the Energy Report 2016 declared that there would be no room for new coal-fired plants, but confirmed that the existing plants would continue to be relevant and reaffirmed once more that the ETS regulated their CO2 emissions (**2.**). In response to a parliamentary motion, the Government then examined the future of coal-fired power plants (**3.**). It concluded that for a variety of reasons a coal phase-out was not necessary (**4.**). The Advisory Division of the State Council advised against a bill which would have resulted in a closing down of coal plants (**5.**).

1. The Dutch Parliament passes a motion to investigate a coal-phase out

255 On 26 November 2015, Lower House passed a motion requesting the Government to investigate the "*phasing out*" of coal-fired power plants (the "**2015 Motion**"). The 2015 Motion did not specify what was meant by this, nor did it give a timeframe. It mentioned only one concrete measure: to exclude the granting of permits for further new coal-fired power stations. The motion requested the Government (which had opposed it[201]):

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[200] Rechtbank Den Haag, Judgement of 24 June 2015, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196; **Exhibit C-0080**: Rb. Den Haag 24 June 2015, ECLINLRBDHA20157145 (Urgenda); **Exhibit C-0081**: Rb. Den Haag 24 June 2015, ECLINLRBDHA20157196, Verdict in English ECLINLRBDHA20157196 (Urgenda).

[201] **Exhibit C-0082**: Phys Org, "Dutch lawmakers approve plan to close coal power plants", 26 November 2015.

> *"*[…] *to phase out the Dutch coal-fired power plants and to draw up a plan to this end in consultation with the sector, taking account of the growth in the share of renewable energy, the legal and financial aspects, potential carbon leakage to other countries and the security of supply of energy and innovation, and to inform the House accordingly when the energy agreement is reviewed in 2016, and to proceed to the agenda.*"[202] (emphasis added)

256 Thus, the 2015 Motion did not request the Government to proceed with the closure of existing coal-fired power plants in the Netherlands, nor did it request a legal ban on the use of coal, as eventually included in the Coal Ban Law. There was no mention in the motion of an obligation to close coal-fired power plants, to impose a ban on the use of coal, or to implement any other coercion or pressure.

257 The Government pledged to investigate various variants for the future of coal-fired power plants, together with the energy sector, in implementation of the motion. This study also served to implement another motion from September 2015 requesting a study of what was needed to achieve the 25 % CO2 reduction by 2020, which had been required by the *Urgenda* judgement. Minister Kamp noted in a letter to the Lower House that the Government would - rightly - include in the study "*liability risks* […] *and the possible costs*" for the State, depending on any measures.[203]

258 However, there was no sign of any change in Government policy at the time of Minister Kamp's letter. This was evident, for example, in Energy Report 2016 that appeared shortly after the letter.

2. The Energy Report 2016 confirms the role of modern, co-firing coal plants like Eemshaven

259 On 18 January 2016, the Government submitted the Energy Report entitled "*Transition to Sustainability"* to the Lower House (hereinafter "**Energy Report 2016**").

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[202] **Exhibit C-0083**: Parliamentary Papers II 2015_16, 34 302, no. 99, Amended Motion by the Members of Parliament Van Weyenberg and Van Veldhoven to Replace the Motion Printed Under No. 60, 18 November 2015 .

[203] **Exhibit C-0084**: Parliamentary Papers II 2015/16, 30 196 and 32 813, no. 380, Letter From the Minister of Economic Affairs, 18 December 2015, p. 5.

260 The Energy Report 2016 again confirmed that fossil fuels would continue to play a role in the "*coming decades*".[204] The 2016 Energy Report further aimed for a "*low-carbon*", safe and reliable electricity supply for the Netherlands by 2050.[205]

261 Furthermore, the Energy Report 2016 was in line with previous Energy Reports and Government policy on coal-fired power plants in general. ETS remained the instrument to achieve climate targets for CO2 reduction. The Energy Report 2016 expressed the expectation (once again) that with a rising price for CO2 emission rights "*in time*" an economic necessity to install CCS would arise for the energy companies:

> "*In addition to specific measures to limit the CO2 emissions of coal-fired power plants, we are therefore working to strengthen the ETS so it provides an effective price incentive. This should ensure that the electricity market is more focused on the use of the least polluting technologies. As a result, operators of coal-fired power plants will eventually be forced for economic reasons to take measures to limit the emissions of their power plants, for example by co-firing biomass, by CCS, by a combination of both or by closing their power plants.*"[206] (emphasis added)

262 The Energy Report 2016 further referred to the Energy Agreement 2013 for co-firing biomass. The five remaining coal-fired power plants in the Netherlands, including Eemshaven, would co-fire biomass, which would be possible because the Government would provide subsidies for this. The coal plants would thus reduce their CO2 emissions and contribute to the target of 14 % renewable energy by 2020 and 16 % by 2023.[207]

263 The Energy Report 2016 thus confirmed that the coal-fired power stations remained important for the supply of electricity and for achieving the targets set for increasing the share of renewable energy through the co-firing of biomass. The same regulatory framework continued to apply to CO2 emissions as had applied to the new coal-fired power stations from the outset.

264 The Energy Report 2016 also mentioned the phase-out motion. In accordance with this motion, the Energy Report 2016 stated that there would be no room for additional or new

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[204] **Exhibit C-0085**: Energy Report 2016, January 2016, p. 6.

[205] **Exhibit C-0085**: Energy Report 2016, January 2016, p. 5.

[206] **Exhibit C-0085**: Energy Report 2016, January 2016, p. 127.

[207] **Exhibit C-0085**: Energy Report 2016, January 2016, pp. 126-127.

coal-fired power plants.[208] Furthermore, in accordance with the Government's response to the motion, the Energy Report 2016 mentioned that, together with the sector, various variants would be worked out for the " *eventual"* phasing out of coal-fired power plants.[209]

3. The Government examined the future of coal-fired power plants

265 To implement the 2015 Motion, the Government indeed examined the future of coal-fired power plants in 2016. The Government also entered into consultations with the energy sector, including RWE.

266 During these consultations, RWE made it clear that it did not agree with the measures that were discussed. In a letter to the Government dated 23 March 2016, RWE proposed to instead reach an acceptable arrangement in bilateral consultations, tailored to RWE's specific situation.[210] In a further letter dated 1 September 2016, RWE expressly pointed out that all of the measures being discussed were such that electricity generation in its coal-fired power plants would no longer be economically viable, requiring RWE to close them. This would amount to unlawful expropriation or an unauthorized interference with RWE's property rights. [211] To avoid any misunderstanding, RWE announced that if the Government unilaterally took such measures, RWE would proceed to take legal action, if necessary.

267 In parallel to that, however, discussions between the Government and the four affected companies continued. At a meeting on 15 August 2016, Respondent and the companies discussed a general framework for those upcoming meetings. The Government on the one hand needed to treat all operators equally, but on the other hand for competition law reasons could discuss financial details only with each company separately. With e-mail of 1 September 2016, Respondent referred to that meeting and sent a summary of the discussion and a methodology for the calculation of possible compensation (in case a closure was

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[208] **Exhibit C-0085**: Energy Report 2016, January 2016, p. 6.

[209] **Exhibit C-0085**: Energy Report 2016, January 2016, p. 127.

[210] **Exhibit C-0086**: RWE Letter from [redacted] to the Minister of Economic Affairs, 23 March 2016.

[211] **Exhibit C-0087**: RWE Letter from [redacted] to Minister of Economic Affairs, 1 September 2016, p. 1.

agreed).[212] Claimants reviewed in particular the methodology, and by e-mail of 30 September 2016 answered Respondent with a list of questions. Respondent never replied to that.

268 The reason for that might have been that the Minister for Economic Affairs did not really want to shut down the power plants. For example, on 4 September 2016, it was reported that "*Minister does not want to close any new coal-fired power plants*" on the news website *Nu.nl*, quoting Minister Kamp as saying that it would not be wise to close down Europe's cleanest coal plants:

> "*Kamp is not keen on this idea and will shortly present calculations showing that it is not necessary. "It is much wiser to close the old polluting power plants in Germany and Poland", he said.*"[213]

4. Research findings: closure of coal-fired power plants has many objections and is unnecessary

269 In early January 2017, the Government presented the results of the study on the future of coal-fired power plants. The outcome of the study by the Government was that reducing electricity production in the Dutch coal-fired power plants, or even closing them, faced many objections and was not necessary to achieve the climate targets for 2020. The Netherlands was on track to do so. By letter dated 19 January 2017, Minister Kamp informed the Lower House about these results and sent as annexes two studies by Frontier Economics it had commissioned,[214] as well as statements and comments from companies and a list of 29 alternative measures for CO2 reduction which the Government had reviewed and assessed. The list included the Government's appreciation whether those alternative measures would be lawful and achieve the desired effect.[215] One of the most cost-effective measures, the

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[212] **Exhibit C-0088**: E-Mail from Ministry to RWE dated 1 September 2016, with attachments.

[213] **Exhibit C-0089**: Nu.nl, Minister Henk Kamp of Economic Affairs does not want to close any new coal-fired power plants, 4 September 2016.

[214] **Exhibit C-0090**: Frontier Report, Research of Scenarios for coal-fired Power Plants in the Netherlands, A Report for the Ministry of Economic Affairs (MinEZ), dated 1 July 2016**Exhibit C-0091**: Frontier Report, Research of Scenarios for coal-fired Power Plants in the Netherlands, Addendum for MinEZ, 26 August 2016.

[215] See Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505 submitted as **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures

Government assessed, would be the further strengthening of the ETS, exactly what the Government had proposed for the last 15 years (measure 16). The Government also mentioned the possibility of company-specific agreements, which it had already envisaged in 2016 (measure 24).

270 Among the various reasons advanced by the Government against the closing of coal plants, three are especially noteworthy.

(a) Due to the "leakage effect", closure of coal plants would not lead to CO2-reductions

271 As the first objection to closing coal-fired power plants in any form, Minister Kamp pointed to the 'leakage' of CO2 emissions in his letter to the Lower House of Parliament on 19 January 2017. In the event of a reduction in electricity production by the Dutch coal-fired power plants, or even complete closure, the lost electricity production would have to be taken over by power plants abroad, which would therefore emit more CO2. These carbon leakage effects occur in all scenarios studied by Frontier Economics in which electricity production by coal-fired power plants in the Netherlands would be reduced.[216] They would occur in particular in the case of early closure of coal-fired power plants:

> "*All scenarios show that, in the event of interventions in the Dutch electricity market which reduce electricity production at Dutch coal-fired power plants, this lost electricity production will be taken over in part by power plants abroad, particularly in Germany, in order to continue to meet the demand for electricity in*

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and Annex "Assessment of possible measures"(*Bijlage 796937 - Beoordeling mogelijke maatregelen*), submitted as **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures) The Letter to Parliament and the Annex are two separate documents and can also be found online, see https://zoek.officielebekendmakingen.nl/kst-30196-505.html (last accessed 14 December 2021).

[216] In its report inc. Addendum, Frontier Economics analysed different scenarios. In one scenario where power plants are shut down in 2030 (scenario 3c), domestic emissions would be reduced by 242 mn tons, but emissions Europe-wide only by 114 mn tons. Thus, approx. 53 % of emissions would leak to other EU member states. See **Exhibit C-0090**: Frontier Report, Research of Scenarios for coal-fired Power Plants in the Netherlands, A Report for the Ministry of Economic Affairs (MinEZ), dated 1 July 2016, tables 4 and 5. See also the **Exhibit C-0091**: Frontier Report, Research of Scenarios for coal-fired Power Plants in the Netherlands, Addendum for MinEZ, 26 August 2016, Addendum 3a, Table 1 (230 mn tons domestic but only 88 mn tons EU-wide).

> *the Netherlands. Reducing electricity production by coalfired power plants in the Netherlands leads to significant CO2 reductions in the Netherlands and, in a European context, also to CO2 reductions. However, the CO2 reduction achieved at the European level by closing coal-fired power plants is considerably less than the CO2 reduction in the Netherlands. This is because when coal-fired power plants are closed in the Netherlands, electricity is generated abroad as a substitute, leading to extra CO2 emissions there. From a Dutch perspective, interventions in the Dutch electricity market therefore create carbon leakage effects.*"[217] (emphasis added)

272 A closure of the Dutch coal-fired power plants could even result in more CO2 emissions overall. The loss of electricity production by the modern and efficient Dutch coal-fired power stations would be taken over not only by gas-fired power stations, which emit less CO2, but also by older, less efficient and more polluting power stations abroad. These plants actually emit more CO2 for the same electricity production. Assuming that the Dutch coal-fired power plants will be closed in 2020, the letter from Minister Kamp states:

> "*Of this extra electricity production abroad, about 40% takes place in gas-fired power plants and 60% in lignite and coal-fired power plants that are often considerably less efficient than the Dutch coalfired power plants. Due to this leakage effect, in this scenario 73% of the CO2 emissions avoided in the Netherlands would still be emitted in replacement production abroad.*"[218]

(b) "Waterbed effect" leads to unused emission allowances being used by other plants

273 As a second objection to coal plant closures, Minister Kamp pointed to the "waterbed effect" under ETS in his January 19, 2017 letter to the Lower House. The CO2 emission rights from the Dutch coal plants would be released for use by other emitters of CO2, resulting in "*zero*" CO2 reduction at the European level:

> "*These leakage effects are separate from the "waterbed effect" in the ETS. This effect occurs when emission reductions as a result of new policy in an ETS sector in a certain Member State, allows for more emissions within the ETS system later or in another place in the EU. This generally cancels out the effect of national*

[217] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, pp. 6-7.

[218] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 4.

> *measures in the ETS sectors and the final CO2 reduction at the European level is close to zero.*"[219] (emphasis added)

274 Thus, closing coal-fired power plants in the Netherlands would simply not be effective as a measure to reduce CO2 emissions. Effective would be a European approach, in which instead of the Dutch coal plants that are precisely the most modern, cleanest and efficient, the older, more polluting plants abroad with a much lower efficiency would be closed first. Minister Kamp:

> "*Given this European interconnectedness of the electricity market, the scenarios show that an approach at the European level is more effective in combating climate change than a national approach. A joint approach with other countries aimed at achieving CO2 reduction ensures that the least efficient and most polluting power plants in the countries concerned are closed first and that production is taken over as much as possible by more efficient power plants. This prevents carbon leakage between the countries concerned. The Netherlands has relatively clean and efficient power plants. The Dutch coal-fired power plants have an electrical efficiency of between 42% and 47%, while elsewhere in Europe there are coal-fired power plants with an efficiency of 34%. This is reflected in the analyses because in the scenarios with a European approach the Netherlands will produce more electricity in the short term, resulting in more CO2 emissions in the Netherlands. This extra electricity production in the Netherlands is used to compensate for the closure of more polluting electricity production abroad.*"[220] (emphasis added)

(c) Closure of coal plants not necessary for climate goals

275 Minister Kamp also pointed out that closing the coal-fired power plants was not necessary. Partly due to the closure of the five existing coal-fired power stations from the 1980s as part of the Energy Agreement 2013, the Netherlands was on course to meet its climate targets for 2020. A CO2 reduction of 25 % by 2020 (compared to 1990) was feasible. This would

[219] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 3.

[220] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, pp. 3-4.

also be in compliance with the ruling of the District Court of The Hague in the *Urgenda* case (which at that time was pending on appeal before the Court of Appeal of The Hague).[221]

276 As a result, on 18 March 2017, being just two years before the Coal Ban Law was submitted to the Lower House as a bill, the Government still *explicitly* concluded that closing coal-fired power plants faced many objections and was unnecessary.

277 The Government also reiterated again that the Netherlands' commitment remained to regulate CO2 emissions through ETS which would remove existing, less efficient power plants abroad from the market:

> *"If the EU decides to raise its ambitions, the ETS target must be adjusted accordingly. This European approach will mean that the most polluting electricity production in Europe will be forced out of the market at an accelerated rate.*"[222]

278 In his letter, Minister Kamp also pointed towards a concrete measure that the Government would consider if the CO2 reduction target of 25 % by 2020, as imposed by the *Urgenda* ruling, would not be met after all. In that case, the closure of a specific coal plant would be considered: one plant in the Netherlands dating from the 1990s that did not co-fire biomass:

> "*The cabinet will continue to monitor the implementation of the Urgenda judgment. If the NEV 2017 shows that we are not on track with the implementation, additional measures will be taken, including the closure of the 1990s coal-fired power plant that will not use co-firing of sustainable biomass.*"[223] (emphasis added)

279 This is the Hemweg power plant (which indeed eventually closed by 2020, but as part of the closure of all coal plants under the Coal Ban Law).

280 In short, a ban on coal or forced early closure of all coal-fired power plants was explicitly out of the question in early 2017. The Government considered this undesirable and

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[221] **Exhibit C-0080**: Rb. Den Haag 24 June 2015, ECLINLRBDHA20157145 (Urgenda)**Exhibit C-0081**: Rb. Den Haag 24 June 2015, ECLINLRBDHA20157196, Verdict in English ECLINLRBDHA20157196 (Urgenda).

[222] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 8.

[223] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 2.

unnecessary. Thus, the Coal Ban Law was not foreseeable at the beginning of 2017. Then, in March 2017, parliamentary elections took place.

5. The Advisory Division of the Council of State advises against a draft bill which would have closed down coal-fired power plants

281 On 17 July 2017, the Advisory Division of the Council of State issued on opinion on amendments proposed by a small group of parliamentarians to the Electricity and Gas Acts ("**2017 Opinion**").[224] The amendments (the "**Vos Amendment**") proposed to impose efficiency requirements on coal plants with the aim of closing all coal plants in the Netherlands. From 1 January 2021 onwards, only coal plants with an efficiency of at least 45 % would be permitted to continue operations. As of 1 January 2031, the required efficiency would be increased to 48 %, an efficiency which no coal plant in the Netherlands would be able to achieve.[225]

282 The Government submitted this draft Vos Amendment to the Advisory Division of the Council of State.[226] In its 2017 Opinion, the Council of State noted that it considered the proposed amendments to be unlawful. It assessed the draft amendments both in terms of their compliance with European Law and their compliance with Article 1 of the First Protocol to the European Convention on Human Rights. It explained that efficiency requirements could not be used to oblige someone to do the impossible.[227] Moreover, it held that the Vos Amendment wrongly claimed that a closure of coal-fired power plants would have been foreseeable for about a decade. Rather, such a measure could at best have been foreseeable following the 2015 Motion mentioned above:

> *"The question of whether closure of the coal-fired power plants is a normal business risk depends on when the owners were able to realise that there was a serious risk of closure. In this case, the owners could not prepare for closure until the adoption of Van Weyenberg/Van Veldhoven motion of 26 November 2015 to*

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[224] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017.

[225] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, pp. 2-3.

[226] For the role of the Advisory Division, see above Section **B.II.2**.

[227] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, p. 614.

> *draw up a plan for phasing out all coal-fired power plants in the Netherlands at the earliest. Contrary to what the explanatory notes to the amendments state, closure was not yet foreseeable in 2007, because the debate at that time was dominated by possibilities to limit greenhouse gas emissions (such as carbon capture and storage; CCS), but not to close coalfired power plants.*"[228]

283 Additionally, it criticised that there was no assessment relating to the length of the transition periods and that they would therefore be arbitrary:

> "*The transitional periods are not justified in the explanatory memorandum. This makes them arbitrary. If the transitional periods are sufficient, it will have to be further investigated and justified why they are considered adequate. In this respect, it may be of importance, among other things, what is the technical and economic life of the coal-fired power plants, whether the owners of the coal-fired power plants, before the adoption of the motion, have made investments to extend the service life and whether the coal-fired power plants can continue to operate profitably during the transition periods. The Advisory Division does not have this information and therefore cannot determine whether the transition periods are adequate.*"[229]

284 The Advisory Division then advised against the Vos Amendment. If the Government wanted to close coal plants, it should do so by a closure law, the legality of which would need to be reviewed separately. It pointed out, however, that a closure of the modern coal plants would be "*an entirely different approach to that chosen at the European level*".[230] In short, not only the Government but also the State Advisory Council considered a coal phase-out to be not advisable. The Government considered this undesirable and unnecessary and the Council of State had found forced measures against coal plants (which the Government always had refused to do) proposed by a small group of parliamentarians even to be unlawful.

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[228] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, p. 12.

[229] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, p. 13 (similarly also p. 14).

[230] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, p. 9.

IX. After the 2017 elections, the new Government announced and enacted the Coal Ban Law

285 In March 2017, parliamentary elections took place, followed by a very long time for the formation of a new Government. A coalition agreement was finally concluded in October 2017. The new Government changed the policy on coal-fired power plants by 180 degrees. While the previous Government had declared that a forced early closure of coal-fired power plants was not necessary, the new Government decided that coal-fired power plants were to be closed at the latest by 2030 (**1.**) It quickly took measures to implement this decision without relevant changes, ignoring objections by Claimants and Uniper as well as the advice by the Advisory Division of the Council of State (**2.**). The Coal Ban Law was thus enacted without any changes (**3.**) and – like the early 2017 Vos Amendment – is based on assumptions and speculations, but not on facts (**4.**). The effect of the Coal Ban Law is the closing down of Eemshaven in 2030 (**5.**).

1. Coalition Agreement 2017 provides a Coal Ban and the stop of support for biomass co-firing

286 The early closure of coal-fired power plants was announced in the Coalition Agreement of the new Government on 10 October 2017. It provides that coal plants will be closed down by 2030 at the latest, and that state support for co-firing of biomass will be discontinued:

> "*Coal-fired power plants will be phased out by the end of 2030 at the latest. A timetable for achieving this will be agreed with the sector in the framework of the national climate and energy agreement.*
>
> *Grants for co-firing biomass in coal-fired power plants will be stopped after 2024.*"[231]

287 The Coalition Agreement also foresaw that the implementation of the Coal Ban would be regulated by an agreement with the energy sector.[232] However, this did not happen. The Government in 2018 did invite companies and civil society organisations from five 'sector

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[231] **Exhibit C-0028**: Coalition Agreement 2017-2021, Confidence in the future, 10 October 2017 (Official EN), p. 43.

[232] **Exhibit C-0028**: Coalition Agreement 2017-2021, Confidence in the future, 10 October 2017 (Official EN), p. 43: "A timetable *for achieving this* will be *agreed* with the sector *in the framework of the national climate and energy agreement*."

platforms', including the electricity sector, to discuss how they could contribute to reaching the goals of the 2015 Paris Agreement. Insofar it purported to behave like previous governments which had negotiated agreements in 2002, 2008 and 2013. The discussions even included the electricity sector. However, at the request of the Minister of Economic Affairs and Climate, the (then existing) Cabinet's proposal to ban the use of coal to generate electricity would not form part of the discussions with electricity sector.

288 On 28 June 2019, the Cabinet published its proposal for a Climate Agreement. The Climate Agreement, as it finally came to pass, confirms that the Cabinet's proposal for a statutory coal ban was not part of the contribution of the electricity sector platform, i.e. not a voluntary agreed contribution.[233]

289 The Coalition Agreement also provided that the SDE+ subsidy (which was used to subsidize biomass co-firing) would be expanded to finance also CCS projects (then as the "SDE++ scheme").[234] The 2019 Climate Agreement, however, mentions the further development of CCS primarily for the industry,[235] with even the small amount designated for electricity used for a steel plant.[236]

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[233] **Exhibit C-0095**: The government of the Netherlands, Climate Agreement, The Hague, 28 June 2019, p. 165.

[234] **Exhibit C-0028**: Coalition Agreement 2017-2021, Confidence in the future, 10 October 2017 (Official EN), p. 42: "*The scope of the Renewable Energy Grant Scheme (SDE+) will be broadened, so that it will also offer incentives for developing other emission reduction technologies, including carbon capture and storage. This can play a key part in reducing emissions from industry, power plants and waste incineration plants*."

[235] **Exhibit C-0095**: The government of the Netherlands, Climate Agreement, The Hague, 28 June 2019, p. 112: "*Capture, transport and storage of carbon dioxide produced by industry (Carbon Capture and Storage, CCS) is regarded by the sector and by the national government as crucial in the combination of technological measures aimed at achieving the climate target in a cost-effective manner. Capture, transport and storage of carbon dioxide (CCS) produced by industry is regarded by the sector and by the national government as a crucial activity to achieving the 2030 target.*"

[236] As of April 2021, the Netherlands Environmental Assessment Agency ("**PBL**") published a report about the possible expansion of CCS. In the introductory note, the PBL explains: "*CO2 capture and storage (CCS) has several possible applications in both industry and electricity production. At various locations, CO2 can be captured, compressed, transported and then stored underground. Within the SDE++, only CCS is currently being investigated for industrial*

290 The new Government thus did not only break with the substantive policy of its predecessors by seeking to ban coal-fired plants. In contrast to the 2002 Coal Covenant,[237] the Energy Sector Agreement 2008,[238] the Energy Agreement 2013,[239] or the 2016 discussions,[240] the Government also broke with the tradition to conclude an agreement with the energy sector.

2. During the legislative procedure, Respondent ignores both objections rendered and advice given by its own State Council

291 Less than five months from taking office (26 October 2017), the new Government submitted a draft law for public consultation on 19 May 2018. According to the Explanatory Memorandum accompanying this draft, the law was to implement the coal ban agreed on in the Coalition Agreement.[241]

292 The consultation announcement explains that the law prohibits the use of coal for electricity generation with immediate effect:

> "*This bill contains a ban on the use of coal as a fuel for electricity generation. This ban will apply immediately when the bill enters into force. For the oldest power stations - the Hemweg and the Amer power station - a transitional period is offered until 31 December 2024. For the new power stations, there is a transitional period*

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applications." See screenshot, of **Exhibit C-0096**: PBL Report, Draft advice SDE++ 2022 CO2 capture and storage (CCS), dated 22 April 2021**.**

[237] **Exhibit C-0050**: Covenant on coal-fired Power Plants and CO2 Reduction, 24 April 2002.

[238] **Exhibit C-0060**: Energy Sector Agreement 2008-2020, 28 October 2008.

[239] **Exhibit C-0076**: Energy Agreement 2013.

[240] See above, Section **B.VIII.3**.

[241] **Exhibit C-0097**: Draft Coal Ban Law & Explanatory Memorandum, 19 May 2018, p. 4: *"This bill implements one of the measures announced by the Rutte III government in its coalition agreement* […]*."* (This exhibit has previously been submitted as exhibit C-0014 (Dutch Original and English translation in a separate document) with the Request for Arbitration. Claimants herewith submit it again with the agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document.)

> *until 1 January 2030. All power plants will no longer be able to use coal for electricity production after the end of the transition period.*"[242]

293 The essential provisions are contained in Articles 2 to 4 of the draft law:

- Article 2 prohibit[s] to generate electricity using coal in a production facility.
- Article 3 offers coal-fired power plants with an efficiency of at least 40 % a transition period up to 31 December 2024 and coal-fired power plants with an efficiency of at least 44 % (such as Eemshaven) up to 1 January 2030.
- Article 4 contains a hardship clause, offering affected operators an unspecified relief if they are disproportionately affected compared to other operators of a coal-fired production installation.

294 The draft Coal Ban Law did not foresee any financial compensation. This was in line with the Coalition Agreement, which also did not foresee any funds to pay compensation for the early closure of the coal-fired power plants.[243]

295 In the consultation procedure,[244] Claimants firmly objected to the draft law for its failure to compensate them for the severe damages arising from the coal ban. They also highlighted that, contrary to Respondent's contentions, for a newly constructed power plant like Eemshaven the 10-year transition period was completely insufficient to recover Claimants' multi-billion euro investment. Moreover, they pointed out that the planned coal ban was ineffective since, without providing support for large-scale renewables projects, such as

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[242] See website: https://www.internetconsultatie.nl/kolencentrales, last accessed 14 December 2021); printout of the website submitted as **Exhibit C-0098**: Overheid.nl, Internet Consultation on the Coal Ban Law

[243] See the assessment of the Coalition Agreement made by the Dutch Environmental Assessment Agency (*Planbureau voor de Leefomgeving*, "**PBL**"), submitted as **Exhibit C-0099**: PBL, Analysis of the Rutte-III Coalition Agreement, Effects On Climate And Energy, 30 October 2017, p. 16. The PBL is a national institute for strategic policy analysis in the fields of the environment, nature and spatial planning, which is part of the Dutch Ministry of Infrastructure and Water Management, see PBL, About PBL, available at https://www.pbl.nl/en/about-pbl (last accessed: 6 December 2021).

[244] **Exhibit C-0100**: RWE, RWE's response to the draft bill on the prohibition of coal in electricity production, 14 June 2018.

subsidised biomass, a reduction in CO2 emission could not be effectively achieved. Otherwise, the electricity produced by Dutch coal-fired power plants would be replaced by electricity from coal-fired power plants abroad. Similar objections were also raised by other operators. Overall, although the Advisory Division of the Council of State in 2017 had still highlighted the importance of carefully preparing a Coal Ban in order to safeguard the interest of the plant owners, this did not happen. Quite to the contrary, the Explanatory Memorandum to the Coal Ban Law openly stated that the Coal Ban implemented the Coalition Agreement 2017-2021, *"is not up for discussion and is the starting point for government policy"*.[245]

296 Hence, unsurprisingly, despite broad criticism of the draft law in the consultation procedure, the Government left the law practically unchanged.[246] In the same month (October 2018), the results from the consultation procedure were published, the Government submitted the draft to the Advisory Division of the Council of State.

297 In its Opinion of 16 January 2019, the Council of State heavily criticised the draft law and concluded that several relevant questions needed further review:

> "*The relevant question points with regard to the new generation of coal-fired power plants are in this connection:*
>
> *- whether the operators of these coal-fired power plants can still recover their investments, whereby the economic life of the power plant is relevant,*
>
> *- whether operators of these power plants who have not hitherto (co-)fired biomass will in practice be able to do so within the specified transition periods (although, according to the explanatory memorandum, adjusting the production process is technically possible within three years, it is conceivable that firing biomass will require completely different knowledge, skills and organisation to firing coal),*

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[245] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 2.

[246] No changes in substance were made. With regard to the provision in Art. 2 to 4, only a technical adjustment was made, namely how the efficiency of the coal-fired power plants is determined. The initial draft had used the "net electrical efficiency", which is calculated by dividing the electricity supplied to high voltage grid by the energy content of the fuels used. This was simplified by using the "electrical efficiency" stipulated in the Environmental permit as the relevant criterion, see **Exhibit C-0102**: Draft Coal Ban Law, 12 October 2018, Art. 1.

> *- in the event of power plant closure: what is the residual value of the assets, such as the land, the industrial building and the inventory.*
>
> *When converting coal-fired power plants to biomass power plants, the following questions also arise:*
>
> *- whether the operators can still generate income during the conversion,*
>
> *- whether sufficient biomass is available, what the future market price of biomass will be in the event of scarcity, and the likelihood that such scarcity will occur,*
>
> *- whether and to what extent operators will receive subsidies for biomass conversion,*
>
> *- whether and to what extent the level of revenues during the transition periods will be affected by the introduction of a CO2 minimum price.*
>
> *The Advisory Division recommends that the explanatory memorandum on the above points be supplemented where possible. This is so that, in the event of legal proceedings, the court can examine whether the legislator has taken sufficient account of the consequences of the legislative proposal.*"[247]

298 As we will show below, the Government only superficially supplemented the memorandum, but did not deal with those issues in substance. In total contrast to the very specific methodology proposed during the 2016 coal closure discussions (see above Section **B.IX.3.-4.**), Respondent did not request any figures or data from Claimants (or, as far as Claimants know, any other affected company). It also did not commission any expert studies, but rather ignored those submitted to it (see below Section 4). The Government submitted the bill virtually unchanged to Parliament on 18 March 2019.

299 The only change was to incorporate the agreement for the early closure of the Hemweg 9 coal-fired power plant reached with its operator Vattenfall. Hemweg 9 is an older coal-fired power plant, which neither co-fires biomass nor provides heat to domestic or industrial customers. Vattenfall agreed to shut down its plant already on 1 January 2020 for a compensation of approximately EUR 52 million on the basis of a DCF calculation.

300 The bill remained unchanged in the further parliamentary process and was adopted by the two chambers of the Dutch parliament on 4 July and 10 December 2019, respectively. The

[247] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

Coal Ban Law was published in the Dutch *Staatsblad* on 19 December 2019 and, in accordance with its Article 7, entered into force on 20 December 2019.

3. The Coal Ban Law prohibits firing of coal with immediate effect

301 As described above, at the time the Coal Ban entered into effect, Eemshaven was a power plant permitted to fire coal and to co-fire up to about 15% of biomass. By prohibiting the firing of coal, the Coal Ban thus essentially prohibits Claimants to use Eemshaven.

302 The Coal Ban Law entered into force with immediate effect. The law grants Eemshaven a non-financial compensation in the form of a ten-year transition period:

> "*The power plants are also offered a transitional period, the length of which depends on the efficiency of the power plants, in order to achieve (further) conversion of the power plant, if necessary, so the power plant is actually suitable for generating electricity using fuels other than coal. These transition periods are also relevant for the assessment of whether there is a "fair balance".*"[248]

303 The transition period is part of a non-financial compensation scheme offered by the legislator:

> "*In view of the foreseeability of CO2 reduction measures for the power plants as early as 2005, the "polluter pays" principle, the possibility for the owners of the power plants to continue generating electricity using fuels other than coal and the generous transition periods offered by this bill, the cabinet believes that there is a "fair balance" between the public interest served by this ban and the interest of the owners of the power plants affected by the regulation of their property. This bill therefore does not a priori provide for additional detriment compensation beyond the transitional periods already offered.*"[249]

304 The Coal Ban Law prohibits Eemshaven from doing what its irrevocable (and not withdrawn) permits allow it to do: to fire coal to generate electricity, and to emit the resulting CO2 as long as it has sufficient emission allowances under the ETS.

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[248] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

[249] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13.

305 Article 4 of the law provides if a power plant operator is disproportionally affected, the Government can decide to grant compensation. The Explanatory Memorandum emphasizes, however, that all power plants should be affected similarly so that no compensation would be due.[250] In any case, the Explanatory Memorandum asserts, that the Minister first should enter into discussion with the plant to see whether operation could be continued without coal.[251] "*Only if it turns out that no compensatory measures are possible will financial compensation be considered.*"[252] However, as the pre-arbitration settlement negotiations (see Section **B.X.1.** below) have demonstrated, this promise was not worth the paper it was printed on.

4. Respondent's assessment of the effects of the Coal Ban Law is not based on facts, but on mere speculation

306 Respondent completely failed to review the effects of the Coal Ban Law on Claimants (or the operators of other coal-fired plants, i.e. Uniper and Engie), despite having been alerted by the Advisory Division of the State Council on the respective necessity. Instead of requesting facts and data from the operators or commissioning expert opinions, Respondent relied on arbitrary political determinations and speculations – to a certain extent even against better knowledge.

307 The Coal Ban Law essentially stands on two legs: Respondent assumes that the transition period is adequate to allow the operators to re-earn a large part of their investment and convert the plants for operation with another fuel, and that such conversion and operation is possible and economical. The Advisory Division had already with respect to the Vos Amendment pointed out how important it was that this would be substantiated. It had repeated this when reviewing the draft Coal Ban Law. Nevertheless, Respondent did not do so.

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[250] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13.

[251] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13.

[252] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13.

308 Instead, the Coal Ban Law is based on speculative assumptions: the transition period was fixed at 10 years because Respondent wanted the coal plants to shut down in 2030. It did not review whether and to what extend the original investments might be re-earned in these 10 years (**a.**). Respondent also did not review whether a conversion of the plants to biomass – or some other fuel – would be possible. It did not review whether the conversion would be possible from a legal point of view and even admitted that it was unclear whether there ever would be sufficient biomass for the operation of the plants (**b.**). And while Respondent in 2017 had had serious doubts that firing of biomass would ever be profitable without state subsidies, it in 2019 ignored that completely, even though the subsidies had been cancelled (**c.**). Respondent even admitted that after 2030 the fate of the coal plants was not its concern. It would be up to the operators to see what they could do with them without coal (**d.**)

(a) Respondent did not review whether the transition period was adequate

309 Respondent did not review whether the transition period was adequate. The Coal Ban Law bans coal-firing but grants a ten-year transition period. No coal is to be fired after 2030. Thus, Respondent with the one hand removes 35 years of expected lifetime of Eemshaven (2015-2055) by banning coal firing, and with the other grants back 10 years as a non-financial compensation.

310 That is comparable in effect to the 2017 Vos Amendment, which sought to impose an irreal efficiency requirement of 48 % from 2030 onwards (see above, Section **B.VIII.5.**). The Tribunal will recall that this was heavily criticized by the Advisory Division of the State Council, which said the following:

> *"However, it is essential that the transitional periods offer an adequate opportunity for the owners of the coal-fired power plants to limit their damage. The transitional periods are not justified in the explanatory memorandum. This makes them arbitrary. If the transitional periods are sufficient, it will have to be further investigated and justified why they are considered adequate. In this respect, it may be of importance, among other things, what is the technical and economic life of the coal-fired power plants, whether the owners of the coal-fired power plants, before the adoption of the motion, have made investments to extend the service life and whether the coal-fired power plants can continue to operate profitably during the transition periods. The Advisory Division does not have this*

> *information and therefore cannot determine* whether the transition periods are adequate."[253] (emphasis added)

311 The *Vos Amendment* then never made it into law. One would have expected the new Government to do better. However, the first draft of the Coal Ban Law also did not contain any such explanation for the transition period. Hence, unsurprisingly, also in its Opinion of 16 January 2019 on the Coal Ban Law ("**2019 Opinion**"), the Council of State highlighted the lacking economic assessment of the transition period again. The Council of State raised fundamental questions, *"especially about the requirement of a fair balance"* under Article 1 of Additional Protocol ("**AP**") to the European Convention on Human Rights ("**ECHR**") for newly constructed generation capacity such as Eemshaven.[254] In particular, the Council of State missed information on *"whether the operators of these coal-fired power plants can still recover their investments"*.[255] It noted that *"[t]his may require an allowance* for costs*"*[256] and advised to supplement the explanatory memorandum in order to permit *"the court can examine whether the legislator has taken sufficient account of the consequences of the legislative proposal"*.[257]

312 However, Respondent again did not do this. It did not ask Claimants for information or data about investments made and/or to which amount these had been recouped. It also did not ask whether the 10-year transition time period would be sufficient. Instead, it simply amended the Explanatory Memorandum with the following speculative assumptions:

> "*This transitional period offers the operators of these relatively new power plants a period of more than 10 years to limit their losses due to the coal ban. This is, in the cabinet's opinion, a sufficient transitional period. The transitional period offered, in fact, gives the power plant operators the opportunity to recoup (a large part of) their investments and to prepare the power plant, whether or not in phases,*

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[253] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, p. 13 (similarly also p. 14).

[254] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

[255] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

[256] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

[257] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

> *for further operation with fuels other than coal. In the opinion of the cabinet, it is not necessary that the operators can fully recover their investments during this transitional period. After all, the transition period is also intended to allow the power plants to be prepared for a switch to other, lower CO2 fuels so the operation of the power plant can continue.*"[258]

313 This is not based on any factual inquiry. It also does not say anything about which percentage of the original investments the government considers sufficient to recover, nor whether or why each of the three plants would meet that threshold until 2030.

314 The real reason why Respondent did not do this is also set out in the Memorandum:

> "*The transition period is based on the assumption that the use of coal for electricity generation will cease by 2030. Climate reports show that the climate objectives for Europe, and therefore also for the Netherlands, are achievable if electricity generation using coal is phased out by 2030 at the latest. Partly for this reason, the transitional period offered in this bill will end no later than 1 January 2030.*"[259]

315 Thus, the transition period was not set on the basis of whether the plants can recoup a (large part) of their original investment. The period was predetermined by the political goal to have a certain CO2 reduction by 2030. Whether or not the coal-fired plants indeed can recover a "*large part*"[260] (whatever that may be) of their investment has not been reviewed, for it was evidently irrelevant to Respondent for the introduction of the Coal Ban Law.

316 Consequently, the allegation that the transition period of 10 years would be sufficient to recoup investments was based on speculation and political expedience, but not on facts.

317 That is why Respondent tries to justify the Coal Ban Law also with the alleged possibility to use the transition period to convert the plant to other fuels and then to continue to operate it: "*After all, the transition period is also intended to allow the power plants to be prepared for a switch to other, lower CO2 fuels so the operation of the power plant can continue.*"[261]

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[258] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

[259] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

[260] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

[261] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

According to Respondent's own calculations such a conversion during the transition period would take three years and thus shorten the transition period further.[262]

(b) Respondent has not reviewed the feasibility or possibility of converting the plants to other fuels

318 Respondent has not reviewed the feasibility or possibility of converting the coal plants to other fuels. A key assumption of the Coal Ban Law, i.e. that after the end of the transition period the plants could be operated on other fuels, is not only based on speculation and guesswork, but evidently and clearly incorrect.

319 In its 2019 Opinion, the Council of State highlighted that the Explanatory Memorandum was missing the following essential information:

> *"- whether the operators can still generate income during the conversion,*
>
> *- whether sufficient biomass is available, what the future market price of biomass will be in the event of scarcity, and the likelihood that such scarcity will occur,*
>
> *- whether and to what extent operators will receive subsidies for biomass conversion,*
>
> *- whether and to what extent the level of revenues during the transition periods will be affected by the introduction of a CO2 minimum price*."[263]

320 Yet, despite this clear call to action from the Council of State, the Government did not address these points in substance. It neither requested any information from Claimants or the other plant operators, nor did it commission any expert studies. In the (revised) Explanatory Memorandum, the Government merely referred to a number of biomass-fired power plants in the UK, Canada, Denmark and Belgium.[264] It neither examine how these biomass projects had been realised, nor whether they could be used as a precedent for the Dutch power plants. Consequently, it failed to note that in all these examples the conversion

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[262] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, pp. 11-13.

[263] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, pp. 4-5.

[264] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 10.

to and operation with biomass was based on subsidies[265] – something Respondent explicitly excluded for the future after 2027 in the Netherlands. Respondent also did not check which costs would be incurred by a conversion. Those CAPEX costs are a relevant factor to assess whether a conversion is economical. Instead, Respondent simply points to the different choices which operators would have needed to make, in particular to fuel, and states that "*[a]n estimate of the costs of conversion is therefore difficult.*"[266]

321 The Government further did not review whether a conversion to biomass – or some other fuel - would be legally possible. Operating with 100 % biomass requires a change of the respective permits and in particular that the plant can remain within the statutory emission limit. For Eemshaven, which operates near the Waddenzee, such permits also might require again an overriding public interest (see above, Section **B.VI.1.(b)**).

322 The Government equally did not review whether sufficient biomass would be available, although it knew this might be a problem. Already in 2017, when the Minister for Economic Affairs sent his letter evaluating a coal ban and alternative measures to parliament, he pointed out that it was unclear whether sufficient biomass was available for a 100 % conversion as:

> "*Moreover, further research is needed into the feasibility of the measure in connection with the availability of sufficient biomass.*"[267]

323 The Advisory Division of the Council of State in 2019 also pointed this out and thought it necessary to review: *"-whether sufficient biomass is available, what the future market price of biomass will be in the event of scarcity, and the likelihood that such scarcity will occur*."[268] In its response, the Government even acknowledged that sustainable biomass would become scarce in the future and that biomass prices were not foreseeable.[269] The

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[265] **Exhibit CER-0001**: NERA Expert ReportSection 1.3.

[266] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 17.

[267] **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), no. 29.

[268] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

[269] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 5.

Government could merely point to possible other forms of biomass like "*roadside grass, pruning waste and sewage sludge, and residual flows from the food industry*"[270], without reviewing their capacity and suitability, and had to admit that it did not know whether there would be sufficient biomass available: "These passages show that whether or not there will be scarcity will depend on global developments in the longer term in terms of supply and demand for biomass*.*"[271] In short: the Government did not know whether there would be enough suitable biomass available to operate the plants in the future.

(c) Respondent itself had serious doubts that 100 % biomass would be economical without state support

324 One of the fundamental requirements for converting a coal plant to an alternative fuel is also that operation with that fuel will be economical. Given the incurred conversion costs, the plant does not only need to re-earn that CAPEX. Spending that money in the first instance only makes sense if not only that CAPEX is re-earned but if conversion and operation can contribute to the recovery of the initial plant investment.[272] As the Tribunal will recall, the *merit order principle* prescribes that power plants are added to the grid in order of their marginal costs. The higher the marginal costs are – and they are to a large extent determined by the fuel costs – the less likely it is the plant will be able to produce electricity.

325 As the Tribunal knows, the co-firing of biomass is currently still subsidized by the SDE+-scheme which provides that the Government will cover the price differential between coal and sustainable biomass. The list of measures sent by Minister Kamp to Parliament included, *inter alia*, the option of full biomass conversion and was commented by Respondent as follows: "*It is not clear whether this measure can ever be implemented profitably without government subsidy*".[273] Nonetheless, it had agreed in the Coalition Agreement 2017 that no further biomass subsidies would be granted, and confirmed this in

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[270] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 6.

[271] **Exhibit C-0103**: Parliamentary Papers II, 2018/19, 35 167, no. 4, Advisory Division of the Council of State, Opinion, 16 January 2019, p. 6.

[272] Cf. **Exhibit CER-0001**: NERA Expert Reportparas 9, 14.

[273] **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), no. 29.

the Explanatory Memorandum. The Government simply noted that operators could "*opt to co-fire alternative biomass such as animal meal and residual flows from the food and luxury food industry (VGI)*" [274] albeit without knowing, reviewing or confirming that sufficient affordable biomass would be available.

326 The Government also had positive evidence that the conversion of modern coal plants to 100 % biomass was not economically feasible. Uniper, which is the operator of the Maasvlakte powerplant, has commissioned an expert report by the advisory firm Frontier. Frontier is well known and respected by Respondent since Respondent itself had relied on Frontier when drafting the Coal Ban Law.

327 Frontier has investigated whether having Uniper's coal-fired power plant – the MPP3 plant on the Maasvlakte – switch to full biomass use by 2030 would be economically feasible. Frontier's answer in its September 2019 report is in the negative:

> *"Overall, we conclude that converting MPP3 into a biomass plant in 2030 is not a viable investment case. In addition, the investment is associated with additional risks, which are caused by:*
>
> - *the volatile biomass price, which would need to be secured over 20 years at additional costs which are currently not considered in the analysis; and*
> - *the negative EBITDA in the first 11 years after the conversion which requires extremely favourable market conditions in the long run in order to yield a positive return on the investment."*[275]

Given this economic unfeasibility, the Coal Ban Law would leave no choice to the MPP3 plant other than to close by 1 January 2030.

> *Given the coal ban which will effect MPP3 from 2030 onwards, the economic decision would rather be to close the plant than to convert it into a biomass plant in 2030.*[276]

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[274] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 17. VGI is "*residual straw from the food and beverage industry*".

[275] **Exhibit C-0104**: Frontier Economics, Profitability and Dispatch of MPP3 Power Plant in Case of Biomass Conversion, A short report for Uniper Benelux, dated September 2019, p. 10.

[276] **Exhibit C-0104**: Frontier Economics, Profitability and Dispatch of MPP3 Power Plant in Case of Biomass Conversion, A short report for Uniper Benelux, dated September 2019, p. 4.

328 Respondent is familiar with this Frontier report. It was discussed in Minister Wiebes' consultation with the Upper House about the Coal Ban Law.[277] The Minister was not prepared to discuss the content of the report and the question of what this meant for the tenability of the argument that the transition period would be an adequate compensation since the plants could use alternative fuels. The Minister simply maintained it would not follow "*in advance*" that switching to full biomass use from 2030 onwards would not be feasible. One of the reasons Minister Wiebes gave for his position was that the report had been commissioned by Uniper. However, it does not follow (of course) from this that the report is substantively incorrect. Frontier is an independent expert who in the past had also acted for the Dutch government and it had based its report for Uniper on the same modelling of the electricity market as in its reports for the Ministry of Economic Affairs in 2017 (see above Section **B.VIII.4.**).

329 Furthermore, Minister Wiebes remarked in the discussion with the Upper House that Frontier's report would at most be meaningful for Uniper's power plant and would not even provide "*any information*" for other power plants.[278]

330 That, however, is not a viable excuse for two reasons. Firstly, it reveals Respondent's own shortcomings: the Government did not commission any studies itself and thus did not have recourse to own expert opinions on the question whether or not biomass conversion would work for the other plants. Secondly, Frontier's report does have relevance for other coal-fired power plants as well, including Eemshaven. All these plants were in the same situation. After all, all coal plants in the Netherlands are part of the same electricity market and will have to buy biomass on the same biomass market. All new coal-fired power plants, including Eemshaven and the Uniper plant, have the same electrical efficiency of 46 % and will most likely also have (almost) the same lower efficiency when switching to full biomass use. The Tribunal will recall that already in the Explanatory Memorandum, Respondent admitted that all three firms were similarly affected by the Coal Ban Law. The Minister's denial is nothing more than a futile attempt to escape liability by not dealing with facts which would force him to change his view.

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[277] See **Exhibit C-0105**: Parliamentary Papers I 2019-20, 35 167, B, Memorandum of Reply, 17 October 2019, p. 12.

[278] See **Exhibit C-0105**: Parliamentary Papers I 2019-20, 35 167, B, Memorandum of Reply, 17 October 2019, p. 12.

(d) Respondent does not know and does not care whether the coal plants could be fired with another fuel

331 All of the above shows that the Government completely ignored the principal question underlying the observations from the Council of State, namely whether the power plants could be operated economically with alternative fuels after 2030. Besides biomass, the Government also pointed to gas, hydrogen or iron powder, albeit without discussing or explaining at all whether, why, and how such a conversion might work or even be economical. Instead, the Government decided not to concern itself with such details and pointed to the operators of the power plants. They should themselves decide what to do with their power plants:

> *"It is up to the operators themselves to make a choice as to how they want to continue operating their power plant, based on their own business assessment."*[279]

332 This shows Respondent's complete lack of appreciation of its responsibility as the legislator to consider the economic consequences of the Coal Ban Law for the companies affected. Hence, the Government's response to the Council of State's questions whether the legislator had given sufficient consideration to the consequences of the bill is essentially "no". The Government has not based its decision on the length of the transition period or whether to offer financial compensation on any economic evidence relating to the impact on the operators of the coal-fired power plants. It did not consider how much money the operators could actually earn until 2030 and whether (any investment in) operating the plant with alternative fuels would be profitable and thus contribute to recouping the initial investment.

333 The Coal Ban Law instead is based on the political decision to shut down coal-fired plants by 2030 irrespective of the consequences for investors. If they cannot make use of their plants after 2030, it is in Respondent's view their own problem for which it bears no responsibility – although the Coal Ban Law has caused this problem.

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[279] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

5. The Coal Ban Law in effect is a Coal Plant Closure Law

334 Claimants have shown above that Respondent did not base the Coal Ban Law on facts. It was based on the speculative assumption that operators could convert their plant to some other fuel and after 2030 continue to operate their plants profitably without state subsidies.

335 However, this is not possible. Respondent itself had serious doubts, and Claimants' experts now confirm this. NERA concludes that it is not possible to economically operate a biomass power plant without state subsidies.[280] Those subsidies, however, have been cancelled by the Government. The Coal Ban Law thus is in effect a coal plant closure law and thereby implements the Coalition Agreement 2017-2021 which had provided for exactly that.

[280] **Exhibit CER-0001**: NERA Expert Report, paras 10, 22.

X. Events after the Coal Ban Law entered into force

336 This section briefly describes issues which have arisen after submission of the Notice of Dispute, but which are nevertheless relevant to understand Respondent's conduct.

1. In the pre-arbitration negotiations, Respondent rejected any responsibility for the future of Eemshaven

337 In the pre-arbitration settlement negotiations,[281] Respondent continued to reject any responsibility for the future of Eemshaven after the transition period. According to Respondent, it would be up to Claimants to come up with a business idea.

338 By letter of 2 December 2020, Respondent confirmed its willingness to discuss "*permitting processes or any other issues related to the future of the coal plants*".[282]

339 Claimants had always been willing to talk with the Government – even in 2016, when the previous Government investigated a coal phase out – but to no avail. Since Claimants were – and still are – interested in securing a viable future for their EUR 3.2 billion investment, they accepted the State's proposal:

> "*For various reasons, our clients do not see a realistic future for Eemshaven with firing biomass only. They thus would appreciate if the Ministry in any meeting would explain what, in its view, the future of Eemshaven could be, if any, and whether and which guarantees for such future it would be prepared to give to our clients.*"

340 The Parties met virtually on 23 December 2020. However, in that meeting Respondent pointed out that it neither could assist with permitting issues for a conversion to biomass, nor would the economic viability or unviability of an operation with biomass be its responsibility. Claimants pointed this out in their letter of 11 January, by which they informed Respondent that they considered the negotiations to have failed:

> "*Regrettably, the meeting showed that the Netherlands is either unwilling or unable to constructively discuss the future of Eemshaven. We had pointed out that*

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[281] These were not real settlement negotiations, since Respondent's representatives failed to present a power of attorney to discuss, let alone conclude a settlement.

[282] **Exhibit C-0106**: Pre-Arbitration Settlement Correspondence between the Parties, Respondent's Letter of 2 December 2020 (Negotiations).

> *the legal possibility to obtain permits to convert Eemshaven from a coal-fired plant into a 100% alternative fuels power* plant *would be speculative at best. However, Mr van den Berghe explained that the Netherlands could not assist with obtaining such permits (the necessity of which it has created) for converting Eemshaven since the competence for granting such permits would not lie with the central government. Similarly, your client refused any responsibility for the problem whether an operation of Eemshaven with e.g. biomass would be economically viable at all. Your client should know from e.g. the Frontier Economics report for Uniper's Maasvlakte 3 plant (published in 2019) that converting and operating coal-fired power plants with 100 % biomass is not economically viable without any subsidies.*
>
> *In summary, it seems to be the Netherlands' position that it is not responsible for any of the consequences resulting from its decision that from 2030 onwards, a coal-fired power plant build for billions of euro and commissioned only five years ago, can no longer be used despite having irrevocable permits for that use. Instead it would be, as the representative of the Dutch Government expressed it, our clients' problem what to do with their plant.*
>
> *That is not a constructive basis for further amicable settlement discussions. RWE does not see what could be discussed in a further meeting. The Netherlands has not even explained that it might be willing to assist in the conversion of the plant."*

341 The stance taken by the Respondent was a clear continuation of the policy adopted in the Explanatory Memorandum for the Coal Ban Law, where Respondent had explained it was "*up to the operators themselves to decide, on the basis of their own business economics, how they wish to proceed with the operation of their plant*." In light of that, even a discussion about how the Government could assist with the future operation of Eemshaven, or about compensation, was bound to fail.

2. Respondent is willing to pay compensation for post-*Urgenda* measures

342 Interestingly, Respondent is willing to compensate Claimants for further CO2 reductions necessitated by the *Urgenda* judgment. The judgment became binding in 2019 when its final appeal was rejected. Thus, Respondent has to reduce greenhouse gas / CO2 emissions by at least 25 % by the end of 2020, compared to 1990 levels. Also after 2020, the Dutch State is obliged to reduce emissions of CO2 in the Netherlands.

343 To comply with the *Urgenda* judgment, Respondent use the coal-fired power plants (again) as a sort of switches. The amount of CO2 emitted from coal firing in power stations will be capped to 35 % of the maximum amount of CO2 that can be produced in a calendar year based on installed capacity, so in fact a cap on the coal used. To meet those targets a bill

on the limitation of coal production ("*Wet productiebeperking kolen*") was announced in June 2020. The bill formalizes the decision by the Government to meet the *Urgenda* reduction order through a decrease of CO2 - which is de facto a decrease in coal-production - of the Dutch Coal fired power plants, including Eemshaven. To that end, the bill inserts new articles in the Coal Ban Law prohibiting CO2 output / the use of coal for electricity production in the years 2022, 2023 and 2024 in excess of a range of 35 % of production capacity. Biomass is not in scope, given it is considered to be CO2-neutral.

344 The initial implementation date was 1 January 2021. For several political reasons, the implementation date has been delayed and is now expected to be not sooner than 1 January 2022 or at least as soon as possible after the bill will have been adopted by the Upper House.

345 Compensation for actual damages caused by this CO2 cap production limitations is part of this new law. Since July 2020, RWE has cooperated with KPMG as representative of the Dutch Government to determine the methodology and actual damage calculations, resulting in an ex-ante damage calculation. KPMG and RWE agreed to disagree on some elements of the calculations. The Dutch State in the end will determine the compensation amount based on the advice of KPMG. The compensation methodology will be presented in a separate General Administrative Order (a so called "AmvB") to the *Wet productiebeperking kolen*.

346 As of the time of submission of this Memorial, the AmvB had been sent to the Advisory Division of the State Council, who has meanwhile recently delivered its advice. However, it has not yet been made public and is thus not known to RWE.

3. The Government confirms that it wants to stop the use of biomass in power plants

347 One of the crucial issues in this case is whether Eemshaven could be operated with 100 % biomass in the future. We have already shown that Respondent has cancelled the subsidies for co-firing of biomass, although it had serious doubts whether co-firing could ever be profitable without subsidies. As Respondent might try to defend itself by disputing that, we draw the attention of the Tribunal to recent statements by various government officials to confirm that the Government does not only want to stop the subsidisation of biomass co-firing, but the co-firing itself:

348 On 21 April 2021, Minister of Economic Affairs and Climate Van 't Wout took the following position:

> "*This does not alter the fact that sustainable biobased raw materials are a scarce commodity. Therefore, the cabinet is committed to the phasing out of high-grade applications such as raw materials for the chemical industry and the phasing out of low-grade applications such as electricity and low-temperature heat.*" [283] (emphasis added)

349 On 20 May 2021, Minister Van 't Wout again confirmed that the use of biomass for electricity production should be phased out:

> "*However, given the scarce availability of sustainable biobased raw materials, the cabinet attaches importance to the phasing out of high-grade applications, such as raw materials for the chemical industry, and the phasing out of low-grade applications, such as electricity and low-temperature heat.*"[284] (emphasis added)

350 In the same vein, State Secretary of Economic Affairs and Climate Yeşilgöz-Zegerius explained on 10 June 2021 that biomass should be phased out:

> *"Because whatever we think of biomass – I don't think there are any fans here – we have given it a fundamental place in our plans for the Climate Agreement and in the development of our climate plans. So if you phase it out earlier than we had foreseen in the plans we shared with each other, there will be consequences. So that will require a bit more political underpinning and consideration, at least on my part, but I think on your part too, than I can put that up for discussion tomorrow.*"[285] (emphasis added)

351 State Secretary Yeşilgöz-Zegerius two weeks later again confirmed that:

> "*In the sustainability framework for biofuels, the cabinet adhered to the classification of the Social and Economic Council in its advice on biofuels, including the final picture that is outlined there. On the one hand there are low-grade applications and according to the Social and Economic Council they do not fit into the final picture. Alternatives will become available in the short term, or are*

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[283] **Exhibit C-0107**: Parliamentary Papers II 2020/21, 32 813, no. 682, Report of a Written Consultation, 22 April 2021, p. 55.

[284] **Exhibit C-0108**: Parliamentary Papers II 2020/21, no. 2815, Letter to the Lower House from the Directorate-General for Climate and Energy, 20 May 2021, p. 2.

[285] **Exhibit C-0109**: Parliamentary Papers II 2020/21, 32 813, no. 809, Report of a Committee Debate, 27 July 2021, p. 46.

> *already available. Policy must be geared to a reduction. It concerns, for example, biomass for energy application.*"[286] (emphasis added)
>
> [...]
>
> "*There is the low-grade application of biomass, which the Social and Economic Council also says should be phased out. I just said that we want to phase it out.*"[287] (emphasis added)
>
> […]
>
> "*I see that the support base, for example for low-grade applications of woody biomass, has decreased. That is why we are going to do other things with it.*"[288] (emphasis added)

352 Likewise the Minister of Minister of Agriculture, Nature and Food Quality, Carola Schouten, on 10 September 2021:

> *"The use of woody biomass to generate energy will also be scaled down over time, whereby this raw material can be used sustainably for high-value applications.*"[289] (emphasis added)

353 Finally, State Secretary Yeşilgöz-Zegerius stated n 18 October 2021:

> *"The cabinet is convinced that the sustainable use of biofuels is necessary in the transition to a climate-neutral and circular economy in 2030 and 2050. The SER advisory report confirms this. As described in the sustainability framework for biobased raw materials (Parliamentary Paper 32 813, no. 617), the cabinet, in line with the SER advisory report, has opted for a responsible use of biobased raw*

[286] **Exhibit C-0110**: Parliamentary Papers I 2020/21, no. 43, Amendment to the Prohibition of Coal in electricity production in connection with the reduction of C02 emissions, 29 June 2021

[287] **Exhibit C-0110**: Parliamentary Papers I 2020/21, no. 43, Amendment to the Prohibition of Coal in electricity production in connection with the reduction of C02 emissions, 29 June 2021 item 9, p. 43-9-33.

[288] **Exhibit C-0110**: Parliamentary Papers I 2020/21, no. 43, Amendment to the Prohibition of Coal in electricity production in connection with the reduction of C02 emissions, 29 June 2021 , item 9, p. 43-9-49.

[289] **Exhibit C-0111**: Parliamentary Papers II 2020/21, 21 501-32, no. 1339, Report of a Written Consultation, 10 September 2021, p. 4.

> *materials with a dynamic approach for the timely phasing out of incentives for low-value applications such as electricity and heat* [...]"[290] (emphasis added)

354 All these statements by various members of the Dutch government after the start of these proceedings leave no room for doubt that the Government wants to stop using biomass for electricity production. The new coalition agreement entered into in December 2021 also provides that the Government wants to phase out the use of woody biomass (i.e. wood pellets) for energy purposes as quickly as possible.

4. Respondent asks German courts to declare these proceedings inadmissible

355 In parallel to these developments in the Netherlands, but relating to a complete different aspect of this dispute, Respondent took action as well. Nearly four months after Claimants submitted their Request for Arbitration, on or around 10 May 2021, Respondent commenced what it itself refers to as "*anti-arbitration proceedings*"[291] before the Higher Regional Court of Cologne (*Oberlandesgericht Köln* – the "**Cologne Court**"). This domestic court action in Germany (the "**German Proceedings**") is directed against Claimant RWE AG only.

356 In the German Proceedings, Respondent filed a petition requesting the Cologne Court to determine that these arbitration proceedings are inadmissible. Procedurally, Respondent bases its action on Section 1032(2) of the German Code of Civil Procedure.[292] In substance,

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[290] **Exhibit C-0112**: Parliamentary Papers II 2021/22, 35 814, no. 6, Memorandum following the report, 18 October 2021, p. 11.

[291] **Exhibit C-0113**: Letter from Minister Bastiaan vant Wout to the Lower House 17 May 2021p. 2.

[292] This provision reads in full in the English translation provided by the German Federal Ministry of Justice, available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html:

"*Section 1032: Arbitration agreement and proceedings brought before the courts*

(1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement.

(2) Until the arbitral tribunal has been formed, a petition may be filed with the courts to have it determine the admissibility or inadmissibility of arbitration proceedings.

Respondent's argument in the German Proceedings is that no agreement to arbitrate existed between RWE AG and Respondent under the ECT due to the operation of EU law and, in particular, the Court of Justice of the European Union's ("**ECJ**") decision in *Achmea B.V. v. The Slovak Republic*.

357 Respondent did not provide Claimants or their counsel with a copy of its filing in the German courts at the time. Instead, Claimants first learned of the German Proceedings as a result of a letter sent to the Lower House by Dutch Minister Bastiaan van't Wout on 17 May 2021.[293] In that letter, the Minister explained Respondent's alleged rationale for commencing the German Proceedings, describing them as "*anti-arbitration proceedings"* that *"are primarily aimed at averting the arbitration*"[294].

358 On 21 May 2021, Respondent wrote to ICSID, indicating that it had initiated the German Proceedings to receive a determination on this Tribunal's jurisdiction from the Cologne Court. Specifically, Respondent stated it was seeking "*to obtain a decision from the courts in RWE's home jurisdiction on the validity of an arbitration agreement which RWE alleges exists between it and the Netherlands by virtue of Article 26 of the Energy Charter Treaty, and that is said to be the basis for these proceedings before ICSID*."[295] Respondent further noted that it would "*continue to diligently take part in the present proceedings before ICSID while the proceedings in Germany are pending.*"[296]

359 It was also only on that day, 21 May 2021, that Respondent's counsel in the German Proceedings transmitted the petition filed with the Cologne Court to Claimants' counsel.

360 On 27 May 2021, Claimants wrote to ICSID, pointing out that "*Respondent's action is in grave breach of Article 26 ICSID Convention.*" Claimants further noted that the "*only forum*

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(3) Where proceedings are pending in the sense as defined by subsection (1) or (2), arbitration proceedings may be initiated or continued notwithstanding that fact, and an arbitration award may be handed down."

[293] **Exhibit C-0113**: Letter from Minister Bastiaan vant Wout to the Lower House 17 May 2021p. 2.

[294] **Exhibit C-0113**: Letter from Minister Bastiaan vant Wout to the Lower House 17 May 2021, p. 2.

[295] Respondent's letter to ICSID of 21 May 2021, p. 1.

[296] Respondent's letter to ICSID of 21 May 2021, p. 2 (emphasis added).

which can determine whether an ICSID tribunal has jurisdiction over a specific case is that ICSID Tribunal, Article 41 (1) ICSID Convention."[297]

361 While Respondent's petition before the Cologne Court dated 10 May 2021 notes that Respondent would raise jurisdictional objections at the earliest possibility, it has so far – as the Tribunal is aware – not raised any such objections. Respondent has also failed to make the intra-EU objection subject to an application under Arbitration Rule 41(5).

362 Claimant RWE AG has responded to Respondent's petition in the German Proceedings on 9 July 2021. Respondent, in turn, filed a second submission on 27 September 2021. The Cologne Court has scheduled further submissions for both sides for 21 January 2022. The matter remains pending under case number 19 SchH 15/21.

XI. Summary

363 Claimants have invested nearly EUR 3,2 billion to build exactly the kind of coal plant Respondent wanted and needed: ultramodern, highly efficient, being able to co-fire biomass and be equipped with CCS if and insofar feasible technically and economically. As the Government's own experts confirmed in the permit procedure, the operation of Eemshaven in multiple ways fulfils public needs and ensures a safe, reliable and affordable electricity supply.

364 Claimants have invested on the premise of a legal framework which allowed coal power plants to operate at the end of their lifetime, provided they have sufficient emissions certificates for the European emissions trading system. Claimants have obtained valid and irrevocable permits which allow them to exactly that: to operate the plant, to fire coal and to emit CO2.

365 All of this has changed since the 2017 election. Promises which held for 15 years, and promises which were repeated again and again, were dismantled in a political compromise. The Dutch government pushed the Coal Ban Law through, ignoring any adverse advice and its own better knowledge.

[297] Claimants' letter to ICSID of 27 May 2021.

366 The Coal Ban Law takes from Claimants 35 years of lifetime, decides to "grant back" 10 years and points Claimants for the rest to an alternative use of their plant which Respondent itself just two years ago had considered unrealistic. Finally, Respondent wants to wash its hands in innocence by declaring that the fate of Eemshaven, which it itself has wanted and caused, would not be its problem.

367 However, Respondent cannot escape its liability. In the following sections we will explain that this Tribunal has jurisdiction to hear this dispute, that Claimants under the Energy Charter Treaty are entitled to compensation for the premature shutdown of its power plant, and that the damage caused by Respondent amounts to approx. EUR 1.4 billion.

368 Finally, Claimants show that Respondent violated the ICSID Convention by turning to the Cologne Court. Respondent must therefore stop the German Proceedings and equally compensate Claimants for any damage caused.

C. THE TRIBUNAL HAS JURISDICTION

369 Article 25 of the ICSID Convention establishes the requirements for a dispute to fall into the jurisdiction of the Centre and thereby also of this Tribunal:

> "*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.*"

370 These requirements are fulfilled. The present dispute arises directly out of an investment (**I.**), for which the Parties have consented in writing that it be submitted to ICSID (**II.**). The dispute could further not be resolved within the 3 month period for an amicable settlement under Article 26(2) of the ECT (**III.**) Finally, the dispute's intra-EU character and the recent *Komstroy* judgment do not affect this Tribunal's jurisdiction (**IV.**).

I. This dispute arises directly out of investments owned and controlled by Claimants

371 Claimants own and control investments in the Netherlands which qualify as Investments under the ECT. Article 1(6) of the ECT reads 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;*
>
> *(e) Returns;*
>
> *(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*."

372 Claimant RWE indirectly owns and controls the shares in RWE Eemshaven as well the plant itself and the affected Environmental Permit as well as the Nature Conservation Permit. Claimant RWE Eemshaven Holding II BV owns and controls the plant and holds the permits. Both also – directly and indirectly – own resp. control the leasehold for the real estate on which the plant is built. Claimants have therefore made and continue to hold investments under Article 1(6)(a), (b) and (f) of the ECT.

373 There should be no doubt that Claimants' investments under the ECT also meet any objective requirement for an investment under Article 25 of the ICSID Convention. Construction and operation of a power plant clearly fulfils the so-called *Salini* criteria. As Eemshaven's permitting procedures haven shown and in particular the relevant ECN Report proves, the construction of Eemshaven fulfilled an overriding public interest (see above Section **B.III.4.**).

374 The dispute also arises directly out of those investments. The Coal Ban Law unduly interferes with the operation of Eemshaven and Claimants' investment in the Netherlands as a whole. This interference by the Netherlands, coupled with its refusal to pay compensation, have led to the present dispute.

II. The Parties' consent to submit the dispute to the Centre

375 The Parties have consented to submit this dispute to the Centre.

376 The Respondent's written consent to arbitrate is contained in the ECT. In particular, paragraphs (3) and (5) of Article 26 of the ECT provide:

> "*(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. […]*
>
> *(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:*
>
> *(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;*"

377 Claimants have taken up Respondent's offer to arbitrate in ICSID proceedings under the ECT in their letter of 16 December 2020,[298] and reaffirmed their consent to arbitrate in their Request for Arbitration on 20 January 2021.[299]

378 Both Germany and the Netherlands are Contracting Parties to the ICSID Convention as well as the ECT.[300]

379 RWE AG, as a company incorporated in Germany, is a national of Germany, another Contracting Party to the ICSID Convention. Under Article 25(2)(b) of the ICSID Convention and Article 26(7) ECT, RWE Eemshaven, in turn, is to be treated as a national of Germany since it is under RWE AG's indirect control. RWE AG *inter alia* operates through 100 % affiliate RWE Generation SE, which owns 100 % of the shares in RWE Generation Holding BV. RWE Generation Holding BV in turn owns 100 % of RWE Eemshaven.

III. Attempts to amicably settle the dispute have failed

380 Under Article 26(2) of the ECT, parties to a dispute are to attempt to resolve such dispute amicably for three months before resorting to arbitration. Such attempts have failed, even though this time-period has been more than exhausted.

381 Claimants notified Respondent of the present dispute on 4 September 2020.[301] The Request for Arbitration was filed on 20 January 2021.[302] Despite Claimants' efforts to approach Respondent for settlement negotiations, these have remained fruitless.

382 Already on a formal level, Respondent's representatives in this arbitration, also acting as the Respondent's representatives in the negotiations, continued to fail to present a power of

[298] **Exhibit C-0114**: Claimants' Letter, Consent to Arbitration, dated 16 December 2020.

[299] Claimants' Request for Arbitration, 20 January 2021, para. 75.

[300] Claimants' Request for Arbitration, 20 January 2021, para. 72.

[301] **Exhibit C-0017**: Claimants' Notice of Dispute.

[302] Claimants' Request for Arbitration, 20 January 2021.

attorney to discuss, let alone conclude a settlement. Despite Claimants' requests to the contrary, [303] this remained the case throughout the negotiations.

383 Secondly, even when the Parties met virtually to discuss a potential settlement on substance on 23 December 2020, despite the uncertainty as to whether or not Respondent's representatives were authorized to engage in these, Respondent was unwilling to reconsider its position. [304]

IV. The Tribunal's jurisdiction is not affected by the dispute's intra-EU character

384 Finally, this Tribunal's jurisdiction is not affected by the circumstance that Germany and the Netherlands are EU member states. As Claimants have pointed out in their Request for Arbitration, all tribunals which had to decide on jurisdictional objections based on the implications of EU law in such circumstances ("**intra-EU objection**") consistently rejected such objections.[305] The ECJ's *Komstroy* judgment[306] does not alter this result.

385 Respondent so far has failed to raise its objections to the Tribunal's jurisdiction. It has not even raised an objection under Article 41(5) of the ICSID Arbitration Rules, despite the fact that it already in May 2021, in breach of Article 26 ICSID Convention, initiated the German Proceedings to have this arbitration declared inadmissible. In the interest of an efficient resolution of this aspect of the case, Claimants already note the following:

386 The dispute's intra-EU character has no effect on the jurisdiction of this Arbitral Tribunal, since jurisdiction in this arbitration is determined under the ECT and the ICSID Convention, not under EU law (**1.**). The *Komstroy* decision is not instructive here (**2.**). Rather, under its proper interpretation in accordance with the Vienna Convention on the Law of Treaties ("**VCLT**") [307], Article 26 ECT applies also in intra-EU relations (**3.**). In any event, even if there

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[303] See **Exhibit C-0106**: Pre-Arbitration Settlement Correspondence between the Parties, Claimants' Letter of 16 December 2020 (Negotiations), para. 3.

[304] See above, Section **B.X.1**.

[305] Claimants' Request for Arbitration, Section **C.III.5**.

[306] **Exhibit CL-0012**: ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655.

[307] **Exhibit CL-0013**: Vienna Convention on the Law of Treaties, Article 31(1), (emphasis added).

was a conflict between EU law and the ECT, Article 16 of the ECT mandates that the ECT takes precedence (**4.**). Whatever consequences of the *Komstroy* judgment the EU member states may be under, it is not this Tribunal's mandate to address them (**5.**).

1. Jurisdiction is to be established under the ICSID Convention and the ECT, not under EU Law

387 As a general rule, an ICSID tribunal's assessment of its jurisdiction is to be made under the ICSID Convention and the instrument containing the consent to arbitration, the ECT in this arbitration. This general rule had already been aptly summarised by the tribunal in *Daimler v. Argentina*[308], adopted by several ECT tribunals[309] and specifically confirmed by the tribunal in *Vattenfall v. Germany*, when that tribunal ruled on the relevance of the ECJ's earlier *Achmea* judgment on its jurisdiction under the ECT:

> "*The Tribunal's competence to decide the present dispute is derived from consent of the Parties to arbitrate pursuant to the ECT. In the absence of any choice of law clause for the law applicable to the Tribunal's jurisdiction, it follows that questions of the Tribunal's jurisdiction must be answered under the terms of the ECT itself, and in particular Article 26 thereof.*"[310]

388 The *Vattenfall* tribunal further pointed out that the ECT contains no choice of law clause applicable to its jurisdiction.[311] Consequently, it concluded that

> "*to derive meaning from Article 26 ECT, like all treaties, it must be interpreted in accordance with international law. These are the principles of international law relating to treaty interpretation, application, and other aspects of treaties, which*

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[308] **Exhibit CL-0014**: Daimler v. Argentina, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 50: "*For purposes of the Tribunal's jurisdiction […] the proper law to be applied is the [relevant investment treaty] itself, in concert with the ICSID Convention, as interpreted in the light of general principles of international law*."

[309] See, in particular, **Exhibit CL-0010**: Novenergia v. Spain, SCC Arbitration (2015/063), Final Award, 15 February 2018, para. 437 : "*The present Tribunal has been constituted under the ECT, and operates in the realm of public international law, not EU law. It is therefore bound to determine its jurisdiction over the present dispute in accordance with the terms of its constitution – the ECT.*"

[310] **Exhibit CL-0005**: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 124.

[311] **Exhibit CL-0005**: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, paras 113-122

> *render the ECT workable. They are reflected in the VCLT, and provide the framework through which all treaties are interpreted and applied.*"[312]

389 On the basis of this reasoning, up to this date, all relevant tribunals have uniformly decided, before and especially after the *Achmea* judgment, that EU law is not applicable to the question of jurisdiction of investment tribunals.[313]

2. The ECJ's conclusion in *Komstroy* is not binding on and not even instructive for this Tribunal

390 Despite what the Respondent will surely try to make the Tribunal believe, the ECJ's *Komstroy* judgment does not address any relevant question. In particular, the ECJ's judgment does not preclude this Tribunal from exercising jurisdiction over this dispute. This Tribunal is the sole and exclusive judge of its competence under Articles 41 and 26 of the ICSID Convention, and not bound by any decision of the Luxembourg court.[314]

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[312] **Exhibit CL-0005**: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 125.

[313] See, *inter alia*, **Exhibit CL-0009**: LBBW v Spain, ICSID ARB/15/45, Intra EU, 25 Feb 2019, paras 134-155*;* **Exhibit CL-0015**: Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic, SCC Case No. V (2015/095), Final Award, 23 December 2018, paras 336-395; **Exhibit CL-0005**: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, paras 172-184; **Exhibit CL-0006**: Antin v. Spain, ICSID Case No. ARB/13/31, 15 June 2018, paras 224-226; **Exhibit CL-0016**: Masdar v. Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras 323-340; **Exhibit CL-0010**: Novenergia v. Spain, SCC Arbitration (2015/063), Final Award, 15 February 2018, paras 454-461; **Exhibit CL-0007**: Eiser v. Spain, ICSID Case No. ARB/13/36, Award 4 May 2017, para. 199; **Exhibit CL-0011EN**: Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award, 21 January 2016, para. 448 (This exhibit has previously been submitted as exhibit CL-0011 (Spanish Original and English translation in a separate document) with the Request for Arbitration. Claimants herewith submit it again with agreed formatting and including the original and the translations relevant for this Memorial combined in one, hyperlinked document); **Exhibit CL-0017**: RREEF v. Spain, ICSID Case No. ARB/13/30 Decision Resp, Princ Quantum, 30 Nov 2018, especially paras 211-213.

[314] Any such binding effect can only exist on courts or tribunals of EU member states, which investment tribunals – according to the ECJ itself – are not. Both in *Achmea* and *Komstroy* (see para. 53), the ECJ confirmed that, as a matter of EU law, a tribunal constituted under an intra-EU BIT is not a "*court or tribunal of a Member State*". EU law therefore recognizes that an investment tribunal is not bound by the judicial system of the EU, including the ECJ's judgments.

391 Further, the *Komstroy* decision cannot be considered instructive for present purposes. In essence, in *Komstroy*, the Luxembourg Court extended its well-known reasoning in the *Achmea* case to the ECT by essentially reproducing it *verbatim*. It has not added any element to its reasoning that would challenge prior investment tribunal jurisprudence.

392 More importantly, the *Komstroy* judgment does not interpret the ECT under the relevant rules of the VCLT. Instead, the ECJ only conducted an interpretation of the ECT as *"an act of EU law"*[315], which all treaties the EU is a member to are under constant ECJ jurisprudence. The ECJ therefore also conducted its interpretation on the basis of and from the perspective of EU law, as the it already had done in *Achmea*. However, EU law and decisions by the ECJ have no role to play in this Tribunal's determinations on jurisdiction.

393 EU law is not part of the applicable law in this arbitration, let alone the law applicable to determinations on jurisdiction, as illustrated above. EU law does not form part of the *"applicable rules and principles"* under Article 26(6) of the ECT, which refers to general principles of law and rules of customary international law.

3. The Tribunal has jurisdiction under Article 26 ECT

394 Article 26 of the ECT also applies to intra-EU disputes. This follows from a proper interpretation according to the rules of treaty interpretation reflected in the VCLT. Such disputes are clearly covered by the ordinary meaning of the article's terms in light of their context as well as the treaty's object and purpose. Article 26 of the ECT refers to disputes between "a Contracting Party", which the Netherlands is, and "an investor from another Contracting Party", which Germany is. As Claimants have already set out, they are also covered by the ECT's definition of investor and Article 26(7) respectively.

395 As multiple tribunals have by now confirmed, the ECT entails no disconnection clause which would render it inapplicable in the intra-EU context. Such a clause cannot be found anyway in the treaty, and it is also not implied. As explained by the tribunal in *RREEF v. Spain*:

> "*If one or more parties to a treaty wish to exclude the application of that treaty in a certain respect or in certain circumstances, they must either make a reservation*

[315] **Exhibit CL-0012**: ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 49.

> *or include an unambiguous disconnection clause in the treaty itself. The attempt to construct an implicit clause within Article 26 ECT is untenable."*[316]

396 It is simply not a proper exercise of interpretation to read something into the treaty that is not there. Given the absence of a disconnection clause, however, the ECT's wording and context are clear. This was in particular also recalled by the so far only publicized investment tribunal ruling addressing the relevance of *Komstroy*. In its decision declining to reconsider an earlier decision on jurisdiction after the ECJ's judgment, the tribunal in *Matthias Kruck and others v. Spain* held:

> "*The Tribunal cannot accept […] that the ECT may have a different meaning in the context of intra-EU disputes from that which it has in non-intra-EU disputes (whether between non-EU investors and EU States, or between non-EU investors and non-EU States, or between EU investors and non-EU States). Such an inherently discriminatory structure cannot be reconciled with the affirmation of the ECT Contracting Parties, including the EU, that they "attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment."*[317]

397 Finally, the ECJ's conclusion in *Komstroy* that Article 26(2)(c) ECT were to be interpreted as being inapplicable in the intra-EU context can also not lead to a restrictive interpretation of Article 26 ECT. Not only is EU law not applicable in this dispute. An interpretation of Article 26 of the ECT in conformity with the Luxembourg Court's position on EU law really would be an impermissible invalidation of Article 26 of the ECT. It would disregard that the Netherlands is an independent Contracting Party to the ECT in its own right and with its own obligations arising from the treaty. Above all, however, it would not be in accordance with the applicable rules of treaty interpretation.

398 The concept under the VCLT that comes the closest to an interpretation in conformity with EU law is the method of systemic integration under Article 31(3)(c) VCLT. A restrictive interpretation of Article 26 ECT excluding its intra-EU applicability would, however, also be

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[316] **Exhibit CL-0018**: RREEF v. Spain, ICSID Case No. ARB/13/30 Decision Jurisdiction, 6 June 2016, 2016, para, 85.

[317] **Exhibit CL-0019**: Matthias Kruck and others v. Kingdom of Spain, ICSID No. ARB1523, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision Dated 19 April 2021, 6 December 2021, para. 40 (referring to the ECT's Preamble and Articles 10 and 25 "concerning the right of Contracting Parties to extend *preferential* (but not disadvantageous) treatment in consequence of membership of Economic Integration Agreements" in footnote 64 to the above-quoted passage.

impermissible under this approach. As the tribunal in *Vattenfall v. Germany* held in response to a similar proposal by the EU Commission:

> "*EU law may not be "taken into account" under the principles in VCLT Article 31 to interpret Article 26 ECT in the manner sought by the EC — and in particular, it cannot be used to generate a meaning of Article 26 that departs from the ordinary meaning of the terms of that Article.*"[318]

399 Moreover, as the tribunal in *Eskosol* pointed out,

> "*this argument requires little discussion. The critical phrase in VCLT Article 31(3)(c) is "between the parties," meaning all parties to the treaty in question. It is hardly an exceptional proposition that where all Parties to a given treaty have agreed to a particular "rule[] of international law," then that rule may inform an understanding of their mutual intent in agreeing to particular treaty text. However, the ECT is not a treaty exclusively among EU Member States, but rather a much broader multilateral treaty that includes non-EU Member States. This prevents the application of EU law for the interpretation of specific provisions within the ECT. The text of a multilateral treaty must have a consistent and objective meaning, not different meanings determined separately and subjectively for each different subset of States that may be involved in a particular future dispute.*"[319]

4. In any event, under its Article 16, the ECT takes precedence over EU law

400 Ultimately, even if one was to assume that EU law had to play a role in the jurisdictional determinations of this Tribunal (*quod non*), the *Komstroy* judgment's interpretation of Article 26(2)(c) ECT to exclude intra-EU investment disputes must not be followed by this Tribunal. The ECT's conflict clause in Article 16 prescribes that the ECT, as the treaty providing the higher degree of investment protection, prevails.

401 From the Luxembourg Court's position,

> "*although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States* […]*, preservation of the autonomy and of the particular nature of EU law precludes*

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[318] **Exhibit CL-0005**: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 165.

[319] **Exhibit CL-0020**: Eskosol v. Italy, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019*,* para. 125.

> *the same obligations under the ECT from being imposed on Member States as between themselves.*"[320]

402 The *Vattenfall* tribunal had made clear, however, that under the proper applicable law to jurisdiction for an ICSID tribunal, namely the ICSID Convention and the ECT, and in light of Article 16 ECT, such an interpretation of Article 26 ECT "is untenable." It further held:

> "*In light of this provision [i.e. Article 16 ECT] it is not possible to "read into" Article 26 an interpretation whereby certain investors would be deprived of their right to dispute resolution, whether against an EU Member State or otherwise.*"[321]

403 The tribunal in *Matthias Kruck and others v. Spain* reaffirmed this position also after the *Komstroy* judgment:

> *"The provision is explicit. All of the provisions on which the Claimants rely are contained in ECT Part III ('Investment Promotion and Protection') and Part V ('Dispute Settlement'); and the Claimants' entitlement to exercise the right to dispute resolution is specifically spelled out. There is no ambiguity or room for doubt."*[322]

5. The Tribunal need not address the consequences of *Komstroy*

404 All in all, this Tribunal's jurisdiction remains a matter of public international law, the ICSID Convention and the ECT. And under all three, the Tribunal has jurisdiction. EU law and the ECJ's *Komstroy* judgment have no role to play in this respect.

405 In order to cater for the consequences of *Komstroy* which the EU and its member states may be under, they will need to seek an amendment of the ECT as foreseen under the ECT's provisions. This is not just the only valid approach under the law of treaties, but even confirmed by the EU member states practice in relation to the intra-EU BITs, where the majority of EU member states, facilitated by the EU Commission, concluded the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the

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[320] **Exhibit CL-0012**: ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 65.

[321] **Exhibit CL-0005**: Vattenfall v. Germany, ISCID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 196.

[322] **Exhibit CL-0019**: Matthias Kruck and others v. Kingdom of Spain, ICSID No. ARB1523, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision Dated 19 April 2021, 6 December 2021, para. 44.

European Union. It is Claimants' understanding that such negotiations are currently under way. Whatever the result will be, however, it cannot affect this Tribunal's jurisdiction over the dispute.

406 The Tribunal's jurisdiction would also not be affected by a potentially negative decision in the German Proceedings, which Respondent has initiated in violation of ICSID's and this Tribunal's exclusive competence. Pursuant to Articles 26 and 41 ICSID Convention, the *Kompetenz-Kompetenz* lies solely with the Tribunal. Domestic courts have no authority over ICSID tribunals or proceedings.

407 This Tribunal cannot and need not provide a solution for the consequences of the *Komstroy* judgment. Its mandate is to apply the ECT and the ICSID Convention. As the tribunal in *Matthias Kruck and others v. Spain* aptly pointed out,

> *"It is deeply regrettable that parties to disputes should find themselves caught up in a clash of* Grundnormen *that could have been foreseen and resolved in advance. But this Tribunal has the duty to fulfil its mandate under the ECT, and has no legal right or capacity to do otherwise. The solution lies in the hands of the Contracting Parties to the ECT."*[323]

[323] **Exhibit CL-0019**: Matthias Kruck and others v. Kingdom of Spain, ICSID No. ARB1523, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision Dated 19 April 2021, 6 December 2021, para. 46.

D. THE NETHERLANDS HAS BREACHED ITS OBLIGATIONS UNDER THE ECT

408 In this section, Claimants will demonstrate that, by enacting the Coal Ban Law, Respondent has breached its obligations towards Claimants under Part III of the ECT.

409 It is the very purpose of the ECT to provide stability for long-term investments, and this must be taken into account when analysing a breach of the ECT. Contrary to what Respondent might want to argue, there is no unwritten "*climate change exception*" in the ECT which would allow States to simply disregard investors rights and expectations (**I.**). Prohibiting newly commissioned coal-fired power plants to fire coal irrespective of their CO2 emissions is the very opposite to stability. It reflects arbitrariness, the more since Respondent after 15 years of supporting coal plants (2002-2017) suddenly and fundamentally changed course. Respondent prohibited the firing of coal without even knowing or assessing whether Eemshaven could be operated economically without coal, and refused to pay compensation on these spurious grounds. None of that is even required by climate change concerns (**II.**)

410 The Coal Ban Law amounts to an indirect expropriation as it renders Claimants' investments essentially useless. They have been left with one of the world's most modern coal-fired power plants, which has valid and irrevocable permits to fire coal and emit CO2 (within the limits of the Emissions Trading System), but has now been prohibited from doing that. The compensation offered by Respondent, i.e. the transition period of 10 years, does by far not reflect the fair market value of the plant (giving back 10 years out of 35 years taken can never be compensation of the value taken). It is essentially useless since a conversion to other fuels is not possible and still effectively shuts down the plant after 1/3 of its lifetime (**III.**).

411 The Coal Ban also breaches Respondent's duty to provide fair and equitable treatment (**IV.**). Respondent has consistently for over 15 years confirmed that coal power plants would be necessary until 2050 and that their CO2 emissions be regulated only by ETS. The coal ban completely ignores that by prohibiting firing coal – irrespective of how much CO2 the plant would emit.

I. The ECT requires Contracting Parties to provide stability for long-term investments

412 The ECT is not a standard investment treaty. It is both wider – in geographical scope and membership, as well as in covering also trade and transit – and narrower since it relates only to investments in the Energy Sector. That it has been tailor-made for this specific nature is reflected in the Final Act of the European Energy Charter Conference by which the ECT was adopted:

> "*The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations.*"[324]

413 The ECT requires its Contracting Parties to provide stability for long-term investments in the energy sector. This follows from the purpose of the ECT, which is to be taken into account when interpreting its provisions, as well as from Articles 10 and 24 ECT.

1. The ECT is to promote long-term cooperation in the energy field

414 In accordance with Article 31(1) of the VCLT, the ECT must be interpreted in light of its object and purpose. The purpose of the ECT is found in Article 2 of the ECT. It reads as follows:

> *"This Treaty established a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."*

415 The "Charter" is the 1991 European Energy Charter which formed the political basis of the Energy Charter Treaty. It contains several objectives and describes ways to implement these objectives. Tribunals acting under the ECT have taken both the preamble and provisions of the treaty into account. The *PV Investors* tribunal in its final award noted the following:

> "***[569]*** *Therefore, the object and purpose of the ECT must be assessed in light of the Charter which is part of its context, since it was made by the Parties in connection with the conclusion of the Treaty and accepted by them as an*

[324] **Exhibit CL-0002**: Energy Charter Treaty, Understanding 1 (all emphasis added).

> *instrument related to the treaty. The objectives of the Charter are expressed in Title 1 which articulates the following principles*
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> […]
>
> ***[570]*** *As can be seen from these principles, the Parties to the ECT aimed at realizing a balance between the sovereign rights of the State over energy resources and the creation of a climate favorable to the flow of investments on the basis of market principles.*[325] *In other words, while the purpose of "promot[ing] long-term cooperation in the energy field" which is stipulated in Article 2 of the Treaty may be facilitated by stability of the investment framework, the requirement of stability is not absolute; it must be balanced with other principles, including those that are directly derived from "State sovereignty", e.g. the State's right to regulate and to adapt the regulatory framework to changed circumstances. More generally, the protection of investments and the right to regulate operate in a balanced way under the ECT as in all other investment treaties."*[326]

416 Similarly conclusions were reached by the tribunal in *Hydro Energy et al v. Spain*

> "*[541] Under the heading "Purpose of the Treaty" Article 2 of the ECT provides: "This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."*
>
> *[…]*
>
> *[543] Consequently, the Tribunal approaches the ECT with due regard to its purpose of establishing a legal framework in order to promote long-term cooperation, but also balancing State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities and the necessity to protect foreign investment and its continuing flow."*[327]

417 In *Silver Ridge v. Italy*, the tribunal concurred as follows::

> "***[399]*** *The extracts quoted from the European Energy Charter underscore, and specify, the two features identified before. As regards the perspective of the host State, a functioning long-term cooperation in the energy (as in any other) field*

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[325] The Tribunal finds confirmation of this conclusion in the statements in **Exhibit CL-0017**: RREEF v. Spain, ICSID Case No. ARB/13/30 Decision Resp, Princ Quantum, 30 Nov 2018, para. 239.

[326] **Exhibit CL-0021**: PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, 28 February 2020, paras 568-570.

[327] **Exhibit CL-0022**: 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, paras 541-543

> *requires respect for its particular role and responsibilities under international law, as embodied in the concept of sovereignty. At the same time, as concerns the investors' side, their investment can only be economically viable and flourish in the long run if States create and maintain a climate favorable to the operation of enterprises and to the flow of investments. In the long-term perspective, this particularly means that investors can operate within a transparent, stable and equitable legal framework.*"[328]

418 Claimants submit that these holdings, and the clear requirement that Contracting Parties must provide a stable legal framework, provide clear guidance for the interpretation of the provisions of the ECT.

2. Article 10(1) ECT requires Contracting Parties to provide stable investment conditions

419 The ECT's focus on stability is not only apparent in the preamble, but also in one of its key provisions on investment protection. Unlike many other investment treaties, Article 10(1)(1) of the ECT establishes a specific obligation to provide stable investment conditions:

> "*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.*"[329]

420 This does not mean that States can never change their legal framework. As the RREEF-tribunal noted, this does not amount to immutability, but "*excludes unpredictable radical transformations in the conditions of the investments.*"[330] A similar conclusion had been reached by the tribunal in *AES v. Kazakhstan*.[331] This is in line with how other tribunals have

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[328] **Exhibit CL-0023**: Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37, Award of 26 February 2021, para. 399.

[329] **Exhibit CL-0002**: Energy Charter Treaty, Article 10(1)(1) of the ECT (emphasis added).

[330] **Exhibit CL-0017**: RREEF v. Spain, ICSID Case No. ARB/13/30 Decision Resp, Princ Quantum, 30 Nov 2018, para. 315: "*Stability is not an absolute concept; absent a clear stabilization clause, it does not equate with immutability. […] However, the obligation to create a stable environment certainly excludes any unpredictable radical transformation in the conditions of the investments. The question therefore is whether the obligation of stability thus defined has been violated by the Respondent to the detriment of the Claimants*."

[331] **Exhibit CL-0024**: AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award, 1 November 2013 , para. 258.

understood the preamble. We will show below that the Coal Ban Act constitutes such a radical change.

3. Measures to protect human or plant life or health do not exempt from liability for breaches of the ECT

421 While the stability requirement of the ECT is not absolute, the ECT explicitly provides that there are no blanket self-judging exceptions which could exempt certain measures from the scope of investment arbitration.

422 Article 24 of the ECT regulates exceptions to its obligations. Under Article 24 (2) (b) of the ECT, the provisions of the ECT shall not preclude any Contracting Party from adopting or enforcing any measure – with the further exception of the provisions on investment protection:

> "*(2) The provisions of this Treaty other than*
>
> […]
>
> *(b) with respect to subparagraph (i), Part III of the Treaty*
>
> *shall not preclude any Contracting Party from adopting or enforcing any measure*
>
> *(i) necessary to protect human, animal or plant life or health;*"

423 That means that a Contracting State cannot escape its liability for breach of an obligation under Part III ECT by arguing that the measure adopted was necessary to protect the environment and in particular human life or health. Even if that was the case, the measure can still be in breach of Part III of the ECT. This exception from an exception is highly unusual and evidences the particular protection enjoyed by investors under the ECT.

4. Summary

424 The Energy Charter Treaty created a special regime for energy investments and emphasizes the importance of stable legal frameworks. Both Article 10(1) ECT and Article 24 ECT are evidence of that purpose which needs to be taken into consideration when interpreting the ECT.

II. Respondent has breached its obligation under Article 10(1)(3) of the ECT

425 Respondent has breached its obligations towards Claimants under Article 10(1)(3) of the ECT by enacting the Coal Ban Law. Article 10(1)(3) of the ECT prohibits unreasonable or discriminatory measures in relation to an investment's "*management, maintenance, use, enjoyment or disposal.*" While Claimants understand, accept and support Respondent's goal to reduce CO2-emissions, the specific measure chosen by Respondent, and the way it was implemented, are in breach of Respondent's obligations under Article 10(1)(3) ECT.

1. A measure is unreasonable if it is not based on facts or reason or is disproportional

426 Arbitral tribunals have examined the term "unreasonable measures" in a number of decisions based on the ECT and other investment treaties and have examined various facets of what an unreasonable measure is.

427 Some tribunals considered that a measure which was not based on reason or rational facts would be unreasonable. For instance, the ECT tribunal in *Plama Consortium Ltd. v. Bulgaria* studied the language of the ECT provision and found unreasonable measures to be "*those which are not founded in reason or fact but on caprice, prejudice or personal preference*."[332] Other ECT tribunals, also relying on the ordinary meaning of the term, reached the same result.[333] The tribunal in *EDF v. Romania*, relying on an expert opinion by Professor Christoph Schreuer, held in quite similar terms that unreasonable conduct is inter alia apparent in "*a measure that is not based on legal standards but on discretion, prejudice or personal preference*".[334] Equally, while also endorsing this reasoning, the tribunal in *Lemire*

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[332] **Exhibit CL-0025**: Plama v Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 184.

[333] **Exhibit CL-0026**: Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 385; **Exhibit CL-0027**: Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 595; see also the non-ECT tribunal in **Exhibit CL-0028**: UAB E Energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 841.

[334] **Exhibit CL-0029**: EDF (Services) v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009 , para. 303.

v. Ukraine summarized that "*the underlying notion of arbitrariness*", which tribunals consistently treat as synonymous to unreasonable treatment[335], "*is that prejudice, preference or bias is substituted for the rule of law*."[336]

428 Other ECT tribunals have required a reasonable relationship of the measures in question to a rational policy of the state. A rational policy alone does not justify a regulation under Article 10(1)(3) of the ECT. What is crucial is that way in which this policy is implemented in each particular case. In *AES Summit v. Hungary*, the tribunal explained this as follows:

> "*There are two elements that require to be analyzed 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.*"[337]

429 This understanding of Article 10(1)(3) was confirmed by the tribunal in *Hydro Energy v. Spain*. Specifically, that tribunal highlighted the state's duty to consider the burden inflicted upon investors when regulating to achieve a certain policy objective:

> "*Reasonableness means that "the State's conduct bears a reasonable relationship to some rational policy." But that alone is not sufficient. In Micula v. Romania the tribunal said: …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*

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[335] See only ibid.

[336] **Exhibit CL-0030**: Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 263.

[337] **Exhibit CL-0031**: AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras 10.3.7-9 (emphasis added); Other tribunals and authors supporting this definition: **Exhibit CL-0032**: Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, paras 460-461; **Exhibit CL-0033**: Heiskanen, "'Unreasonable or discriminatory measures' as a cause of action under the Energy Charter Treaty", (2007) International Arbitration Law Review, Vol. 10, Issue 3, p. 110.

> *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."*

430 As an example of an inappropriately tailored implementation of a policy, and thereby a measure violating Article 10(1)(3) ECT, the tribunal in *Watkins Holdings and others v. Spain* named the subsequent withdrawal of undertakings and assurances that persuaded investors to invest:

> *"The Tribunal in order to determine if Spain's measures are unreasonable, must identify a rational policy goal and it must then demonstrate that these measures were reasonable. The Tribunal is of the view that Spain cannot satisfy this test because having induced the Claimants to invest, there was a sudden and drastic change in Spain's policy with regard to the RE industry and the legal and regulatory framework was amended over a period of time.*
>
> *The Tribunal refers by way of analogy to the decision in BG v. Argentina where the said tribunal stated that "withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investment is by definition unreasonable and a breach of the treaty."*[338]

431 As stated above, Claimants fully appreciate and support the goal of CO2-reduction. With the Coal Ban Law, Respondent pursued a rational policy objective. Yet, the way in which this policy objective is implemented is unreasonable under the terms of the ECT. The Coal Ban Law is not based on facts (**2.**); the purported reasons given by Respondent are mere pretexts (**3.**), and Claimants in any case are disproportionally affected (**4.**).

2. Respondent did not act on the basis of facts

432 Claimants have explained above that the implementation of Respondent' policy objective through the Coal-Ban Law lacked a factual basis (see Section **B.IX.4.**). Respondent never reviewed

- whether the transition period was adequate – it was simply set for political expediency (see Section **B.IX.4.a.**);

[338] **Exhibit CL-0027**: Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020, paras 597-598 (footnote omitted, emphasis added); See para. 600 of the Award for the tribunal confirming the unreasonable nature of the measures.

- whether a conversion to biomass was feasible, having doubts itself (see Section **B.IX.4.b.**);

- whether operation with biomass could ever be economical without state support – which it had decided to cancel and which would run out in 2027 (see Section **B.IX.4.c.**).

433 Overall, Respondent never assessed whether Eemshaven could technically and economically be converted and operated with 100 % biomass. Its own evaluation of 100 % biomass as alternative for the Coal Ban Law led it to the conclusion that this would likely not be economical without subsidies (which it in 2017 decided to cancel) and that there might not be sufficient biomass available. As Claimants' experts show, these concerns were well founded.[339]

434 In sum, Respondent chose to ignore the unclear consequences of the politically desired Coal Ban Law, and have Claimants deal with them on their own. Respondent neither based its decision in solid factual assessments, nor did it attempt to do so. Instead, the Government followed through with its preferred way of implementing its policy agenda, namely phasing out energy production by firing coal without compensating those affected by this decision. Such a substitution of a solid factual assessment by a simple decision based on pure preference is unreasonable under the terms of the ECT.

3. The reasons Respondent puts forward are manifestly without merit

435 Furthermore, the Coal Ban Law is unreasonable as all reasons put forward to justify it are *prima facie* invalid. While Respondent must be given a certain level of deference, it cannot be sufficient, however, for Respondent to have recourse to any reasons irrespective of their validity. The reasons given must have *prima facie* at least some merit to back the respective measure. Any other view would simply generate a blanket justification for a state to evade international responsibility.

436 This requirement is not fulfilled. Rather, the reasons Respondent put forward are manifestly without merit.

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[339] **Exhibit CER-0001**: NERA Expert Report, para. 10, 22.

437 In the Explanatory Memorandum, Respondent tried to justify the Coal Ban Law with a variety of reasons:

> "*In view of the predictability of CO2 reduction measures for the power stations as early as 2005, the 'polluter pays' principle, the possibility for the owners of the power stations to continue generating electricity using fuels other than coal and the generous transitional periods offered by this proposal, the government is therefore of the opinion that there is a 'fair balance' between the public interest served by this ban and the interest of the owners of the power stations affected by the regulation of their property. This proposal therefore does not a priori provide for additional loss compensation beyond the transitional periods already offered.*"[340]

438 None of these reasons has any merit:

- The Coal Ban was not foreseeable. The Advisory Division of the State Council confirmed in its 2017 Opinion that even the mere possibility of a coal ban was not foreseeable before November 2015. Respondent in vain tries to justify its law by arguing that this applied only to a closure law but not a coal ban law.[341] As we have shown, the law effects a closure of Eemshaven and Respondent was fully aware of this possibility. Substance always prevails over form, and contending something is what it is not seldom helps[342];

- The "polluter pays"-principle is the very foundation of the ETS and the corresponding price for CO2 emissions. It was at the heart of Respondent's support of coal plants. It now cannot be used to justify a prohibition of coal, even irrespective of the CO2 emissions;

- The alleged possibility to continue the operation with other fuels is a mere speculative assumption by Respondent against its own better knowledge and not covered by facts (as shown above). Further, Claimants' experts from NERA conclude that a 100 % operation with biomass would not be economical.[343]

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[340] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13.

[341] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 19.

[342] Except for René Magritte with his painting The Treachery of Images ("Ceci n'est pas une pipe"). But Respondent clearly is no Magritte.

[343] **Exhibit CER-0001**: NERA Expert Report, paras 10, 22.

- The transition period is not "generous". Respondent has not even reviewed whether and to what extent the initial investment could be re-earned during those ten years. The period was set completely without regard to those factors, and only with regard to the extraneous political decision to shut down plants by 2030.

439 Consequently, also for these reasons, the Coal Ban Law unreasonably affects Claimants' use and enjoyment of its investments.

4. Claimants are disproportionally affected

440 The purpose of the Coal Ban Law is to reduce CO2 emissions. The Explanatory Memorandum states the following:

> "*The purpose of the bill is to achieve a significant reduction in Dutch CO2 emissions. The cabinet has committed itself to measures that add up to a 49 per cent reduction in CO2 emissions by 2030 (compared to 1990). The realisation of CO2 reduction at Dutch coal-fired power plants is an important contribution to this.*"[344]

441 As already set out, Claimants do not dispute that this is a reasonable public purpose. However, as equally illustrated, the end does not justify the means, neither under general international law nor under the ECT in particular. The means adopted must stand in a reasonable relationship to the end pursued. That is the case if the measure does not disproportionally affect foreign investors.

442 The Coal Ban Law, however, disproportionally affects Claimants.

443 To comply with the principle of proportionality, a measure must be

- suitable to achieve a legitimate policy objective,
- necessary for that objective, and

[344] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 3.

- 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.[345]

444 First, already from Respondent's own perspective, the effect produced by the Coal Ban Law is evidently not suitable to achieve the required CO2 reduction. In 2017, when rejecting the idea of a coal ban, Respondent itself took the position that the "leakage effect" and the "waterbed effect" would prevent a coal ban from leading to considerable CO2 reductions. The studies commissioned by the Government in 2016 showed that the CO2-reductions in the Netherlands would lead only to 50% net reductions on an Europe-wide level, i.e. that approx. 50% of the saved emissions would be leaked to other EU member states (see above, Section **B.VIII.4**). Even in the Explanatory Memorandum, Respondent still admits that a "carbon leakage effect" will take place.[346]

445 Secondly, the Coal Ban Law is not necessary. There are less drastic but more cost-efficient measures available to achieve effective CO2 emission reductions. In the Explanatory Memorandum, Respondent merely asserted that

> "*[a]lternative instruments, such as tightening the efficiency requirements for these power plants, taking ETS allowances out of the market or an obligation for carbon capture and storage (CCS) have been studied previously and judged to be less effective, cost-efficient and/or legally untenable."*[347]

[345] See **Exhibit CL-0022**: 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, para. 574; PL Holdings S.A.R.L. v. Republic of Poland, SCC Case No V2014/163, Partial Award, 28 June 2017, para. 355.

[346] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 12.

[347] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 3.

446 That is not credible. The Government itself refers to the letter of Minister Kamp of 19 January 2017, with its attached list of 29 measures.[348] However, that list cannot serve as a justification for the Coal Ban Law for at least two reasons:

- The letter evaluates the measures not only with respect to CO2-reductions, but also the political goal of closure of coal plants (which the Dutch parliament in 2015 had asked the Government to review). That is a different purpose than the one allegedly pursued by the Coal Ban Law.

- The Minister considered that "*there are ten measures that are both feasible and potentially effective and efficient to realise CO2 reduction or phasing out"*.[349] Among them is the strengthening of the ETS system (measure 16), which Respondent considered to be the "*most cost-effective measure imaginable to achieve more CO2-reduction in the EU*." Instead, the Government chose to ban the firing of coal and thus the most drastic solution.

447 Equally, Respondent's considerations in the Coal Ban Law that a coal ban might be more efficient than e.g. Respondent buying the plant or the further support of biomass co-firing[350] also cannot justify it. It is of course more cost-efficient to shut down a plant without compensation than to consider alternative means involving compensation, but that in itself cannot serve as a legal justification.

448 Respondent in the domestic litigation further tried to defend itself by arguing that the Coal Ban Law was a necessary consequence of Claimants not installing a CCS system. This attempt of a justification is as misguided there as it would be in this arbitration. There was never an obligation to install a CCS system. In 2017, the Government considered it still not

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[348] See **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures and **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures).

[349] **Exhibit C-0092**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, page 7.

[350] See **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures)**,** measures 22-24, 29.

possible to make CCS mandatory.[351] The Government and the energy sector had always agreed that any application of CCS was subject to technological and economic feasibility.[352] When the Respondent stopped onshore CCS in 2011 (and thereby Claimants' planned demonstration project), it confirmed that only the ETS would be mandatory for CO2 reductions.[353] Until today, Respondent has not even created the necessary financial support scheme for CCS in electricity production.

449 Lastly, the Coal Ban Law is grossly excessive and unduly burdensome for Claimants. The Coal Ban Law does not restrict or limit CO2 emissions, but prohibits the firing of coal irrespective of how much CO2 Eemshaven will emit. Eemshaven has been built *capture-ready* and is able to co-fire biomass. These are technical features desired by Respondent when it promoted the construction of new coal-fired plants over 15 years ago.[354] The idea was that, once CCS would become technically and economically viable (if at all), operators like RWE would likely install it anyway. And in the meantime, Respondent would support the co-firing of biomass. Respondent had also continuously affirmed that no restrictions would be put on CO2 emissions, save for those coming from the European Emissions Trading System.[355]

450 With the Coal Ban Law, all of this does not matter anymore. Even if Eemshaven increased the co-firing of biomass to 50 % – and thus were to emit as little CO2 per MWh as a gas plant – it would not be allowed to fire coal. And if CCS would become operational and economical by 2030, so that Eemshaven might even have negative emissions[356] (since all CO2, even fire biomass, would be captured and stored) – even then – it would not be allowed to fire coal.

451 There simply is no justification for this approach.

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[351] See **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), measure 9.

[352] See, e.g. **B.V.4.c.**, **B.V.6.** and **B.VII.2**.

[353] See Section **B.VII.2.c.**

[354] See above, Section **B.IV.6.**

[355] See above, Section **B.V.**, in particular **B.V.4.-6.**

[356] Negative emissions would, in this scenario, be reached, since all CO2 – even that resulting from firing biomass – would be captured and stored.

5. Summary

452 In summary, the Coal Ban Law is an unreasonable measure impairing the use and enjoyment of Claimants' investments in Eemshaven. The implementation of Respondent's policy objective is not based on facts. The reasons put forward to justify it are manifestly without merit. In any case, the Coal Ban Law disproportionally affects Claimants.

453 All in all, the Coal Ban Law reflects Respondent's preference to simply phase out coal-fired power plants without taking Claimants' interests and secured legal positions into account at all.

454 RWE suffers at least a damage of [redacted] as a result of the ban at Eemshaven, as will be further outlined below.[357]

III. Respondent breaches Article 13 ECT by indirectly expropriating Claimants' investments without compensation

1. Introduction

455 The Coal Ban equally constitutes an indirect expropriation of Claimants' investments in the Eemshaven power plant. Article 13 of the ECT reads as follows:

> "*(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having equivalent effect to nationalization 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.*
>
> *Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending*

[357] See Section **E.**

> *Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").*"

456 It is evident that no formal expropriation has taken place. Claimants are still in ownership and possession of Eemshaven and the permits. However, as we will show below, the Coal Ban Law is a measure having an equivalent to an expropriation of the plant and the Environmental Permit. It substantially deprives Claimants of the value and the use of the plant. It also supersedes and thereby indirectly withdraws the Environmental Permit. The Coal Ban Law also does not constitute, as Respondent has asserted, a non-compensable general regulatory measure.

2. The Coal Ban Law amounts to an indirect expropriation

457 In its Explanatory Memorandum to the Coal Ban Law, Respondent itself considers that an indirect expropriation exists

> "*only if the investor is deprived, in whole or in substantial part, of the right to his property or loses effective control over his investment or if, as a result, the investment loses, in whole or in substantial part, its value"*[358]

458 Arbitral tribunals agree that measures which result in a total or "substantial" deprivation of the value of the investment, or the use and enjoyment of the investment, have an effect equivalent to an expropriation. A similar test was applied by recent ECT and non-ECT tribunals.[359]

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[358] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 15.

[359] **Exhibit CL-0034**: Eurus Energy Holdings Corporation v. Kingdom of Spain ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 ; paras 257-258; **Exhibit CL-0035**: 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, para. 652; **Exhibit CL-0036**: Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 192; **Exhibit CL-0028**: UAB E Energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 1074; **Exhibit CL-0037**: Peter A. Allard v. Government of Barbados, PCA Case No. 2012-06, Award, 27 June 2016, para. 263.

459 These requirements are fulfilled. The Coal Ban Law deprives Claimants of at least a substantial part of the value of their investment, and also deprives them of the use of Eemshaven.

(a) The Coal Ban Law substantially deprives Claimants of the value of their investment

460 What exactly the threshold for a "substantial deprivation" is, however, remains very fact-specific. The tribunal in *LG&E v. Argentina* considered the threshold of a substantial deprivation to be reached if the interference was so severe as to warrant compensation:

> "*191. In considering the severity of the economic impact, the 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.*"[360]

461 The Coal Ban Law prohibits Eemshaven to do what its irrevocable permits allow it to do: generate electricity by firing coal, and to emit the resulting CO2 as long as sufficient emissions certificates exist. The plant is thus – with the Coal Ban Law in force – useless and valueless for Claimants. This substantially deprives Claimants of the value of the plant. While it can co-fire biomass, it is not possible to operate the plant profitably on biomass alone, let alone without subsidies.[361]

462 Respondent itself considered the effects of the Coal Ban Law so severe that compensation was necessary. The three most modern plants, including Eemshaven, are granted what Respondent considers non-financial compensation in the form of the ten-year transition period:

> "*The power plants are also offered a transitional period, the length of which depends on the efficiency of the power plants, in order to achieve (further) conversion of the power plant, if necessary, so the power plant is actually suitable*

[360] **Exhibit CL-0038**: LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 191; also **Exhibit CL-0039**: Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, para. 173.

[361] **Exhibit CER-0001**: NERA Expert Report, paras 10, 22.

> *for generating electricity using fuels other than coal. These transition periods are also relevant for the assessment of whether there is a "fair balance".*"[362]

463 The transition period is part of a non-financial compensation scheme offered by the legislator:

> "*In view of the foreseeability of CO2 reduction measures for the power plants as early as 2005, the "polluter pays" principle, the possibility for the owners of the power plants to continue generating electricity using fuels other than coal and the generous transition periods offered by this bill, the cabinet believes that there is a "fair balance" between the public interest served by this ban and the interest of the owners of the power plants affected by the regulation of their property. This bill therefore does not a priori provide for additional detriment compensation beyond the transitional periods already offered.*"[363]

464 The transition period's character as (insufficient) compensation is further proven by Respondent's explanation why the old coal plant Hemweg 8 (operated by Vattenfall) is paid financial compensation. The Explanatory Memorandum illustrates this as follows:

> "*As mentioned above, the Hemweg power plant has not been granted a transition period and the ban on this power plant will come into force on 1 January 2020. The operator of the Hemweg power plant will therefore not receive any compensation in kind. In view of the short period in which the ban on this power plant is intended to come into force, compensation will be offered to the operator of the Hemweg power plant for any loss suffered as a result of a "fair balance". Compensation will be offered for the disadvantage suffered by the operator of the Hemweg power plant because, unlike the other power plants, it is not offered a transition period. My Ministry will consult with the operator of this power plant to determine the extent of the damage compensation in accordance with the legal framework.*"**[364]** (emphasis added)

465 Respondent thus considered the granting of a transition period of 10 years as necessary compensation for the coal ban – which amounts for Eemshaven to a loss of 35 years of

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[362] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 11.

[363] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13.

[364] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 13. It bears note that the compensation paid to Hemweg 8 was based on a DCF-calculation.

operating time. This, Respondent assumed, should allow operators such as Claimants to re-earn a part of their investment and convert the plant to other fuels.

466 The existence of the transition period does not affect the existence of an expropriation already now. Previous awards do confirm that an investor need not immediately loose the investment itself even for a direct expropriation to occur. In *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, the Claimant even remained in possession of the expropriated property for more than 22 years before an ICSID award regulated transfer of the property against payment of compensation.[365]

467 Respondent is likely to argue that the Coal Ban Law prohibits the firing of coal only by 2030, and that the lifetime of Eemshaven is only reduced, thus excluding a substantial deprivation of value. However, such an argument would be in vain. First, the transition period explicitly has been designated as compensation. Secondly, if one were to consider any compensation granted – however small and insufficient – when determining the impact of the measure on the value of the investment, then States would be allowed to escape the scope of Article 13 ECT by offering insufficient compensation. And, thirdly, even taking into account the cash-flows until 2030 the Coal Ban Law would substantially deprive Claimants of the value of their investments. In *CME v. Czech Republic,* the tribunal found an expropriation to exist where approx. 90 % of the value had been destroyed.[366] Claimants' experts from Brattle have calculated that the value of Eemshaven with the Coal Ban in place (i.e. an operation until 2030) is less than [redacted] % of Eemshaven's value without the Coal Ban.[367]

468 Claimants thus loose already now more than [redacted] % of the value which the plant would have without the coal ban.

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[365] **Exhibit CL-0040**: Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica ICSID Case No. ARB961, Award, 17 February 2000. See also the case of the **Exhibit CL-0041**: Reverend Jonas P. King, cited in Christie, What Constitutes a Taking of Property under International Law, BYBIL 1960, pp. 307, 312. The Greek state had requisitioned the property but not taken the title until years later.

[366] **Exhibit CL-0042**: CME Czech Republic B.V. v. Czech Republic, Final Award of 14 March 2003, para. 620.

[367] **Exhibit CER-0002**: Brattle Expert Report.

(b) The Coal Ban Law deprives Claimants of the use of their investments

469 The Coal Ban Law also amounts to an expropriation since it deprives Claimants of the use of their investments. It in particular affects the Environmental Permit which allows Eemshaven to operate as a coal-fired power plant. Tribunals dealing with comparable factual matrixes have held that such measures can be economically equivalent to expropriation.

470 In *Saar Papier v. Poland*, a German investor had built behind the German-Polish border a factory for the recycling of high-quality used paper which needed to be imported from Germany. After two years of operation, the Polish authorities prohibited the necessary import, considering the used paper to be waste (which could not be transported across the border). Domestic sorts of used paper, in turn, could not be used in the plant. The *Saar Papier* tribunal considered the prohibition of the import to be economically equivalent to an expropriation.[368]

471 In *Middle Eastern Cement*, the investor had a licence to import and store cement, and the State prohibited the import of a certain kind of cement. The investor claimed that a de-facto revocation of the licence had occurred, and the tribunal agreed with the investor that this amounted to an expropriation.[369] In *Goetz v. Burundi*, the tribunal found that the revocation of a free zone certificate amounted to an expropriation.[370] In *Tecmed v. Mexico*, the case arose out of a non-renewal of a licence to operate a landfill. The tribunal considered that the non-renewal of that licence amounted to an expropriation of the landfill.[371]

472 The present case is comparable. The Environmental Permit allows Claimants to operate Eemshaven with coal. It is a "*right conferred* […] *by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector*" and thus

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[368] **Exhibit CL-0043**: Saar Papier Vertriebs GmbH v. Poland, Final Award of 16 October 1995, para. 87.

[369] **Exhibit CL-0044**: Middle Eastern Cement v. Egypt, ICSID Case ARB/99/6, Award of 12 April 2002, paras 103-107.

[370] **Exhibit CL-0045**: Antoine Goetz and others v. Republic of Burundi, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, para. 124, as reproduced in August Reinisch and Christoph Schreuer, International Protection of Investments: The Substantive Standards (CUP 2020), p. 161, mn. 763.

[371] **Exhibit CL-0046**: Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, paras 115-117.

a protected investment pursuant to Article 1(6)(f) ECT. As the Tribunal knows, the Coal Ban Law prohibits that a coal-fired power plant uses coal to produce electricity. Eemshaven thus cannot use the main fuel for which it was designed, built and permitted. The Coal Ban Law effectively supersedes the existing irrevocable permits. As regards the effect, it amounts to an indirect expropriation of the Environmental Permit, comparable to withdrawing of the existing unlimited permit, and the issuance of a new permit limited until 31 December 2029 as compensation in kind.

(c) Summary

473 By prohibiting to operate Eemshaven, which was designed, permitted and build as a coal-fired power plant, exactly as a coal-fired power plant, Respondent deprived Claimants of the value and use of their investments. The transition period is merely insufficient compensation – 10 years out of the 35 years of lifetime that are taken.

3. The Coal Ban Law is not a regulatory measure exempt from the scope of the ECT

474 Respondent very likely will try to defend itself by arguing that the Coal Ban Law is intended to combat climate change, serves a legitimate public purpose and thus was a regulatory measure exempt from the scope of the ECT.[372]

475 Such a defence would be erroneous and in vain for the following reasons:

(a) Climate protection measures are not exempt from the scope of the ECT

476 The first reason is that climate protection measures are not exempt from the scope of the ECT. The limits of the state's regulatory power (which as such is undisputed) is to be found

[372] See **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p.15: "*Furthermore, it follows from established case law that introducing or amending non-discriminatory legislation in order to serve the public interest cannot be regarded as expropriation, unless specific obligations have been entered into by the government with the foreign investor, see e.g. Methanex v USA, award 3 August 2005 and Saluka v Czech Republic, partial award 17 March 2006, paragraph 255.*"

primarily in the investment treaty at issue. The arbitral tribunal in *ADC v. Hungary* spelt this out as follows:

> "*423. 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.*
>
> *424. 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.*"[373]

477 This was relied on subsequently both by non-ECT[374] and ECT tribunals[375].

478 As set out above in Section **D.I.**, there is no blanket exception for regulatory measures under the ECT, neither for regulatory measures in general nor for environmental measures in particular. The ECT in Article 24 explicitly provides for the contrary: measures designed to

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[373] **Exhibit CL-0047**: ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, 2 October 2006.

[374] **Exhibit CL-0048**: Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras 529, 530; **Exhibit CL-0049**: M. Meerapfel Sohne AG v. Central African Republic, ICSID Case No. ARB/07/10, Excerpts of Award, 12 May 2011, para. 312.

[375] **Exhibit CL-0027**: Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 521; **Exhibit CL-0050**: Athena Investments AS (formerly Greentech Energy Systems AS) and others v. Kingdom of Spain, SCC Case No. V(2015/150), Final Award, 14 November 2018, para. 364; **Exhibit CL-0007**: Eiser v. Spain, ICSID Case No. ARB/13/36, Award 4 May 2017, para. 371.

protect life and health of humans or animals can still amount to be breach of Part III of the ECT. Climate change measures are exactly that: measures with the purpose to protect life and health of humans and animals. Regulatory measures thus of course can constitute an indirect expropriation under the ECT.[376] Given this clear provision, it is not possible to interpret the ECT *contra legem* to argue that climate change measures could not constitute an expropriation.

(b) The Coal Ban does not fall under the any exception discussed in arbitral case law

479 A defence based on general regulatory powers furthermore cannot succeed because the Coal Ban Law does not fall under what is generally discussed as the "police powers exception" or the "regulatory taking doctrine". As mentioned, Respondent is likely to raise this defence since it relies on it in in the Explanatory Memorandum to the Coal Ban Law.

480 The Coal Ban Law amounts to an indirect expropriation as it deprives Claimants of the use and value of their investments. And although the Coal Ban Law serves a public purpose, has been enacted after public consultation and is non-discriminatory (at least insofar as all operators – which are all foreign investors – are treated equally bad) and still only fulfils three out of four criteria for a lawful expropriation, Respondent has not paid any compensation, even though it offered insufficient non-monetary compensation.

481 The decisive question is whether there are any additional criteria beyond the effect of the measure on the investment which could serve to distinguish a legitimate regulatory measure from an indirect expropriation. This, however, is not the case.

(aa) <u>The effect of the measure amounts to an expropriation</u>

482 A number of tribunals have rejected this. If a measure deprives the investor of the use or value of its investment, then it amounts to a compensable indirect expropriation. Similarly,

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[376] **Exhibit CL-0022**: 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, para. 533; See generally **Exhibit CL-0046**: Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, para. 121.

the Respondent's intent of the government cannot be relevant, for in case of an indirect expropriation the state will seldom have an express intent.[377]

(bb) The existence of a public purpose is irrelevant since it is a requirement for a lawful expropriation

483 It is also clear that the purpose of the measure as such is irrelevant. Respondent, in the Explanatory Memorandum, seems to focus only on the existence of a non-discriminatory measure which serves the public interest. Such an approach is incompatible with the wording of Article 13 ECT. It would take compliance with the requirements for a lawful expropriation – non-discrimination, due process and a public purpose – as evidence for the absence of an expropriation. That a measure serves a public purpose cannot mean that it does not amount to an expropriation. If every measure adopted for a public purpose was exempt from expropriation, then there would be no expropriation.[378]

(cc) Respondent itself admitted that the Coal Ban Law was unforeseeable

484 The tribunals in *Saluka*[379] and *Tecmed v. Mexico*[380] took into consideration whether the investor legitimately could expect that no such regulation would be enacted. The tribunal in *Tecmed* based its conclusions also on that finding:

> "*The Arbitral Tribunal does not agree with the Respondent's position denying that upon making its investment, the Claimant had legitimate reasons to believe that the operation of the Landfill would extend over the long term.183 The political and social circumstances referred to above, which conclusively conditioned the issuance of the Resolution, were shown with all their magnitude after a substantial*

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[377] See **Exhibit CL-0051**: Christoph Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties, TDM 2 (5), para. 107 et seq.; **Exhibit CL-0052**: National Grid plc v. The Argentine Republic, UNCITRAL, Award, 3 November 2008, para. 287.

[378] **Exhibit CL-0053**: 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 , para. 7.5.21; see also **Exhibit CL-0051**: Christoph Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties, TDM 2 (5)) para. 79.

[379] **Exhibit CL-0032**: Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006.

[380] **Exhibit CL-0046**: Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003.

> *part of the investment had been made and could not have reasonably been foreseen by the Claimant with the scope, effects and consequences that those circumstances had. There is no doubt that, even if Cytrar did not have an indefinite permit but a permit renewable every year, the Claimant's expectation was that of a long-term investment relying on the recovery of its investment and the estimated return through the operation of the Landfill during its entire useful life.*
>
> […]
>
> *This shows that even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent — as well as the Resolution — violate the Agreement, such expectations should be considered legitimate and should be evaluated in light of the Agreement and of international law.*"[381]

485 The record of this case clearly shows that Claimants did not have to expect any form of coal ban when they made their investment. This was explicitly stated in the 2017 Advisory Opinion of the Council of State, which noted that, before the 2015 Motion, a coal-phase out was not foreseeable (see above, Section **B.VIII.5.**). A coal plant closure in the Netherlands was neither foreseeable in 2007, when Claimants took the principal decision to build, nor in 2009 when they took the final decision. Still in 2015, when Eemshaven was commissioned, the situation remained the same. There is a continuous line of explicit political promises given in parliamentary letters and in the Energy Reports 2005, 2008, 2011 and 2016 that Respondent considered coal plants to be important and – given the ETS – would not ban them. Respondent also in the Energy Agreement 2008 explicitly promised not to interfere with coal-fired power plants. Even in early 2017, in response to the parliamentary motion, the Dutch government confirmed that a coal ban was unnecessary to reach the country's climate goals (see above, Section **B.VIII.4.**).

(dd) The Impact of the Coal Ban goes beyond a typical regulation

486 The tribunal in *Continental Casualty v. Argentina* differentiated on the basis of the impact of the measure on the investment:

[381] **Exhibit CL-0046**: Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, paras 149-150.

> "*(i) On the one hand, there are certain types of measures or state conduct that are considered a form of expropriation because of their material impact on property, and which are legitimate only if adopted for public purpose, without discrimination, and against the payment of compensation according to the general or specific applicable standards One may distinguish between: (a) outright suppression or deprivation of the right of ownership, usually by its forced transfer to public entities; (b) limitations and hampering with property, short of outright suppression or deprivation, interfering with one or more key features, such as management, enjoyment, transferability, which are considered as tantamount to expropriation, because of their substantial impact on the effective right of property. Both of these types of measures entail indemnification under relevant international treaties, as well as under most constitutions which respect fundamental human rights.*
>
> *(ii) On the other hand, there are limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public (being ultimately beneficial also to the property affected). These restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner as compared with other similarly situated property owners. These restrictions are not therefore considered a form of expropriation and do not require indemnification, provided however that they do not affect property in an intolerable, discriminatory or disproportionate manner.*"[382]

487 If the Tribunal chose to adopt this test, which was relied on also by other tribunals,[383] then the Coal Ban Law clearly constitutes an expropriation of Eemshaven. The Coal Ban Law interferes with a "key feature", the "basic, typical use" of a coal-fired power plant: that is the firing of coal to generate electricity. A coal-fired plant which may not fire coal is essentially useless.

488 As Claimants have explained, the Government itself doubted whether an operation with 100 % biomass could work and would be economical. It would of course be technically possible to convert the plant to fire other fuels and get other permits for that – yet, then it is no longer a coal-fired plant but something else. Legally, it would require making a new investment and thus cannot exclude consequences of the state's interference with the previous investment. The plant that was build and permitted, however, would no longer exist.

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[382] **Exhibit CL-0054**: Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB039, Award, 5 September 2008, para. 276.

[383] **Exhibit CL-0055**: Mobil Exploration v. Argentina, ICSID Case ARB/04/16, Decision of 10 April 2013 para. 825;**Exhibit CL-0056**: El Paso Energy v. Argentina, ICSID Case ARB/03/15, Award of 31 October 2011, para. 248.

(ee) The Coal Ban is not proportional

489 Finally, some tribunals reviewed whether the measure at issue was proportional to the purpose of the measure.[384]

490 The sole purpose of the Coal Ban Law is to achieve the CO2-reduction goals of 49 % until 2030, which the new Government that came into power in 2017 had set itself:

> "*In the coalition agreement, partly with a view to the Paris Agreement, the cabinet committed itself to measures that go beyond the European ambition of at least 40% CO2 reduction by 2030 (compared to 1990) and that add up to a 49% reduction of CO2 emissions by 2030 (compared to 1990) in the Netherlands.*
>
> […]
>
> *This bill implements one of the measures announced by this cabinet in its coalition agreement to achieve its ambition to achieve a 49 per cent reduction in CO2 emissions by 2030 (compared to 1990); the phasing out of coal-fired electricity generation in the Netherlands by 2030 at the latest."*[385]

491 To achieve this, the Coal Ban Law prohibits the firing of coal. This is the most severe interference with the rights of Claimants short of a direct expropriation which could be imagined. Claimants own a coal-fired power plant, which they must not operate as a coal-fired plant. The Government knows that other measures to achieve CO2 reductions would be available, but considers:

> "*Alternative instruments, such as tightening the efficiency requirements for these power plants, taking ETS allowances out of the market or an obligation for carbon*

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[384] **Exhibit CL-0046**: Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, para. 122; **Exhibit CL-0057**: LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB_02_1, Award, 25 July 2007, para. 195; **Exhibit CL-0058**: Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 522; **Exhibit CL-0059**: PL Holdings Sarl v. Poland, SCC Case No. V 2014/163, Partial Award, 28 June 2017, paras 373-391.

[385] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, pp. 1-2.

> *capture and storage (CCS) have been studied previously and judged to be less effective, cost-efficient and/or legally untenable."*[386]

492 It is noteworthy that among the list of alternative measures is also a revocation of the permits, the nationalisation of coal plants (which without any doubt would have led to compensation) or a company specific agreement between Government and operators of coal plants.[387] The Tribunal will recall that such an agreement had even been proposed by the Government in 2016, and that even principles of compensation had been discussed between the Parties. Instead of these measures, Respondent chose to prohibit the use of coal and tries to justify the drastic impact with an alleged possibility to convert the plant to 100 % biomass – an alternative measure which it itself had considered speculative in its 2017 list of alternative measures.[388] Simply spoken, the evidence shows that the Coal Ban Law was adopted since Respondent considered it to be more cost-efficient: in Respondent's view, it does not need to pay compensation.

493 That approach is certainly more cost-efficient than buying the plants or having to pay compensation. Yet, it is not proportional. If the pursuit of self-set political goals, and the intent to escape a duty of compensation, would be sufficient to convert an indirect expropriation into a non-compensable regulatory measure, this would basically lead to a self-judging and self-justifying exception that deprives Article 13 ECT of any practical application.

(c) Summary

494 The Coal Ban Law amounts to an expropriation of Eemshaven and the Environmental Permit. As possible defence that the Coal Ban Law is meant to combat climate change cannot exonerate Respondent: an expropriatory measure is exactly that, and the Coal Ban Law cannot be described as a mere regulatory measure.

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[386] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, p. 3.

[387] **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), nos. 6, 23 and 24.

[388] **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), no. 29.

4. Respondent did not provide the required compensation

495 Respondent failed to provide the required compensation. Under Article 13 ECT, a direct or indirect expropriation is only lawful if it is accompanied by the payment of prompt, adequate and effective compensation. The compensation must amount to the fair market value of the investment.

496 Respondent has not paid anything.

497 The non-financial compensation granted in the form of the transition period of 10 years does clearly not amount to the fair market value of Eemshaven. Coal-fired power plants have a minimum lifetime of 40 years, and when the Coal Ban Act entered into force, Eemshaven had been in operation for five years only. As alleged compensation for removing 35 years of lifetime, Respondent thus grants back 10 years. That is quite audacious since already the maths does not work. The alleged possibility to convert to 100% biomass is unproven and speculative and thus does not compensate Claimants for the loss of their rights. In essence, a state has to promptly pay compensation and cannot ask the investor to earn for itself the due compensation by doing something else with the investment than what it was built and permitted for. That applies in particular where such action would be unreasonable (because uneconomical) and the State knows that.

498 Claimants' experts from Brattle have calculated the value of the cash flows until 2030 and concluded that these amount to only [redacted] % of the fair market value.[389]

IV. The Coal Ban Law breaches obligations entered into with Claimants/Claimants' investments (Article 10(1) *ad finem* ECT)

1. Scope of the umbrella clause in Article 10 (1) *ad finem* ECT

499 Under Article 10(1) of the ECT, Respondent shall "*observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*"[390]. The Netherlands has failed to adhere to this standard.

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[389] Cf. **Exhibit CER-0002**: Brattle Expert Report, para. 14.

[390] Emphasis added.

500 The purpose of the provision, commonly referred to as an "umbrella clause", is to ensure that the host state complies with agreements entered into with investors and with other commitments assumed towards investors. A claim brought under the umbrella clause is independent from any other claim based on the standards of fair and equitable treatment, unreasonable and discriminatory measures, most constant protection and security, and expropriation.

501 An umbrella clause must be interpreted in accordance with its ordinary meaning, its context and the object and purpose of the treaty.[391] As explained above, part of the ECT's context is provided by the opening words of Article 10(1), which states that each party shall "*encourage and create stable, equitable, favourable and transparent conditions for Investors*".

502 The Netherlands has entered into, and has subsequently breached, its obligation towards Claimants under the 2008 Energy Sector Agreement.[392]

2. The Netherlands breached its obligation under the 2008 Energy Sector Agreement

503 The Energy Sector Agreement 2008-2020 was concluded on 28 October 2008. It was concluded between the two Dutch Ministers and a State Secretary on the one hand, and *inter alia*

- the energy companies organised in the association EnergieNed (including RWE),
- the energy companies organised in the Dutch Association for Free Market in Energy, and
- the network operators organised in Netbeheer Nederland

[391] **Exhibit CL-0013**: Vienna Convention on the Law of Treaties, Art. 31(1).

[392] See above, Section **B.V.6.** (2008 Energy Sector Agreement) and Section **B.VII.4.** (Energy Agreement 2013).

504 The agreement is binding also on RWE. As explained, this is also Respondent's position in the pending Dutch litigation.

505 Annex I to the 2008 Energy Sector Agreement contains specific agreements reached. One of the specific agreements reached is Article 2.2.1, which reads as follows:

> "*2.2.1 When shaping government policy, the central government shall not use measures that would force the number or type of (coal)-fired power plants to be determined; in addition, the central government shall offer the market an investment perspective for 2020 and beyond.*"[393]

506 Respondent has breached this obligation by enacting the Coal Ban Law. The Coal Ban Law specifically provides that the firing of coal for generation of electricity is prohibited. This affects existing all existing coal plants, including Eemshaven.

507 The official name of the Coal Ban Law is the "*Act prohibiting coal in electricity production*". No new coal power plants can be permitted, and existing ones need to close down. It leads to a phasing-out of coal plants and thereby determines the number of coal plants. Additionally, Respondent destroyed any investment perspective which might have existed beyond 2020. No one will invest in coal-fired power plants with a limited lifetime and complete lack of political support.

508 Consequently, Respondent has breached its obligation towards Claimants under Article 10(1) last sentence ECT.

V. Respondent breached its obligation to treat Claimants' investments fairly and equitably

509 Article 10(1) of the ECT includes an obligation for the host state "*to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*". This standard of protection (the "**FET standard**") constitutes an autonomous standard of protection.

510 The obligation to ensure fair and equitable treatment must be interpreted in the context of the explicit undertaking in the first sentence of Article 10(1) of the ECT to "*encourage and*

[393] **Exhibit C-0060**: Energy Sector Agreement 2008-2020, 28 October 2008

create stable, equitable, favourable and transparent conditions for Investors […] to make Investment in its area".[394]

511 It follows from the cases dealing with the FET standard under the ECT and other investment treaties that the standard includes, *inter alia*:

(i) a duty to provide a stable and consistent legal framework;

(ii) protection of the investor's legitimate expectations.[395]

512 Respondent has failed to accord Claimants' investments fair and equitable treatment in all these respects.

1. Respondent has failed to provide a stable and consistent legal framework

513 By enacting the Coal Ban Law, Respondent has failed to provide a stable and consistent legal framework. As the tribunal in *Eiser v. Spain* concluded,

> "*Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. "[T]he legitimate expectations of any investor [...] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law." However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to*

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[394] **Exhibit CL-0025**: Plama v Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras 172-173; **Exhibit CL-0060**: Isolux v. Spain, SCC Case No. V2013/153, Award (Extracts) dated 12 July 2016 and Dissenting Opinion, 6 July 2016, para. 765; **Exhibit CL-0050**: Athena Investments AS (formerly Greentech Energy Systems AS) and others v. Kingdom of Spain, SCC Case No. V(2015/150), Final Award, 14 November 2018, para. 361; **Exhibit CL-0061**: Stadtwerke Munchen GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 195; **Exhibit CL-0021**: PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 567.

[395] **Exhibit CL-0062**: Kaj Hober, The Energy Charter Treaty, p. 191; **Exhibit CL-0063**: Rudolf Dolzer, Fair and Equitable Treatment: Today's Contours, 12 Santa Clara Journal of International Law 7 (2014),), p. 15, also available at: http://digitalcommons.law.scu.edu/scujil/vol12/iss1/2.

> *existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value.*"

514 Subsequently, further arbitral tribunals have adopted and relied on this holding.[396]

515 The emphasis on stability is due to the special circumstances of the energy sector. In this sector, investments are often scheduled for decades and the re-earning of the investments depends on the state not changing the fundamental legal and factual framework. The late Professor Rudolf Dolzer explained this as follows:

> "*It is well-known that major investments are concluded with a long-term perspective, often for more than twenty years. The willingness of foreigners to invest is linked to the degree of stability in a host state, and stability is one factor for an investor to determine the location of its investment. BITs are meant to contribute to stability for these very reasons. The FET standard with its focus on legitimate expectations appropriately reflects the connection between the flow of investments and legal stability. The ECT expressly recognizes an obligation on the part of the host state to provide for legal stability.*"[397]

516 Long-term planning and stability had always been a centrepiece of Respondent's energy policy until the Coal Ban Law. Early on (see Section **B.III.3.**), Minister Brinkhorst pointed this out in his letter to the Lower House of 3 September 2003:

> "*Energy policy is not incident-driven policymaking. After all, the supply and security of supply require a structural, internationally coordinated approach. Investments in power plants often have a term of thirty years or more. (...) The government must be stable and reliable and ensure a stable investment climate*

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396 **Exhibit CL-0050**: Athena Investments AS (formerly Greentech Energy Systems AS) and others v. Kingdom of Spain, SCC Case No. V(2015/150), Final Award, 14 November 2018, para. 359; **Exhibit CL-0064**: OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 509; **Exhibit CL-0017**: RREEF v. Spain, ICSID Case No. ARB/13/30 Decision Resp, Princ Quantum, 30 Nov 2018, para. 316; **Exhibit CL-0065**: SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 315; **Exhibit CL-0066**: Cube Infrastructure Fund SICAV and others v. of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019 , para. 354; **Exhibit CL-0023**: Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37, Award of 26 February 2021 para. 416.

397 **Exhibit CL-0063**: Rudolf Dolzer, Fair and Equitable Treatment: Today's Contours, 12 Santa Clara Journal of International Law 7 (2014), p. 23.

> *and regulatory framework so that market parties are actually able to make sound investment decisions.*"[398]

517 The Government was fully aware of the long life of coal-fired power plants, as evidenced by this passage in the 2003 *Long-Term Vision for Security of Supply*, where the importance of clarity on environmental requirements is discussed:

> "*At present, there are no formal obstacles to investments in coal units, but in practice the investments are not getting off the ground. A prerequisite for companies is that long-term certainty is provided regarding the environmental regulatory framework and its preconditions. The main environmental requirements that apply or will apply to these units are derived from European and other international policies. For the long term (relevant because the life span of a new coal-fired power plant certainly extends to around 2040), the ambitions for the development of the most important emissions are indicated in the National Environmental Policy Plan 4 (2002).*"[399] (emphasis added)

518 The need for a clear and stable investment climate was also one of the Government's policy point in the Energy Report 2005[400] and in the 2008 Energy Sector Agreement. In the latter, the parties agreed that the targets of the Government could be achieved if they are "*linked to an appropriate and stable investment climate*" and if there *"is a regulatory framework for infrastructure that provides clarity in advance about how research and investments will be efficiently carried out and financed*."[401]

519 Respondent for over 15 years had provided this stable investment climate. This has been extensively discussed above in Sections **B.II–B.VIII**. Whether it was the 2002 Coal Covenant, the Energy Reports 2005 or 2008, the 2008 Energy Sector Agreement, the Energy Reports 2011 or 2016 or even the extensive study by the Government in 2017, the message was always the same: coal-plants are necessary until 2050 and their CO2

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[398] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, pp. 1-2.

[399] **Exhibit C-0037**: Parliamentary Papers II 2002/03, 29 023, no. 1, Letter from the Minister of Economic Affairs, 3 September 2003, p. 11.

[400] **Exhibit C-0039**: Energy Report 2005, Now for Later, p. 41: "*It is crucial that this legislative reform creates a stable investment climate. After all, there must be multi-year certainty about the government's contribution to each project. That is what the MEP now offers. Moreover, an investor must have insight into the short & long-term objectives of the policy, including the financial frameworks and preconditions*."

[401] **Exhibit C-0060**: Energy Sector Agreement 2008-2020, 28 October 2008, p. 4.

emissions are regulated only by the ETS. Biomass co-firing required governmental support and helped the State meet its renewables goals, and CCS would need to be developed by the State and operators in partnership.

520 This stability existed when Claimants announced their intent to build Eemshaven, and when they took the final construction decision in 2009. They had obtained all relevant permits and considered that they would finally obtain irrevocable permits. The stability was also still in place when Eemshaven was commissioned in 2015. As explained, Claimants did not expect a coal ban and had no need to. Respondent's own Advisory Division of the State Council confirmed in 2017 that a coal ban was not foreseeable before the 2015 Motion.[402] That was after Eemshaven had been commissioned.

521 However, by enacting the Coal Ban Law, Respondent breached its obligation to provide a stable and consistent legal framework. Respondent completely reversed a legal position it had adopted and maintained over a period of 15 years, and which led Claimants to invest in the Netherlands. During all that time, essential changes to the framework, such as the coal tax, had been discussed and agreed between the Parties (see Energy Agreement 2013). In contrast to the previous Governments' approach, which had concluded agreements in 2002, 2008 and 2013, the Coal Ban Law was explicitly excluded from the scope of the 2019 Climate Agreement and pushed through Parliament. Power plants which have valid and irrevocable permits may not fire coal, irrespective of whether they have sufficient ETS certificates. It is difficult to imagine a more radical change of the legal framework than this. It is not surprising that, when the Advisory Division in 2017 advised against the Vos Amendment, it pointed to the ETS system (which the State had considered relevant for 15 years) and opined that the "*closure of – relatively modern – coal-fired power plants is an entirely different approach to that chosen at the European level*".[403]

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[402] The difference Respondent tries to create by arguing that it did not enact a coal closure law but the coal ban law is artificial and more sophistry. Pointing an investor to another use of its investment, one which the State itself considered not realistic, is nothing than a coal closure law in disguise. And the Explanatory Memorandum clearly states that the Coal Ban Law implements the Coalition Agreement which provided for a closure of coal plants by 2030. See above, Section **B.IX.1.**

[403] **Exhibit C-0094**: Parliamentary Papers II 2016-2017, 34627, no. 15, Advisory Division of the Council of State, Opinion, 10 July 2017, p. 9.

522 By enacting the Coal Ban Law, Respondent thus breached its obligation under Article 10(1) of the ECT.

2. Respondent has frustrated Claimants' legitimate expectations

523 It is generally accepted that the FET standard also includes the protection of the investor's legitimate expectations.[404] This has been described as *"the dominant element"* of fair and equitable treatment[405] or even as its *"most important function".*[406] Respondent has not observed this core-obligation under the FET standard.

(a) The Standard of Legitimate Expectations

524 The tribunal in *Thunderbird v. Mexico* defined the concept of legitimate expectations as restricting government activity when

> "*a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.*"[407]

525 The tribunal in *Duke Energy v. Ecuador* found that the FET standard protects investor's legitimate expectations, which arise from conditions offered to the investor by the host state.

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[404] **Exhibit CL-0067**: Marc Jacob/Stephan W Schill, 'Fair and Equitable Treatment: Content, Practice, Method', in Bungenberg/Griebel/Hobe/Reinisch, International Investment Law (Nomos: Baden-Baden, 2015), p. 724, para. 55; **Exhibit CL-0068**: Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, 2012, p. 63.

[405] **Exhibit CL-0032**: Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para. 302.

[406] **Exhibit CL-0069**: Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.75.

[407] **Exhibit CL-0070**: International Thunderbird Gaming Corporation v. Mexico, UNCITRAL, Award, 26 January 2006, para. 147.

> "*[S]uch expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.*"[408]

526 It should be common ground between the Parties that this standard is breached if

- the investor relied on certain expectations when making the investment,
- those expectations were legitimate, and
- the state frustrated those expectations.[409]

527 As for the basis of the legitimate expectations, a breach of the legitimate expectations standard will

> "*in the first place become arguable if the host State acts 'in breach of representations made by [it] which were reasonably relied on by the [investor]. This can result, for example, from express opinions and statements released by administrative agencies about the application of domestic law. But legitimate expectations need not be based solely on an explicit representation; they can be engendered more generally by the 'common level of legal comfort' one could reasonably have anticipated in a given business sector, most likely because of past practices.*"[410]

528 In other words, legitimate expectations can particularly be based on representations by the host state on which the investor relied and on the legal framework in a specific business sector which could be reasonably anticipated.

(b) Claimants had the legitimate expectation that they would be allowed to operate Eemshaven on the basis of irrevocable permits

529 Claimants had the legitimate expectation that they would be allowed to operate Eemshaven on the basis of irrevocable permits. Under the Environmental Permit, Eemshaven was

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[408] **Exhibit CL-0071**: Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340.

[409] However, Claimants reserve the right to amend and supplement their submissions if they consider it necessary during the course of these proceedings.

[410] **Exhibit CL-0067**: Marc Jacob/Stephan W Schill, 'Fair and Equitable Treatment: Content, Practice, Method', in Bungenberg/Griebel/Hobe/Reinisch, International Investment Law (Nomos: Baden-Baden, 2015), p. 726, para. 58.

allowed to fire coal to generate electricity.[411] While Eemshaven was allowed also to co-fire biomass, there was no obligation to do so.

530 That expectation was legitimate. Investors are entitled to expect that the host state will honour irrevocable lawful permits, and will not withdraw or invalidate them for reasons lying outside the law applicable to the permits themselves (i.e., in the present case, the Environmental Permitting Act). The basis for that expectation is the rule of law, which applies in every state and without doubt also in the Netherlands. The investor in general does not have to expect an abrogation or termination of the permit, or that the host state supersedes it by subsequent law. That is because the permit is considered to be a protected investment under the ECT.

531 The expectation's legitimacy was reinforced in the light of numerous explicit representations given by Respondent in public statements, in the Energy Reports 2005, 2008, 2011 and 2016 and the Energy Agreement 2008:

- Respondent openly advocated the construction of new coal-fired plants, arguing for their need until 2050 (see Section **B.IV.3.**);
- Respondent was fully aware that new coal plants would operate for 40 years or more and considered that compatible with its climate goals (see Section **B.IV.5.**)
- Respondent confirmed that the CO2 emissions of coal plants would be governed only by the ETS. It promised not to ban certain technologies such as coal (see above Sections **B.IV.5.**);
- Respondent, even as late as in 2017 in response to a parliamentary motion, concluded that a coal ban was unnecessary to meet its climate goals (see above, Section **B.VIII.4.**).

532 Finally, even Respondent's State Council advised it that no one could have expected the possibility of a coal ban before the 2015 Motion (see above, Section **B.VIII.5.**). Claimants

[411] See above, Section **B.VI.1.b.**

therefore legitimately could rely on the expectation that – once the permits were granted and became irrevocable – they could operate Eemshaven within the framework of these permits.

533 By adopting the Coal Ban Law, Respondent has frustrated this expectation. The Coal Ban Law directly interferes with the Environmental Permit by prohibiting the firing of coal.

534 Respondent has thereby breached its obligation under Article 10(1) of the ECT.

3. Summary

535 The Coal Ban Law breaches Respondent's obligations to accord fair and equitable treatment to Claimants' investments. By unilaterally prohibiting the firing of coal after 15 years of confirming that this would not happen (and anyway be not good policy), it has radically changed the legal framework under which Claimants invested. This at the same time breached the legitimate expectation to use and enjoy the irrevocable permits – and thus Eemshaven as such.

VI. The Netherlands failed to provide Claimants with most constant protection and security

536 Finally, by unduly interfering with an unlimited permit, without even providing compensation to recover the amount invested, Respondent breached its obligation under Article 10(1)(3) of the ECT to provide Claimants with the most constant protection and security.

537 The most constant protection and security standard laid down in Article 10(1)(3) obliges Respondent to provide physical as well as legal protection and security to Claimants and their investments (**1**). This standard is breached when a state unduly interferes with the legal basis of the investment (**2**). Respondent bypassed the obligation to compensate Claimants in case of withdrawal of the Environmental Permit, and thereby interfered with the legal foundation on which Claimants' decision to invest in a coal-fired plant had relied (**3**).

1. Under the most constant protection and security standard, the Netherlands is obliged to provide legal security

538 Pursuant to Article 10(1)(3) of the ECT "[…] *Investments shall also enjoy the most constant protection and security* […]*."* The language, context, purpose and history of the provision[412] all show that, under the ECT, this standard reaches beyond requiring states to protect investments only against physical harm. The ECT protects also non-physical investments such as contracts and permits, which can only be protected legally. A Contracting Party must provide protection and security also in regard to the legal investment conditions.

539 First, the wording of the terms *"most constant protection and security*", as found in Article 10(1)(3) of the ECT, is stronger than "*full protection and security*" as frequently used in other investment treaties. This distinction of wording and legal scope has been highlighted by the tribunal in *AAPL. v Sri Lanka*.***[413]*** Already under the treaties using the weaker formulation of "full protection and security", tribunals have noted that this must, by virtue of language, extend to legal security as well.[414]

540 Given already the more lenient wording of "*full protection and security*" encompasses legal security, the stronger – described by the late Professor Thomas Wälde as "reinforced"[415] – standard of "*most constant protection and security*" also includes legal security. This is confirmed by the provision's context, and in particular the ECT's emphasis on stability (see above, Section **D.I.**). Article 10(1)(1) ECT obliges the Contracting Parties to "*encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area*." The duty to ensure "*most constant*

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[412] Cf. **Exhibit CL-0013**: Vienna Convention on the Law of Treaties, Art. 31.

[413] **Exhibit CL-0072**: Asian Agricultural Products Ltd. v Republic of Sri Lanka, ICSID Case No. ARB/8/73, Award, 27 June 1990, para. 47 (reference omitted; emphasis added).

[414] **Exhibit CL-0073**: Azurix v. Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 406, 408; **Exhibit CL-0074**: Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 729; See also: **Exhibit CL-0075**: Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 1 December 2011 para. 321; **Exhibit CL-0076**: Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, para. 482.

[415] **Exhibit CL-0077**: Wälde, Energy Charter Treaty, JWIT 3 (2004), 5(3) Journal of World Investment & Trade, p. 373, 390.

protection and security" is an important facet of the obligation to maintain the investment conditions once created.

541 Moreover, the ECT protects both tangible assets (such as the power plants themselves) and intangible assets (such as the companies operating the plants, the shares held therein, as well as the licenses) as investments. As Professor Schreuer explains, since it is impossible to give physical protection to intangible assets, the "*most constant protection and security*" required under Article 10(1)(3) ECT necessarily extends to legal security as well.[416] Otherwise, the provision would be stripped from the comprehensive protection it ought to grant and thus prove futile. This is confirmed by decisions of arbitral tribunals.[417]

2. The most constant protection standard is breached when a state unduly interferes with the legal basis for the investment.

542 Tribunals have found that the standard to provide legal protection and security is breached when a state bypasses or dismantles the legal basis for the investment.

543 The tribunal in *CME v. Czech Republic* held that the Czech Republic violated the standard through legal and regulatory measures that first changed the legal basis which guaranteed CME's exclusive right to use a broadcasting licence and later led to its complete deprivation.[418] In *National Grid v. Argentina*, Argentina had adopted reform laws with regards to the currency convertibility which impacted the remuneration regime on which National Grid's investment was premised. The tribunal found that the provision "*protection and constant security*" was not limited to the protection of physical assets, and that the effective circumvention of a legal framework governing the investment and the uncertainty created by such measure amounts to a breach of this obligation.[419] Correspondingly, in *Siemens v.*

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[416] Cf. **Exhibit CL-0078**: Christoph Schreuer, Full Protection and Security, Journal of International Dispute Settlement (2010) p. 1, 9.

[417] **Exhibit CL-0079**: Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 665 (footnotes omitted).

[418] **Exhibit CL-0080**: CME Czech Republic BV v. Czech Republic, Partial Award, 13 September 2001, para. 613.

[419] **Exhibit CL-0052**: National Grid plc v. The Argentine Republic, UNCITRAL, Award, 3 November 2008, para. 189.

Argentina, the tribunal explained that to provide "legal security" means to ensure *inter alia* the foreseeable application of legal norms.[420]

544 The scope of a state's most constant protection obligation depends on the actor(s) performing the infringing measures. While a state is only bound to observe due diligence requirements to prevent damage resulting from third-party conduct, a state is strictly liable for the acts of its own state organs, including its legislative bodies:

> "*The Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.*"[421]

545 Consequently, the Netherlands is directly liable for acts of its relevant organs in this case, i.e. the Dutch government and both Chambers of Parliament.

546 Even if no strict liability standard for acts of state organs should apply, however, the Netherlands is still at the very least obliged to observe due diligence by acting reasonably

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[420] **Exhibit CL-0081**: Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 303: "*As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than "physical" protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, "security" is qualified by "legal". In its ordinary meaning "legal security" has been defined as "the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application." It is clear that in the context of this meaning the Treaty refers to security that it is not physical. (…)*" (footnotes omitted, emphasis added); See also **Exhibit CL-0079**: Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 665.

[421] **Exhibit CL-0074**: Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 730; Also cited by: **Exhibit CL-0082**: Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I, ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 439; **Exhibit CL-0083**: Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, ARB/09/20, Award 16 May 2012, para. 280; See also: **Exhibit CL-0084**: ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Art. 4(1); **Exhibit CL-0085**: Ralf Alexander Lorz, 'Protection and Security (Including the NAFTA-Approach)', in Bungenberg/Griebel/Hobe/Reinisch, International Investment Law (Nomos: Baden-Baden, 2015), p. 776.

and rationally in the specific circumstances of the case, which – as outline above – the Netherlands has failed to do.

3. By prohibiting the firing of coal without providing full compensation in return, the Netherlands factually circumvented the regulatory framework for Claimants' investment, thus failing to provide legal security

547 The basis for Claimants' final investment decision were the relevant permits. We have explained above (Section **B.VI.2.**) that the final construction decision was taken when the relevant permits had been obtained, and when the risk of a revocation or change was considered very low by Claimants' legal advisors.

548 Claimants hold the Environmental Permit which allows to generate electricity by firing of coal, and this permit is valid for an indefinite time period. For the event of a withdrawal, if possible at all,[422] these permits would likely have required compensation. The Coal Ban Law, however, deprives Claimants of these secure legal positions and neither the Law as such nor the transition period compensate Claimants for this.[423] What is more, Respondent in fact went around Claimants' secure legal position under the permits by enacting the Coal Ban Law with immediate effect on Claimants' business instead of taking the path of revocation/withdrawal under the applicable law.

549 The Coal Ban Law, in this way, dismantles the basis for Claimants' investment in the Netherlands, without adhering to the compensation requirements stemming from the Respondent's own permit system or offering any other compensation scheme or recourse. Such a circumvention of a state's own administrative legal system cannot be reconciled with due process and the rule of law. It is by nature incompatible with the obligation to provide the "most constant protection and security" to Claimants' investments.

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[422] In the 2017 List of Measures, the Minister for Economy considered a withdrawal / revocation to have "considerable legal and administrative risks", see **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), Measure 6.

[423] See above, Section **D.II.3**.

550 Respondent thus breached its obligation under Article 10(1) of the ECT to provide most constant protection and security by enacting the Coal Ban Law.

VII. Conclusion

551 By enacting the Coal Ban Law, Respondent breached its obligation

- under Article 10 (1) ECT not to impair by unreasonable measures the use and enjoyment of Claimants' investments in Eemshaven;
- under Article 13 (1) ECT not to expropriate Claimants' investments in Eemshaven without payment of compensation;
- under Article 10 (1) ECT last sentence to observe any obligations it has entered into with the investments of Claimants;
- under Article 10 (1) ECT to accord to Claimants' investments at all times fair and equitable treatment, and
- under Article 10 (1) ECT to accord at all times most constant protection and security to Claimants' investments.

E. QUANTUM – RESPONDENT MUST COMPENSATE CLAIMANTS FOR THEIR DAMAGES IN AN AMOUNT OF EUR [redacted]

552 Under the ECT and under public international law, Respondent is obliged to fully compensate Claimants for the damages suffered due to its breaches of the ECT (**I.**). To analyse and quantify the considerable damages suffered from these breaches, Claimants have instructed Dr Serena Hesmondhalgh and Mr Dan Harris of The Brattle Group, Inc. (collectively, "**Brattle**"). In their extensive expert report ("**Brattle Report**"), Brattle conservatively assess Claimants' damages to amount to [redacted] (**II.**). Full compensation also requires that Claimants are compensated for any additional tax liabilities resulting from the awarded damages, i.e. taxes Claimants must pay on the awarded damages which they would not have to pay had Respondent not breached its obligations under the ECT (**III.**). In addition, Claimants are entitled to pre- and post-award interest on this amount at the prevailing 12-month EURIBOR rate plus two percentage points, compounded annually (**IV.**).

553 Claimants' aforementioned damage arises as a consequence of the early shut down of Eemshaven in 2030 due to the Coal Ban. Contrary to Respondent's allegations – advanced, without any support, inter alia in the Explanatory Memorandum and in pre-arbitration amicable settlement discussion – this damage cannot be mitigated by reasonable damage mitigation measures (**V.**). Notwithstanding Respondent's burden of proof with regard to damage mitigation measures, Claimants have engaged Messrs Tomas Haug and Bastian Gottschling of NERA Economic Consulting (collectively, "**NERA**"). In their expert report ("**NERA Report**") they analyse whether converting Eemshaven and operating it with fuels other than coal would be feasible, reasonable and economically viable – and conclude that this is not the case.[424]

554 Claimants refer to the Brattle and NERA reports in their entirety and will only set forth a summary of Claimants' case on these quantum issues in this Memorial.

[424] Cf. **Exhibit CER-0001**: NERA Expert Reportparas 10, 22.

I. Under the ECT and general international law, Respondent must fully compensate Claimants

555 The ECT sets out the applicable standard of compensation for lawful expropriations (**1.**) but does not explicitly address the standard of compensation for breaches of the ECT. This is regulated under general international law by the principles of state responsibility. (**2.**). Yet, in the present case, both standards lead to the same results. In particular, both standards require that Respondent fully compensates Claimants for their damage and that such compensation is to be based on the fair market value of Claimants' Investment.

556 Moreover, under both standards, the (loss in) fair market value to be compensated is to be assessed on an *ex ante* basis, i.e. before the impending Coal Ban started to affect Eemshaven's value (**3.**). This date is 9 October 2017, i.e. the day before the Coalition Agreement 2017-2021 was published. Furthermore, both the ECT and general international law recognised that full compensation requires that Claimants are awarded pre- and post-award interest on the compensation due (Error! Reference source not found.**.**).

1. Compensation for expropriation under the ECT

557 As the Tribunal knows, the applicable standard of compensation for lawful expropriations is set out in Article 13(1) of the ECT. It stipulates that any expropriation must inter alia be *"*accompanied by the payment of prompt, adequate and effective compensation*".*[425] It further provides:

> *"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."*[426]

[425] **Exhibit CL-0002**: Energy Charter Treaty, Article 13(1)(d).

[426] **Exhibit CL-0002**: Energy Charter Treaty, Article 13(1) (emphasis added).

558 Claimants have shown above that the Coal Ban Act amounts to an expropriation of their investments in Eemshaven. Consequently, they are entitled to be compensated with an amount corresponding to (i) the fair market value of the investment, (ii) determined as of the date immediately before the (impending) expropriation became known, (iii) in a freely convertible currency and (iv) which includes interest at a commercial rate from the date of expropriation until payment.

559 However, no compensation has been paid or even offered by Respondent.

2. Compensation for breaches of the ECT

560 The ECT does not explicitly address compensation for breaches of the ECT. Thus, the damage caused by Respondent's violations of its obligations under Article 10 of the ECT is to be determined in accordance with customary international law.[427]

(a) Compensation requires full reparation

561 It is well established that a breach of a treaty, such as a breach of Article 10(1) of the ECT, gives the aggrieved party a right to be compensated for the harm sustained, i.e. the full loss suffered.[428] This was established already in 1928 by the *Chórzow Factory* case in which the Permanent Court of International Justice concluded that:

> *"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*

[427] **Exhibit CL-0086**: Nykomb Synergetics Technology Holding AB v. Latvia, SCC Award, 16 December 2003, p. 38; **Exhibit CL-0047**: ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, 2 October 2006, p. 483.

[428] **Exhibit CL-0087**: Campbell McLachlan et al, International Investment Arbitration – Substantive Principles (2007) , para. 9.78; **Exhibit CL-0088**: Jeswald W. Salacuse, The Law of Investment Treaties (2010) , p. 254; **Exhibit CL-0089**: Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (London British Institute of International and Comparative Law, 2008), p. 89; **Exhibit CL-0090**: SD Myers Inc v. Canada, UNCITRAL, First Partial Award, 13 November 2000, paras 311-312.

> *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."*[429]

562 The court's conclusion in the *Chórzow Factory* case has been widely embraced by subsequent arbitral tribunals.[430]

563 This standard has also been recognised by the International Law Commission in its Articles on State Responsibility, which have been formally adopted by the United Nations General Assembly.[431]

564 It follows from the above that a host State that has committed a breach of its obligations under international law is obligated to repair the breach and to put the aggrieved party in the same situation as if the breach had never occurred (the principle of full compensation).[432]

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[429] **Exhibit CL-0091**: Factory at Chórzow (Merits), 1928 PCIJ Series A No 17, p. 47 (emphasis added).

[430] See **Exhibit CL-0092**: MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID Case No ARB/01/7, Award, 25 May 2004, para. 238, stating that the standard set forth in the *Chórzow Factory* case is a *"classic standard"*; **Exhibit CL-0090**: SD Myers Inc v. Canada, UNCITRAL, First Partial Award, 13 November 2000, para. 311, which recognises the standard as *"authoritative"*; **Exhibit CL-0093**: Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award, 16 September 2015, paras 327-328; **Exhibit CL-0094**: CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 400; **Exhibit CL-0095**: Franck Charles Arif v. Republic of Moldova, ICSID Case No ARB/11/23, Award, 8 April 2013, para. 559; **Exhibit CL-0047**: ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, 2 October 2006, paras 484, which at para. 493 also lists jurisprudence of the International Court of Justice reaffirming this standard; **Exhibit CL-0080**: CME Czech Republic BV v. Czech Republic, Partial Award, 13 September 2001, paras 616-618; **Exhibit CL-0096**: Joseph C Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 149; **Exhibit CL-0097**: British Caribbean Bank Ltd v. Government of Belize, PCA Case No. 2010-18BCB-BZ, Award, 19 December 2014, para. 288; **Exhibit CL-0098**: Gold Reserve Inc v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF/)09/1, Award, 22 September 2014, para. 681; **Exhibit CL-0099**: Metalclad Corporation v. Mexico, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para. 122; **Exhibit CL-0100**: Petrobart Ltd v. Kyrgyz Republic, SCC 126/2003, Award, 29 March 2005, pp. 77-78.

[431] **Exhibit CL-0084**: ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001Articles 31, 35-36.

[432] **Exhibit CL-0089**: Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (London British Institute of International and Comparative Law, 2008), p. 89.

This can be done either by restitution, if possible, or by monetary compensation for all costs incurred as well as all damages suffered, including lost profits. The injured party has the right to select between restitution and compensation.[433]

565 In the present case, Claimants choose compensation. Moreover, restitution is hardly desirous for Respondent since it would require the Tribunal to interfere with the sovereign decision of Respondent to prohibit the use of coal for electricity generation. Therefore, Respondent must pay full compensation to Claimants for the damage they have suffered resulting from its breaches of Articles 10(1) and 13 of the ECT. The damage corresponds to the value Claimants' investment lost as a result of the Coal Ban, i.e. the difference between the value of Claimants' investment with and without the Coal Ban.

(b) The "fair market value" of the investment is the relevant standard for the quantification of damages

566 For the quantification of these damages, the fair market value is widely recognized as the value standard to be applied.[434] For example, in his Commentary on the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Professor Crawford states that

> *"[c]ompensation reflecting the capital value of property taken or destroyed as a result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."*[435]

567 This has also been affirmed for protection standards other than expropriation. The tribunal in CMS v. Argentina held that the proper approach to calculating compensation for damages caused by a breach of the FET standard and the umbrella clause was "by resorting to the standard of *fair* market *value*", highlighting in particular *"important long-term losses"*, which

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[433] **Exhibit CL-0084**: ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Article 43.

[434] **Exhibit CL-0101**: Mark Kantor, Valuation for arbitration (Kluwer Law International, 2008), pp. 33-34.

[435] **Exhibit CL-0102**: ILC Draft Articles State Responsibility 2001 with Commentaries, Article 36, para. 22, with further references (emphasis added).

also exist in this Arbitration.[436] Similar findings have been made by the tribunals in *Azurix v. Argentina*, *Enron v. Argentina, Murphy v. Ecuador* and *Gold Reserve v. Venezuela*.[437] This has also been affirmed in the ECT arbitration *Stati v. Kazakhstan*.[438]

3. The (loss in) value of Claimants' investment is to be assessed on an *ex ante* basis

568 In order to fully compensate Claimants for the loss in fair market value of Eemshaven, Eemshaven's value is to be assessed at the latest date before it was affected by the impending Coal Ban. For the situation of an expropriation, this is expressly stipulated in Article 13(1) of the ECT:

> *"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')."*

569 Article 13(1) of the ECT describes an *ex ante* valuation date. The same applies for other breaches of investment protection standards.[439]

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[436] **Exhibit CL-0094**: CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras 410-411.

[437] **Exhibit CL-0073**: Azurix v. Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 420-424; **Exhibit CL-0103**: Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 359 - 363, 380; **Exhibit CL-0104**: Murphy v. Ecuador, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 482; **Exhibit CL-0098**: Gold Reserve Inc v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF/)09/1, Award, 22 September 2014, para. 681.

[438] **Exhibit CL-0105**: Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan, SCC Case No. V (116/2010), Award, 19 December 2013, paras 1460-1461.

[439] **Exhibit CL-0072**: Asian Agricultural Products Ltd. v Republic of Sri Lanka, ICSID Case No. ARB/8/73, Award, 27 June 1990, paras 3, 106-107; **Exhibit CL-0094**: CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 441; **Exhibit CL-0073**: Azurix v. Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 418; **Exhibit CL-0104**: Murphy v. Ecuador, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 482-484.

570 For the present case, this means that the valuation date is 9 October 2017, i.e. the date before the Coalition Agreement was published. This announced the end of coal-fired power generation in the Netherlands by 2030. As set out in the factual background above, this announcement was quickly implemented, with a draft law published for consultation within less than six months which was eventually approved by parliament without any relevant changes. As Brattle explain, this announcement already impacted the value of Claimants' investment because a potential buyer would know what any operation beyond 2030 would at best be speculative.[440] 9 October 2017 thus represents a date where the value of Eemshaven was not yet impacted by the impending Coal Ban. It therefore ensures a "clean" (i.e. unaffected) value for the damage assessment. This is important since any damage assessment must compare the value of the investment free from any effects of the impending measure to the value with of that investment with the effects of the measure.

571 Applying 9 October 2017 as the valuation date means that only information available or readily foreseeable as of that date is to be used in the valuation since the value of an asset can only be established with regard to a specific moment in time. At a different point in time, the value may be different.

4. Summary

572 Under the ECT and customary international law, Claimants must be fully compensated for the loss in fair market value of their investment due to the Coal Ban. This assessment is to be conducted based on information available as of the valuation date, namely 9 October 2017, which is the date when the Coal Ban was announced, affecting Eemshaven's value.

II. Claimants suffered damages of EUR 1.4 billion due to the Coal Ban

573 The Coal Ban adopted by Respondent has severely impacted Claimants' Investment and caused Claimants damages of about EUR 1.4 billion.

574 To determine Claimants' damages, Brattle have compared the fair market value of Claimants' Investment with the Coal Ban in place ("**Actual**" case) and without – or "but for"

[440] **Exhibit CER-0002**: Brattle Expert Report, para. 2(a).

– the Coal Ban ("**But-For**" case).[441] For the convenience of the Tribunal, in the following, we summarize the main findings of the Brattle Report:

575 Brattle calculate the Actual and But-For values of Claimants' Investment using the widely used and accepted Discounted Cash Flow ("**DCF**") method (**1.**). They project Eemshaven's future cash flows in the Actual and But-For cases (**2.**). Brattle conclude that Claimants' damages, the difference between the cash flows in the Actual and But-For cases, as of the valuation date conservatively amount to EUR [redacted] (**3.**).

1. The DCF method is the most appropriate method to determine Claimants' damages

576 Brattle determine Claimants' damages using the Discounted Cash Flow ("**DCF**") method.[442] The DCF method is an income-based valuation approach, meaning that the value of an asset is determined by the cash flows expected to be generated by this asset in the future (i.e. the difference between incoming and outgoing future cash flows – in other words: revenue and costs).

577 The DCF method is the standard approach applied in the energy sector to determine the fair market value of power plants[443] and is also widely recognised as the preferred method for damage assessments in international arbitrations.

578 As Brattle explain, the DCF method is also particularly appropriate in the present case since Eemshaven derives its value from generating cash flows and its technical characteristics and value drivers are well understood:

> *"A DCF method is particularly appropriate to establish the FMV [= fair market value] of Eemshaven, because Eemshaven was, at the valuation date, an operating asset. Its technical characteristics, for example how costs vary with the level of electricity production – were well understood, as were its main revenue drivers. In particular, […] the data needed to project its revenues and costs were readily available. In particular, to determine the plant's key revenues and costs,*

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[441] **Exhibit CER-0002**: Brattle Expert Report para. 31.

[442] **Exhibit CER-0002**: Brattle Expert Report, para. 9.

[443] **Exhibit CER-0002**: Brattle Expert Report, paras 34-37.

> *the forward prices and forecast prices of the relevant commodities were available, as was data on the volatility of prices of these commodities."*[444]

579 Conversely, other valuation methods (such as market or cost approaches) are not suitable for assessing the fair market value of Claimants' investment and the damage Claimants suffered.[445]

- Assessing Claimants' damage through a market approach is not possible. In particular, using changes in the share price of RWE AG around the valuation date is not a suitable alternative, inter alia, because RWE AG's share price reflects RWE's entire business. The share price will thus be influenced by a variety of different events.[446]

- Likewise comparable transactions (another market approach) are not an alternative. There are no comparable transactions around the valuation date (i.e. October 2017, see Section **I.3** above).[447] Moreover, any transaction would only reflect the value in either the Actual or But-For case but not in both and hence be insufficient to calculate damages.[448] Additionally, the compensation accepted by RWE for its German coal plant Westfalen in December 2020 is not comparable, inter alia, since the compensation relates to a different and much more limited time period and also relates to a different electricity market, namely the German one.[449]

- Finally, also a cost approach, such as replacement costs, is not suitable because the (replacement) costs of an asset do not reflect its fair market value. The fair market value of an asset can be either higher or lower.[450]

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[444] **Exhibit CER-0002**: Brattle Expert Report, para. 39.

[445] **Exhibit CER-0002**: Brattle Expert Report, paras 33, 41-61.

[446] **Exhibit CER-0002**: Brattle Expert Report, paras 42-45.

[447] **Exhibit CER-0002**: Brattle Expert Report, paras 46-48.

[448] Cf. **Exhibit CER-0002**: Brattle Expert Report, para. 47.

[449] **Exhibit CER-0002**: Brattle Expert Report, paras 49-54.

[450] **Exhibit CER-0002**: Brattle Expert Report, paras 58-61.

580 The DCF method is thus the most appropriate method to determine Claimants' damages. In particular, unlike other valuation approaches, it allows to accurately model the impact of the Coal Ban by creating two scenarios (Actual and But-For) where the only difference are the changes caused by the Coal Ban.[451] Brattle ensure a robust damage assessment by additionally applying a stochastic approach which allows them to take into account a broad range of potential future price developments over Eemshaven's minimum remaining lifetime until 2054 (for details, see Section **2.(a)** below).

2. Cash flows

581 To determine the value of Eemshaven using the DCF method, Brattle first identify and projected Eemshaven's cash flows in the Actual and But-For cases. For each year from 2020[452] until the end of Eemshaven's minimal lifetime in 2054, Brattle therefore determine Eemshaven's incoming cash flows (revenues) and outgoing cash flows (costs). Costs can be divided in two categories: variable and fixed costs. Variable costs vary with the electricity output of the plant (in particular, fuel and CO2 costs) while fixed costs are largely independent of the output level of the plant.

582 The principal value drivers for coal plants are commodity prices. They impact coal plants' revenues as well as their costs. Prices for coal and CO2 are the main components of a coal plant's variable costs.[453] These commodity cost, together with those of gas, are also the central drivers for electricity prices since they determine the costs of producing electricity of fossil fuel-fired power plants (which typically are the price setting power plants in the electricity market).[454]

583 Brattle, thus, proceed as follows:

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[451] **Exhibit CER-0002**: Brattle Expert Report, para. 60.

[452] Brattle do not model cash flows for the period from the Valuation Date to 31 December 2019 since the Actual and But-for cases would be the same. In particular, Eemshaven could have hedged its output and commodity costs for this period using contemporaneous forward curves, which show a positive clean dark spread for a plant with Eemshaven's efficiency as explained in the **Exhibit CER-0002**: Brattle Expert Report, footnote 109.

[453] **Exhibit CER-0002**: Brattle Expert Report, para. 64.

[454] **Exhibit CER-0002**: Brattle Expert Report, para. 64.

(a) They project the commodity prices for coal, gas, and CO2.

(b) They feed these into a European electricity market model to determine the electricity prices.

(c) Using the commodity and electricity price paths, Brattle model the expected dispatch of Eemshaven, i.e. determine when Eemshaven should produce electricity and when not.

(d) They feed this information into its financial model to determine the fair market value FMV.

(a) Commodity prices

584 The prices for coal, gas, and CO2 are characterised by volatility. Given this inherent volatility, and the duration of the price forecast period, a wide spectrum of future price paths is possible. When projecting commodity prices, Brattle therefore do not focus only on one central price path but consider a broad range of possible future price paths. Brattle's methodology results in a robust estimate that gives due weight to a wide range of potential and plausible outcomes.[455]

585 Brattle do so by using a widely accepted technique, a "Monte Carlo" simulation. Monte Carlo simulations are widely used in financial valuation and were also accepted by the Netherlands and the EU Commission when approving the compensation granted by the Netherlands to Vattenfall for the early closure of its coal plant Hemweg 9.[456]

586 As Brattle explain, a Monte Carlo simulation permits to generate a large number of possible commodity price paths using a probabilistic / stochastic approach.[457] The different possibilities for how commodities prices may develop can be well captured in a Monte Carlo simulation because commodities prices change "randomly" but within certain defined constraints (also referred to as a "random walk").[458] Historical data for coal and gas prices shows that price changes from one trading period to the next (e.g. from month to month) are

[455] **Exhibit CER-0002**: Brattle Expert Report, para. 80.

[456] **Exhibit CER-0002**: Brattle Expert Report, paras 70-71.

[457] **Exhibit CER-0002**: Brattle Expert Report, para. 83.

[458] **Exhibit CER-0002**: Brattle Expert Report, paras 258-259.

independent from each other, meaning that after a rise in prices either another rise or a drop in prices may follow.[459] Changes in prices from one period to the next however stay within historically observed volatility parameters.[460]

587 Brattle therefore derive the necessary parameters for their probabilistic assessment from historic data and, on this basis, establish 100 different price paths.[461] Ultimately, Brattle use the 100 price paths to determine 100 Actual and 100 But-For fair market values for Eemshaven. By taking the average of each of these 100 scenarios, they establish a robust value for Eemshaven in the Actual and But-For scenarios.

588 In order to generate these 100 different price paths, Brattle:

(i) Determine the mean price path expected as of the valuation date (turquoise line in the figure below);

(ii) Derive the historical volatility of the commodity prices and the correlation between the movements of coal and gas prices;

(iii) Based on mean price path and the volatility, establish the distribution of possible prices at regular intervals (monthly or daily), i.e. the range in which prices are expected to deviate from the mean price path as well as the probability of the various prices within this range (red line in the figure below);

(iv) At each interval, randomly select a price based on the distribution determined above, thereby creating a price path (blue line in the figure below).

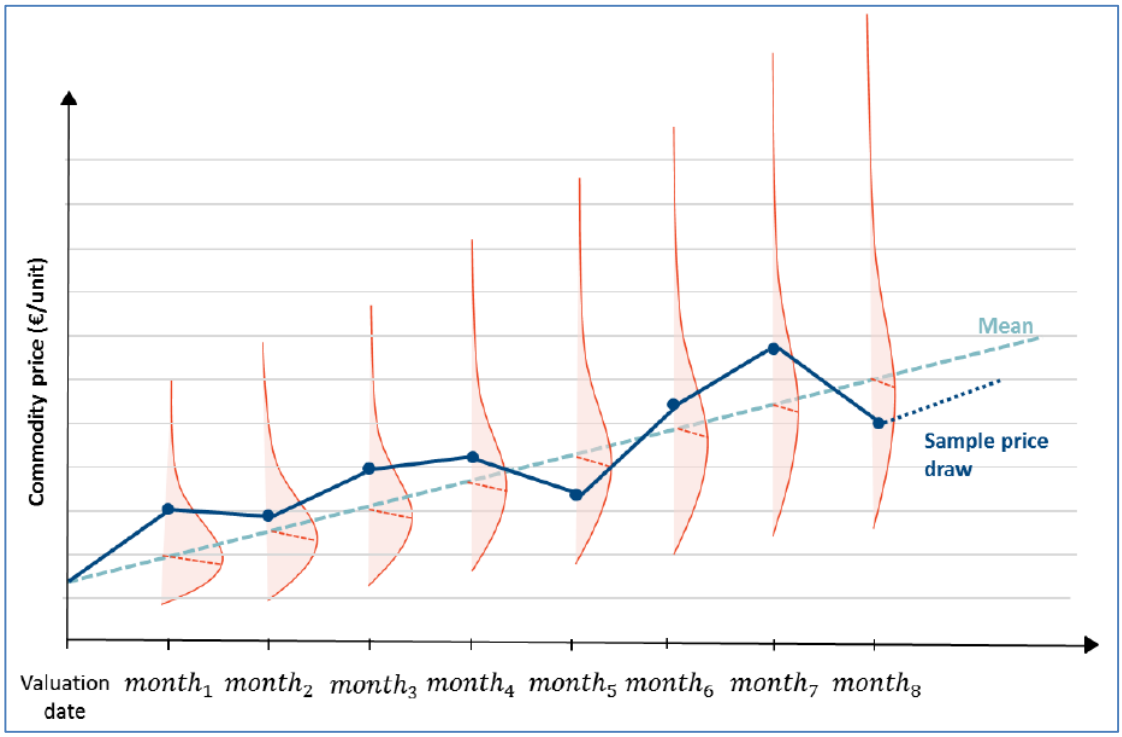
589 This can be illustrated by the following figure:[462]

[459] **Exhibit CER-0002**: Brattle Expert Report, para. 258.

[460] **Exhibit CER-0002**: Brattle Expert Report, para. 258.

[461] **Exhibit CER-0002**: Brattle Expert Report, para. 259.

[462] **Exhibit CER-0002**: Brattle Expert Report, Figure 4 at para. 84.



590 Brattle repeat this 100 times, on the one hand, for coal and gas prices and, on the other hand, in a similar but not identical approach for CO2 prices.

(aa) Coal and gas prices

591 Hence, first Brattle establish the mean price path expected as of the valuation date. They primarily use the projected prices from the "New Policies" scenario in the latest price forecast study "World Energy Outlook" ("**WEO**") available on the valuation date – the WEO 2016.[463] The WEO is published annually by the IEA, an intergovernmental organisation established in the framework of the Organisation for Economic Co-Operation (OECD). The WEO is widely used for valuations in the energy sector. The "New Policies" scenario is the IEA's central price path and takes into account new energy and climate policies by governments

[463] **Exhibit CER-0002**: Brattle Expert Report, paras 91(b), 92, 269, the latest available WEO as of the valuation date being the one published in November 2016. For the short- to mid-term period (2017 to 2022), they use forward prices. Forward prices are the prices at which one can buy a commodity to be delivered in the future. Buyers considering various future delivery dates for a commodity, create a price path of forward prices can be established. See **Exhibit CER-0002**: Brattle Expert Report, para. 91(a), 92, 268.

even if they have not yet been enacted.[464] All the scenarios in the WEO 2016 take into account the policy commitments undertaken in response to the 2015 Paris Agreement.[465]

592 Second, Brattle derive the volatility of the commodity prices over different time intervals from historical data.[466] The volatility describes the amount by which a commodity price may increase or decrease over time. Commodity prices tend to be more volatile in the short-term than in the long-term as the market is expected to return to equilibrium after short-term effects.[467] This relationship between the level of volatility and the length of time from the valuation date to the price forecast date is referred to as the "term structure" of the volatility and is derived by Brattle from historical data.[468]

593 Third, Brattle determine the distribution of the individual prices around the mean price path identified above, taking into account the volatility term structure of the prices. The distribution describes the probability of prices within the given rang.

594 The range of possible prices widens over time because commodity prices may continuously increase or decrease over a number of time periods ("*cumulative volatility*"). As the volatility decreases over time, also the rate at which the distribution widens declines.[469]

595 With regard to the probability distribution of prices within this range, Brattle explain that commodity prices follow a "random walk", meaning that deviations above and below the

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[464] **Exhibit CER-0002**: Brattle Expert Report, para. 93; Cf. **Exhibit CER-0002**: Brattle Expert Report, para. 93.

[465] **Exhibit CER-0002**: Brattle Expert Report, para. 93.

[466] **Exhibit CER-0002**: Brattle Expert Report, paras 91(c), 94, with footnote 86. Brattle use the start of the third phase of the ETS in 2013 as the starting point for their historic assessment (up to the valuation date) since this may have impacted the volatility and relationship between coal and gas prices. For further information on the data used, see **Exhibit CER-0002**: Brattle Expert Report, paras 282-292. For coal, the monthly volatility was established, while for gas, which is traded daily, also the intra-month variations were determined, **Exhibit CER-0002**: Brattle Expert Report, paras 298-299.

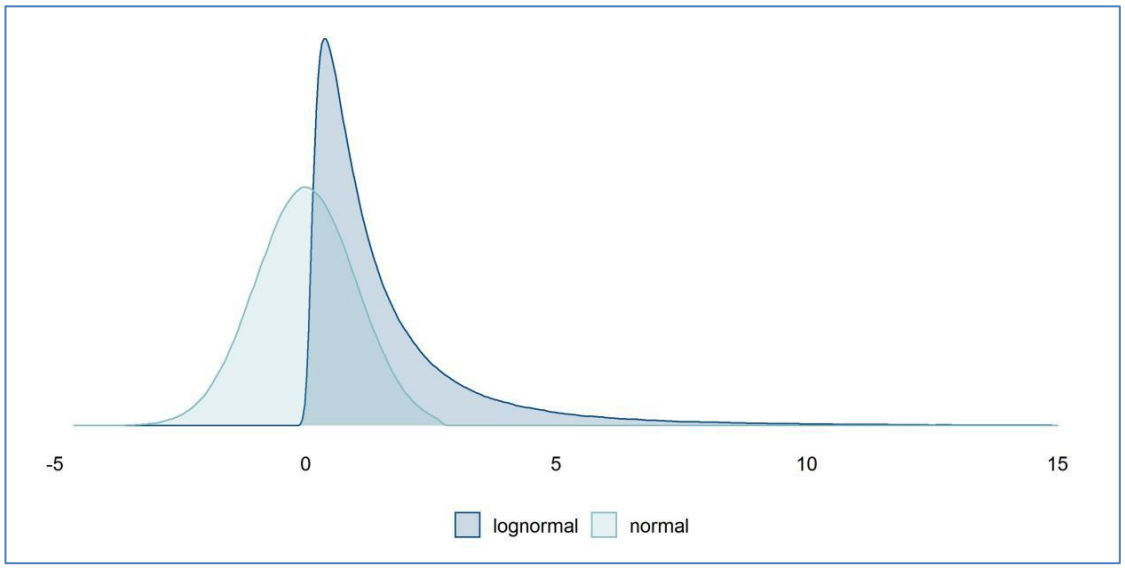
[467] **Exhibit CER-0002**: Brattle Expert Report, paras 94, 260-262.

[468] **Exhibit CER-0002**: Brattle Expert Report, paras 261-262.

[469] **Exhibit CER-0002**: Brattle Expert Report, paras 261-262.

mean are equally likely.[470] However, since, over time, commodity prices tend to move towards the expected mean price path ("mean reversion tendency"), prices closer to the mean price path are more likely than those further away from the mean.[471] Another characteristic is that commodity prices are not expected to become negative.[472] Hence, the range of the distribution below the mean price is limited. As can be seen form the following figure, such a distribution is best described by a so-called "log-normal" distribution (rather than a "normal" distribution where prices could also be negative).[473]

596 The widening and the log-normal type of the distribution are reflected in the increasing length and the shape, respectively, of the red line in the figure above.



597 Based on the distribution and volatility, Brattle derive 100 different prices paths for coal. By construction, each of these price paths has the same probability of occurring.[474]

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[470] **Exhibit CER-0002**: Brattle Expert Report, paras 258-259, 263.

[471] **Exhibit CER-0002**: Brattle Expert Report, footnote 209.

[472] **Exhibit CER-0002**: Brattle Expert Report, para. 264.

[473] **Exhibit CER-0002**: Brattle Expert Report, Figure 19 at para. 264.

[474] **Exhibit CER-0002**: Brattle Expert Report, paras 14, 228 with footnote 209. The probability whether or not an individual prices path moves away from the mean is thus taken into account by Brattle at the level of each individual price path when constructing it. Therefore, this is not to be taken into account again when forming a single damage figure from the different resulting price paths. Rather, each of them is equally likely to occur.

598 Since coal and gas prices do not develop completely independent of each other, Brattle also determine the correlation between coal and gas prices, taking also into account the difference between gas prices in summer and winter given the use of gas for heating purposes.[475] On the basis of these correlation coefficients, Brattle established a matching stochastically determined gas price path for every coal price path, thereby ensuring that coal and gas prices used are consistent.[476]

(bb) CO2 prices

599 As mentioned in in Section **B.IV.5.** above, CO2 prices in the EU are formed within in the Emission Trading System. The ETS Directive determines how many EU emission allowances ("**EUA**") are available on the market.[477] Therefore, the development of CO2 prices is more dependent on policy choices than the historic development of prices. This, together with other factors means, that Brattle's approach for determining coal and gas prices cannot be directly transferred to the situation of CO2 prices.

600 Given the relevance of policy choices, Brattle use the two more ambitious CO2 price scenarios in the WEO 2016 to set the range of the distribution and again applies a log-normal distribution as also CO2 prices are not expected to ever be negative.[478]

601 On this basis, Brattle then creates 100 CO2 price paths. To do so, at different points in time, they first draw 100 prices each from the distribution and rank them, for each year, from highest to lowest. The draws for different years then need to be connected to form a price path. When doing so, Brattle take into account that, while coal and gas prices are expected to go up and down, it is expected that policy decisions will prevent that CO2 prices drop.[479] Brattle therefore apply a "policy ratchet". This ensures not only that the CO2 prices do not

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[475] **Exhibit CER-0002**: Brattle Expert Report, paras 293-296.

[476] **Exhibit CER-0002**: Brattle Expert Report, para. 297.

[477] **Exhibit C-0027**: Directive 2003/87/EC (as amended), consolidated version of 29 October 2015, Articles 9, 9a.

[478] **Exhibit CER-0002**: Brattle Expert Report, paras 100 (with footnote 94), 305.

[479] **Exhibit CER-0002**: Brattle Expert Report, para. 311.

decrease over time but also that a price track which starts out with the e.g. 10th highest price is always at least equal to the 10th highest price in subsequent years.[480]

(b) Electricity prices

602 Next, in order to assess Claimants' revenues, Brattle determine the electricity prices. Electricity prices in the Netherlands (and in the EU) are set as follows: [481]

603 Each plant offers to the wholesale electricity market a price at which it is willing to sell its electricity. Plants usually make offers equivalent to their marginal costs, i.e. their costs for producing a given unit of electricity. These costs are mainly made up by the respective fuel costs. Offers can also be made by plants outside the Netherlands to the extent that sufficient interconnector capacity is available to the respective market. All offers are ranked from lowest to highest. The wholesale electricity price paid to all generators will be the price of the last offer needed to meet the given demand.

604 To determine the electricity prices, Brattle employed the services of Baringa Partners ("**Baringa**"), who model electricity prices using PLEXOS, a software widely used by electricity market participants to simulate electricity markets.

605 Prices in an electricity market depend on supply and demand. For the EU, the assessment of energy supply and demand closest to the valuation date from reputable source is contained in the EU Reference Scenarios published every few years by the EU

[480] More specifically, the price path is constructed by drawing a CO2 price from each of the different points in time. If the CO2 price for the next time period has either a lower value or a lower rank than that of the price selected for the previous time period, then not the selected price but the higher of the following is applied: (i) price selected for the previous period or (ii) the price with the same rank as the price selected for the previous period. That means that if a price ranked 10th has been drawn in the first period, a draw of the price ranked 12th in the second period would be substituted with the price ranked 10th – unless the price ranked 10th in the first period is higher than the 10th ranked price in the second period, then the price ranked 10th from the former period would be applied. For further details, see **Exhibit CER-0002**: Brattle Expert Report, paras 307-310.

[481] **Exhibit CER-0002**: Brattle Expert Report, para. 116; **Exhibit CER-0001**: NERA Expert Report, Section 1.1.

Commission.[482] Baringa's electricity market modelling therefore primarily uses the 2016 EU Reference Scenarios.[483] In principle, the electricity market assumptions for the Actual and But-For cases are identical, except, of course, that the Actual case takes into account that all coal plants in the Netherlands are shut down in compliance with the Coal Ban Law, i.e. latest on 31 December 2024 and 31 December 2029, respectively.[484]

606 The modelling of the electricity market moreover takes into account that prices for coal, gas and CO2 can have an impact on the development of the available renewables capacity in the market.[485] The renewable capacity inputs in the electricity market model can therefore react to the 100 different commodity price paths developed by Brattle.[486]

607 Using these inputs, the model derives two sets with each 100 electricity prices path: one set for the Actual (2020-2029)[487] and one for the But-For case (2020-2054). The distribution of But-For price paths can be seen in the following figure:[488]

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[482] **Exhibit CER-0002**: Brattle Expert Report, para. 109. For example, the next EU Reference Scenario was only published in 2020.

[483] Baringa's own reference case is needed for various additional inputs. The EU Reference Scenarios, for example, only provide an annual demand forecast. The Baringa reference scenarios therefore supplement the hourly (peak) demand profiles. In addition, the Baringa reference scenarios are used to set the characteristics of the plants in the various markets and determine the available interconnector capacities between countries/electricity markets. Furthermore, Baringa's data is used for e.g. annual demand and capacity assumptions for markets not covered by the EU Reference Scenario or which are very remote and therefore have essentially no impact on Dutch electricity prices. For details, see **Exhibit CER-0002**: Brattle Expert Report, paras 111, 319-320, 331-335.

[484] **Exhibit CER-0002**: Brattle Expert Report, para. 115.

[485] **Exhibit CER-0002**: Brattle Expert Report, para. 113.

[486] **Exhibit CER-0002**: Brattle Expert Report, para. 114, explaining also that the modelling also ensures that the capacity/reserve margin (i.e. excess capacity above expected peak demand) is maintained and that sufficient flexible generation capacity is available to deal with fluctuations in renewables capacity. For details, see **Exhibit CER-0002**: Brattle Expert Report, paras 322-330.

[487] Since, due to the Coal Ban Law, Eemshaven would no longer operate after 31 December 2029, electricity prices are not modelled beyond this date in the Actual case.

[488] **Exhibit CER-0002**: Brattle Expert Report, para. 120 with Figure 8.

(c) Dispatch

608 Based on these prices, Brattle then model the dispatch of Eemshaven, i.e. whether Eemshaven would operate given, inter alia, the respective commodity and electricity prices. The electricity prices determined by Baringa are for periods of four hours each. Hence, for each of these four-hour blocks, Brattle's dispatch model determines whether Eemshaven would generate electricity during this period or not.

609 In principle, the decision whether Eemshaven operates or not is rather straightforward: It will operate when electricity prices are higher than the costs Eemshaven would incur for producing said electricity ("**marginal costs**"; the difference between electricity prices and marginal costs is called "**clean dark spread**", abbreviated as "**CDS**"). This principle is subject to certain limitations, for example costs for starting up the plant must also be

considered.[489] The dispatch model also takes into account planned and unplanned outages of the plant, by applying 17 days per year as an average maintenance period.[490]

610 In a first step, Brattle thus determine Eemshaven's marginal costs which consist of:[491]

- the coal and CO2 prices that apply in each period;
- the maximum output of the plant (which varies with the prevailing outside temperature[492]);
- the efficiency of the plant, which depends on its output; and
- the variable operating costs.

611 In addition to these costs, Brattle also take into account the harbour fees Eemshaven must pay since they are also partially dependent on the output level.**[493]**

612 When simulating the dispatch of Eemshaven, Brattle not only consider operation of Eemshaven with coal but also the possibility to co-fire biomass under the Stimulering Duurzame Energieproductie+ ("**SDE+**") support scheme. As Brattle explain,[494]

> *"The SDE+ provides plants burning biomass with a "top-up" to electricity market prices for a pre-determined volume of electricity produced from renewable sources based on a 'strike price' that is designed to reflect the additional costs a plant incurs when burning biomass. The strike price and the maximum electricity volume that will be supported are specifically stipulated in each subsidy package awarded. As shown on the left-hand side of Figure 11, the top-up amount paid for a given year is normally equal to the difference between the strike price and the annual average electricity price for the Dutch market. However, if the average*

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[489] **Exhibit CER-0002**: Brattle Expert Report, para. 125-127. Consequently, a plant may not generate electricity despite a positive CDS since the start-up costs are too high and the period of positive CDS too short. Conversely, a plant may decide to continue operating during a period with a negative CDS if the following periods have positive CDS again.

[490] **Exhibit CER-0002**: Brattle Expert Report, para. 129.

[491] **Exhibit CER-0002**: Brattle Expert Report, para. 124.

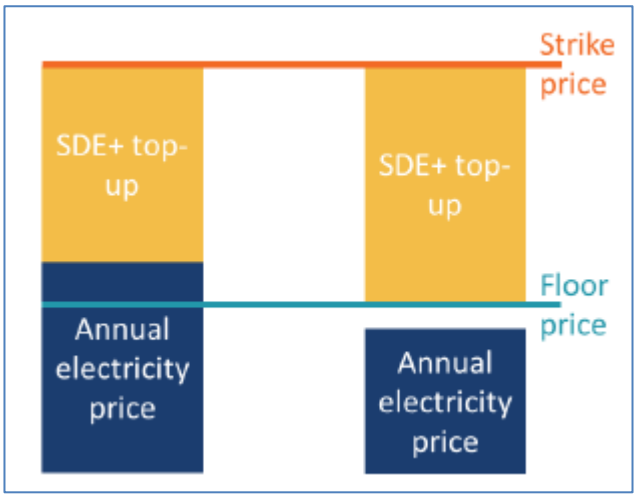
[492] For details, see **Exhibit CER-0002**: Brattle Expert Report, Figure 41 at para. 352.

[493] **Exhibit CER-0002**: Brattle Expert Report, para. 128.

[494] **Exhibit CER-0002**: Brattle Expert Report, para. 131 with Figure 11.

annual electricity price falls below a floor price, as shown on the right-hand side of Figure 11, the top-up is limited to the difference between strike price and the floor price.

FIGURE 11: OPERATION OF THE SDE+ SCHEME"



613 The SDE+ scheme granted for Eemshaven offers a "strike price" of [redacted] per MWh of electricity generated with biomass, available for a maximum of 1.789 TWh of electricity per year.[495] It applies for eight years, i.e. until 30 April 2027 based on the expected start on [redacted].[496] After 30 April 2027, Eemshaven is assumed to only fire coal since co-firing biomass is not economically viable without the SDE+ support scheme.[497]

614 After having run its dispatch model, Brattle transfers the following information to use it in its financial model:

- commodity margins of periods during which Eemshaven operates (i.e. revenue Eemshaven generates);

- the number of hours of generation (since some [semi-] fixed costs in the financial model depend on the number of running hours); and

[495] **Exhibit CER-0002**: Brattle Expert Report, para. 135.

[496] **Exhibit CER-0002**: Brattle Expert Report, Table 1 at para. 133.

[497] **Exhibit CER-0002**: Brattle Expert Report, paras 18, 123.

- whether the minimum harbour fee is already reached and, if not, what the remaining difference is.[498]

(d) Financial model

615 In a final step, Brattle builds the full financial model containing all of Eemshaven's cash flows. For this, they

(**aa**) add all revenues and costs not already accounted for in the commodity margins (see above) to the financial model;

(**bb**) determine the period during which Eemshaven would operate in each of the 100 Actual and But-For scenarios (i.e. the specific period for which cash flows are to be projected); and

(**cc**) discount the annual cash flows to the valuation date in order to account for the time value of money.

(aa) Complementing Eemshaven's cash flows

616 To complete Eemshaven's cash flows, Brattle primarily add:[499]

(i) In terms of revenues, income from trading activities related to the commodities used or produced at Eemshaven.[500] Such trading is common practice in the energy industry and, within RWE, referred to as "Commercial Asset Optimisation" ("**CAO**").[501]

(ii) In terms of costs, Eemshaven's "fixed costs" [502] (i.e. costs which are largely independent from the amount of electricity produced) such as costs for staff,

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[498] **Exhibit CER-0002**: Brattle Expert Report, para. 137.

[499] In addition, Brattle adjust the cash flows to take into account working capital, **Exhibit CER-0002**: Brattle Expert Report, paras 181-183.

[500] **Exhibit CER-0002**: Brattle Expert Report, paras 144-148.

[501] **Exhibit CER-0002**: Brattle Expert Report, para. 143. Such trading exploits price differentials of these commodities (e.g. at different points in time). For details, see **Exhibit CER-0002**: Brattle Expert Report, paras 403-410 (= Appendix E).

[502] The variable generation costs (in particular, fuel and CO2 costs) are already included in the commodity margins, see **Exhibit CER-0002**: Brattle Expert Report, para. 149.

maintenance, overhead,[503] land leases, taxes etc.,[504] taking into account the possibility to reduce certain costs when Eemshaven runs at less than ■ %.[505]

(iii) Taxes based on the 25 % corporate income tax rate applicable in the Netherlands. The fair market value calculated by Brattle is thus based on post-tax cash flows.[506]

(bb) Determining the length of the forecast period

617 Using these inputs, Brattle use their financial model to determine the annual cash flows for each year in each of the 100 Actual and But-For scenarios until, respectively, 2029 and 2054. When doing so, Brattle also take into account that the operator of Eemshaven would at all times have the option to either keep the plant running or to shut it down if the continued operation was economically no longer attractive.[507] Brattle model this decision for each of 100 Actual and But-For scenarios.

618 Whether or not to shut down a power plant is a complex decision. In practice, a power plant would may be "moth-balled" rather than immediately be shut down.[508] In order to simplify the decision, Brattle disregard the moth-balling option and only consider two options: continued operation or shut down.[509] This is a conservative approach since in many of the price paths

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[503] For details, see **Exhibit CER-0002**: Brattle Expert Report, paras 166-172.

[504] Brattle derive the relevant fixed costs mainly based on Claimants' SCOut reports, which they benchmarked against historical operating cost of Eemshaven and external studies, see **Exhibit CER-0002**: Brattle Expert Report, paras 150-151, 154-155, 173-175.

[505] **Exhibit CER-0002**: Brattle Expert Report, paras 152-154. Certain costs (such as land lease payments and property tax payments) even continue irrespective of the closure of Eemshaven, see **Exhibit CER-0002**: Brattle Expert Report, paras 157-165.

[506] **Exhibit CER-0002**: Brattle Expert Report, paras 62(a), 192.

[507] **Exhibit CER-0002**: Brattle Expert Report, para. 195.

[508] **Exhibit CER-0002**: Brattle Expert Report, para. 201. Moth-balling means that the plant would no longer operate but be maintained in a state that permits the operator to reactivated the plant later (if needed). Moth-balling temporarily reduces operating costs to a certain degree but requires additional expenses when reactivating the plant.

[509] Brattle take into account that a shutdown on the one hand would allow certain cost savings (e.g. overhead costs, major overhauls etc.) and on the other hand trigger certain additional cost (such as redundancy payments for workers) and mean that other costs (such as dismantling costs) would be incurred earlier. Additionally, also after a closure Eemshaven would continue to incur

where Brattle assume a shut down,[510] the operation of Eemshaven becomes profitable again in later years.[511] If Brattle had not applied this approach, the continued operation of Eemshaven in the But-For case would result in a significantly (i.e. about [redacted]) higher fair market value.[512]

(cc) Discounting

619 The annual cash flows determined in the 100 Actual and But-For scenarios reflect the value of those cash flows in the given year. In order to account for the time value of money (having money now is worth more than having it in the future) and risks related to realising these cash flows, Brattle discounts the annual cash flows to the valuation date, i.e. to their present value.[513] The sum of the present values of annual cash flows for a given Actual or But-For scenario gives the fair market value for that specific scenario.

620 Cash flows are discounted at the weight average cost of capital ("**WACC**") of the asset, i.e. the return that an investor would expect to earn at least from such an asset.[514] The WACC reflects an investor's cost of equity and cost of debt, weighted based on the ratio between debt and equity.[515] The WACC formula can be represented as follows:[516]

certain costs (such as land lease payments, some taxes and fees, and the minimum harbour fees). For details, see **Exhibit CER-0002**: Brattle Expert Report, paras 196, 205 and paras 157-165.

[510] For details on Brattle's shut-down rule, see **Exhibit CER-0002**: Brattle Expert Report, paras 197-198.

[511] **Exhibit CER-0002**: Brattle Expert Report, para. 203.

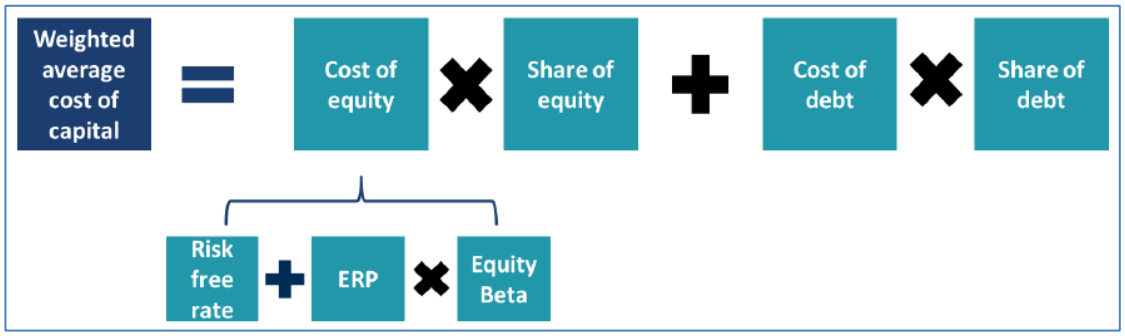
[512] **Exhibit CER-0002**: Brattle Expert Report, para. 203 with footnote 193.

[513] **Exhibit CER-0002**: Brattle Expert Report, paras 213-214.

[514] **Exhibit CER-0002**: Brattle Expert Report, para. 215.

[515] **Exhibit CER-0002**: Brattle Expert Report, para. 217.

[516] **Exhibit CER-0002**: Brattle Expert Report, Figure 49 at para. 426.



621 The cost of equity is determined based on the Capital Asset Pricing Model ("**CAPM**"). According to CAPM, when investing in a business an investor will require a return above the return for a risk-free asset in order to be compensated for the market risk it is exposed to. As of the valuation date, a risk-free investment would yield a return of [redacted] %.[517] Brattle assess the market risk premium ("**MRP**") on top of the risk-free rate to be 5 % to 5.5 % – and conservatively applies 5.5 %.[518] This reflects the general or systemic market risk. The risk of a given investment may however be higher or lower than this general risk. This is measured by the beta factor: a beta factor below 1 reflects a risk below the systemic market risk, a beta factor above 1 reflects a risk above the systemic risk. Brattle derive the beta factor for investing in Eemshaven from a group of publicly traded comparable companies for which this beta factor can be determined.[519] They arrive at a beta factor of 0.47.[520]

622 The cost of debt depends on the creditworthiness of the potential buyer which Brattle consider to be a European utility. Based on a sample of such companies, Brattle determined

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[517] **Exhibit CER-0002**: Brattle Expert Report, para. 444.

[518] **Exhibit CER-0002**: Brattle Expert Report, para. 443. Applying the upper end of the range is conservative because it leads to a higher discount rate and a higher discount rate results in a lower present value. The longer the period for discounting is, the greater the impact on the present value since the discount rate. Hence, due to the longer operating lifetime in the But-For case, the impact of the higher discount rate is stronger for these cash flows. It thus reduces the But-For value and thereby damages.

[519] Brattle build a peer group of publicly listed companies which obtain their revenues mainly from electricity generation and trading activities and for which coal-fired power generation is the important part of their generation activities, see **Exhibit CER-0002**: Brattle Expert Report, paras 435-437.

[520] **Exhibit CER-0002**: Brattle Expert Report, paras 438-441.

the Standard & Poor's credit ranking of a potential buyer to be BBB.[521] This translates into a cost of debt of [redacted] %.[522]

623 To determine the debt to equity ratio, Brattle derive the share of debt from the publicly traded companies used to determine the beta factor.[523] They conclude that the share of debt to be applied is 39 %.[524]

624 Using the WACC formula set out above, Brattle arrive at a discount rate of 3.85 %. They apply this discount rate to all annual cash flows in each of the 100 Actual and But-For scenarios, resulting in the fair market value of Eemshaven for each of these scenarios.

625 As a result from this step, Brattle thus have 200 fair market values of Eemshaven, namely 100 Actual values and 100 But-For values, giving 100 pairs of Actual and But-For values.[525]

3. Claimants' damages amount to at least [redacted]

626 In a final step Brattle determine Claimants' damages. For this, they first determine the damage in each of the 100 pairs of Actual and But-For values and then consolidate them in to a single damage figure.

627 The damage is calculated by subtracting the Actual value from the But-For value. Brattle do so for each of the 100 pairs of Actual and But-For values.[526]

628 Since all 100 scenarios are equally likely to occur, Claimants' damage could be calculated as the average of all 100 scenarios. Yet, in order to make their damage calculation even more robust, Brattle excludes the top 5 % and bottom 5 % of damages results. Nevertheless, even with this limitation, Claimants' total damages amount to at least [redacted].[527]

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[521] **Exhibit CER-0002**: Brattle Expert Report, para. 445.

[522] **Exhibit CER-0002**: Brattle Expert Report, para. 446.

[523] **Exhibit CER-0002**: Brattle Expert Report, para. 447.

[524] **Exhibit CER-0002**: Brattle Expert Report, paras 448-450.

[525] **Exhibit CER-0002**: Brattle Expert Report, para. 221.

[526] **Exhibit CER-0002**: Brattle Expert Report, para. 222.

[527] **Exhibit CER-0002**: Brattle Expert Report, para. 231.

629 More specifically:

- Without the Coal Ban (i.e. in the <u>But-For</u> case), the fair market value of Eemshaven as of 9 October 2017 was at least [redacted].[528] The robustness of this value is confirmed by the fact that only one year earlier, in 2016, the Dutch tax authorities agreed that Eemshaven's tax book value was [redacted].[529]

- With the Coal Ban (i.e. in the <u>Actual</u> case), Eemshaven's fair market value is reduced to merely [redacted] or just [redacted] % of its But-For value.[530] The Coal Ban has thus deprived Eemshaven of almost all value.

630 In their report, Brattle also look at the compensation Respondent owes to Claimants from the perspective of costs for avoided CO2 emissions, i.e. how much Respondent is paying with this compensation per ton of avoided CO2 emissions. This is analogous to the logic under the Kyoto Protocol's Joint Implementation mechanism, where CO2 credits can be obtained by investing in a project that reduces CO2 emissions.[531] Hence, since the early closure of Eemshaven due to the Coal Ban results in avoided carbon emissions of about 210 million tons, Claimants' compensation of [redacted] would mean that Respondent pays approximately <u>EUR 17 per ton of avoided CO2 emissions</u>.[532] This is significantly lower than the average CO2 price Brattle applies in its model.[533]

4. Summary

631 In summary, Claimants' damages of at least [redacted] have been robustly determined.[534]

632 In particular, with the DCF method, Brattle applied the most widely used and accepted valuation method for valuing operating assets in the energy sector. Moreover, they carefully

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[528] **Exhibit CER-0002**: Brattle Expert Report, para. 14(b).

[529] **Exhibit CER-0002**: Brattle Expert Report, para. 60.

[530] **Exhibit CER-0002**: Brattle Expert Report, para. 14(a).

[531] **Exhibit CER-0002**: Brattle Expert Report, para. 244.

[532] **Exhibit CER-0002**: Brattle Expert Report, paras 243, 245-246.

[533] **Exhibit CER-0002**: Brattle Expert Report, para. 246.

[534] Brattle Report, Harris-Hesmondhalgh Workpapers – Tables H, Tabs "H1" and "H2".

implemented an established approach – a Monte Carlo simulation – to transparently determine a 100 possible commodity prices paths. On this basis, Brattle – together with Baringa – also derived corresponding electricity price paths and determined at what times it would be profitable for Eemshaven to operate. Taking into account the revenues from electricity generation as well as other revenues and costs, Brattle established the annual cash flows in the 100 Actual and But-For cases and discounted them at a rate of 3.85 % to the valuation date, i.e. 9 October 2017.

633 After conservatively removing outliers, Brattle determined that the Coal Ban has destroyed about [redacted] % of Eemshaven's fair market value, causing Claimants' damages in an amount of at least [redacted]. This damage amount is also conservative for other reasons. Throughout their assessment, Brattle made various choices leading to lower damage figure, such as the application of the shut-down. Moreover, this damage amount determined by Brattle is equivalent to Respondent paying only EUR 17 for each ton of CO2 emission it's measure aims to avoid.

634 This damage (i.e. the difference between the fair market value in the Actual and But-For scenarios) derives mainly from the fact that, due to the Coal Ban, Eemshaven has to shut down latest on 31 December 2029 while without the Coal Ban it could have operated for the remainder of its minimal lifetime, i.e. up to 25 years longer. Contrary to Respondent's unsupported contentions, this damage cannot be mitigated by reasonable damage mitigation measures and, in particular, converting Eemshaven to fully operate on biomass is not a viable option to mitigate damages as Claimants will explain in Section **IV.** below.

III. Claimants must also be compensated for any additional tax losses

635 The principle of full compensation requires that Claimants are put into *"the situation which would, in all probability, have existed if that [impugned] act had not been committed."* Consequently, Claimants must also be compensated for any additional tax liabilities resulting from the awarded damages, i.e. taxes Claimants must pay on the awarded damages which they would not have to pay had Respondent not breached its obligations under the ECT ("**tax gross-up**").

636 The risk of such additional taxes arises, inter alia, in two regards:

- Firstly, the damages calculated by Brattle are calculated on a post-tax basis.[535] Therefore, applicable Dutch taxes have already been deducted from the claimed damage amount. Upon payment of the damages, this amount is likely to be taxed again by the competent tax authorities. Had Claimants been able to continue operating its business unimpededly, its income from its business operation would only have been reduced by taxes once.

- Secondly, irrespective of the previous point, RWE AG may incur additional tax damages should the Tribunal not follow Claimants' request to order payment of the entire damage amount to RWE Eemshaven but decide to order payment (of part of the damage amount) directly to RWE AG. In that case, this damage payment may be fully taxable in Germany while profits from Eemshaven's business operations, when being passed on to RWE AG, may for example have benefitted from the preferential tax treatment applicable to dividends.

637 Given that the exact amount of taxes can likely only be determined once tax authorities have assessed taxes after an award in favour of Claimants has been rendered, Claimants only request a declaratory award from the Tribunal finding that, in principal, Claimants are entitled to compensation for damages resulting from additional taxes.[536] However, they reserve the right to amend their current requests.

IV. Claimants are entitled to pre- and post-award interest at the 12-month EURIBOR rate plus two percentage points

638 In addition to compensation for the loss in value of their investment, Claimants are entitled to pre- and post-award interest.

639 It is also generally recognised that full compensation requires interest to be paid on the fair market value from the date of valuation.[537] Pursuant to Article 38(1) of the Articles on State

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[535] **Exhibit CER-0002**: Brattle Expert Report, para. 62(a).

[536] Claimants' request thus significantly differs from claims filed, and denied, in other cases, where investors asked to be awarded specific amounts.

[537] See only **Exhibit CL-0106**: James Crawford, The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries (2002), Article 38, para. 2: "*As a*

Responsibility, the rate of interest shall be set so as to *"*ensure full compensation*"*.[538] For a commercial entity, this means that it must be compensated at a commercial rate. For lawful expropriations, this is also specifically stated in Article 13(1), subparagraph 3, of the ECT, which provides that *"compensation shall also include compensation at a commercial rate established on a market basis"*.[539] There is no reason to apply a lesser standard in cases of unlawful expropriations or other acts unlawful under the ECT.[540]

640 It is also widely recognised, and even considered *"jurisprudence constant*e*"*, that full compensation requires compound interest to be awarded, that is, interest accrues on interest owed.[541]

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general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.

As explained in the footnote to this passage, the caveat *"to the extent that it is necessary to ensure full reparation"* refers simply to the situation no pre-award interest is required because *"the loss is assessed in current value terms as at the date of the award"*.

[538] **Exhibit CL-0084**: ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Article 38(1): "*Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result*." (emphasis added)

[539] **Exhibit CL-0002**: Energy Charter Treaty, Article 13(1), subparagraph 3 (emphasis added).

[540] **Exhibit CL-0107**: STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4, Award, 17 August 2021 para. 102.

[541] That compounded – rather than simple – interest now represents a form of "*jurisprudence constante*" has been recognised, inter alia, by the tribunals in the following cases: **Exhibit CL-0108**: Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, para. 16.26; **Exhibit CL-0109**: Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-03 AA226, Final Award, 18 July 2014, para. 1689; **Exhibit CL-0110**: Oko Pankki Oyj (formerly called OKO Osuuspankkien Keskuspankki OYJ) et al v. The Republic of Estonia, ICSID Case No. ARB/04/6), Award, 19 November 2007, para. 349; **Exhibit CL-0093**: Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award, 16 September 2015, paras 523-524 (with further references). See also **Exhibit CL-0111**: OI European Group B.V. v. Bolivian Republic of Venezuela, ICSID Case No. ARB/11/25, Award, 10 March 2015, paras 948-949, where the tribunal affirms that in *"recent arbitral practice, a preference towards compound interest exists"* and concludes that *"compound interest is indispensable to fully compensate the investor"*. This is also affirmed by distinguished scholars

641 Interest accrues from the moment the damage is caused[542] until full payment of the principle amount plus interest. Interest is also due on any costs awarded to Claimants, accruing from the date they are awarded until full payment.[543]

642 In their report, Brattle determine that the 12-month EURIBOR rate plus two percentage points (equivalent to "plus 200 basis points") constitutes a *"commercial rate* established on *a market basis"*.[544] EURIBOR (European Inter-Bank Overnight Borrowing Rate) is one of the two most commonly quoted commercial interest rate benchmarks (the London Inter-Bank Overnight Borrowing Rate, LIBOR, being the other). It is established on the basis of commercial, market-based agreements between large banks.[545] However, other market participants cannot borrow at this rate but pay a premium on top of the EURIBOR rate – with two percentage points being a typical premium. Hence, EURIBOR plus two percentage points represents a typical commercial rate of interest.[546] This assessment is consistent with the findings of many other investment tribunals which held that EURIBOR/LIBOR is the most

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such as *Irmgard Marboe* and *Sergey Ripinsky***Exhibit CL-0089**: Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (London British Institute of International and Comparative Law, 2008), footnote 135 at p. 386; **Exhibit CL-0112**: Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (Oxford: Oxford University Press, 2009), para. 6.236, concluding, after reviewing arbitral practice, that

> *compound interest as opposed to simple interest appears to be predominantly accepted as appropriate in recent international investment arbitration. It is regard as better reflecting actual economic realities both for the purpose of remedying the loss actually incurred by the injured party and for the prevention of unjustified enrichment of the respondent State.*

[542] **Exhibit CL-0089**: Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (London British Institute of International and Comparative Law, 2008), footnote 135 at p. 376

[543] **Exhibit CL-0113**: S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Final Award (Concerning the Apportionment of Costs Between the Disputing Parties), 30 December 2002, paras 50-51; **Exhibit CL-0114**: Walter Bau v. Thailand, UNCITRAL, Award, 1 July 2009 para. 16.2; **Exhibit CL-0109**: Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-03 AA226, Final Award, 18 July 2014, para. 1690; **Exhibit CL-0115**: Olympic Entertainment Group AS v. Republic of Ukraine, PCA Case No. 2019-18, Award, 15 April 2021, para. 198.

[544] **Exhibit CER-0002**: Brattle Expert Report, para. 238.

[545] **Exhibit CER-0002**: Brattle Expert Report, para. 237.

[546] **Exhibit CER-0002**: Brattle Expert Report, para. 238.

appropriate basis for determining interest and applied an additional two percentage points as premium.[547]

643 Brattle also confirm that compound interest is the norm for commercial loans and required to make a claimant whole.[548] For the present case, Brattle determine a compounding corresponding to the tenor of the interest rate (i.e. 12 months) to be appropriate.[549]

644 Thus, under the principal of full compensation, Claimants are entitled to interest at the 12-month EURIBOR rate plus two percentage points from the valuation date until full payment.

V. Claimants' are not obliged to take damage mitigation measures

645 In its Explanatory Memorandum, Respondent alleges that no financial compensation would be needed because owners of coal plants could mitigate their damage by converting their plants to alternative fuels during the transitional period and continue to operate them profitably thereafter.[550]

646 That has no merit. A respective defence by Respondent would be raised in vain.

647 We have already explained in Section **B.IX.** that Respondent's allegation is based on speculative assumptions, not on facts. Respondent itself doubted that a 100% biomass

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[547] **Exhibit CL-0116**: CEF Energia BV v. Italian Republic, SCC Case No. V2015/158, Award, 16 January 2019, para. 285; **Exhibit CL-0015**: Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic, SCC Case No. V (2015/095), Final Award, 23 December 2018, para. 577; **Exhibit CL-0117**: Deutsche Telekom v. Republic of India, PCA Case No. 2014-10, Final Award, 27 May 2020, paras 316, 319; **Exhibit CL-0118**: (DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar, ICSID Case No. ARB/17/18, Award, 17 April 2020para. 457; **Exhibit CL-0119**: Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt, PCA Case No. 2012-07, Final Award, 23 December 2019, paras 532-533, 542; **Exhibit CL-0120**: Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 431; **Exhibit CL-0121**: Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019, paras 1607, 1609.

[548] **Exhibit CER-0002**: Brattle Expert Report, para. 239.

[549] **Exhibit CER-0002**: Brattle Expert Report, paras 240-241.

[550] **Exhibit C-0101**: Parliamentary Papers II 2018/19, 35 167, no. 3, Explanatory Memorandum, dated 18 March 2019, pp. 10-11.

operation could ever be profitable without subsidies – which it chose to cancel at the same time it announced to ban coal. Also, Respondent examined neither the conversion possibilities and costs nor whether the operation with other fuels would be economically viable. That Claimants could mitigate their damage by converting Eemshaven to alternative fuels is merely an argument of convenience raised by Respondent so shift the political burden of awarding compensation for coal plants to its courts and this Tribunal.

648 In the following, we will thus only very briefly address Respondent's contentions regarding damage mitigation. We will start by setting out the standard Respondent – who bears the burden of proof – would need to meet (**1**) and then explain why Respondent will not be able to do so (**2**).

1. Respondent would have to prove that Claimants failed to act reasonably

649 Damage mitigation is an objection which can be raised by the party responsible to provide compensation. It requires an injured party to act reasonably when faced with an unlawful act and not to act against its own self-interest.[551] The burden of proof for a failure to so lies with the party invoking that failure[552] and is a high one[553].

650 The standard of reasonableness is understood to mean that a claimant should neither be *"unreasonably inactive following a breach of treaty"* nor *"engage[] in unreasonable conduct*

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[551] **Exhibit CL-0122**: William Richard Clayton et al. v. Canada, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 204; **Exhibit CL-0123**: Achmea B.V. v. Slovak Republic, PCA Case No. 2008-13, Final Award, 7 December 2012, para. 320; **Exhibit CL-0124**: Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-07, Award, 21 December 2020, para. 1888.

[552] **Exhibit CL-0124**: Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-07, Award, 21 December 2020, para. 1887; **Exhibit CL-0125**: AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.6.4.4; **Exhibit CL-0126**: Union Fenosa Gas v. Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 10.126.

[553] **Exhibit CL-0124**: Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-07, Award, 21 December 2020, para. 1888; **Exhibit CL-0127**: Chris Osborne, Dora Grunwald and Ömer Kama, Contributory Fault, Mitigation and other Defences to Damages, The Investment Treaty Arbitration Review, 18 June 2021, p. 5.

following a breach of treaty".[554] Examples are that a claimant may be required to continue its business activity despite its business having been damaged or to cease its business activity if this would only increase damages.[555]

651 Rebuilding a destroyed business activity is however not required. A Respondent cannot demolish one business activity and then refuse to pay damages because the claimant did not build up a new business activity. As the tribunal in *AIG v. Kazakhstan* explains, this would *"only encourage Governments to breach with impunity solemn provisions of an international treaty and weaken the protection of foreign investors – which such a treaty is expressly designed to safeguard."*[556]

652 In particular, a claimant is not required to make alternative investments. Tribunals have even held that a claimant is not even required to accept an alternative site for the same investment.[557] Even less so a claimant can be required to make an additional investment to change its business activity.

653 The standard of reasonable also means that a claimant is not required to take measures whose prospects are uncertain. For instance, in *Union Fenosa v. Egypt*, the tribunal held that a claimant could not even be expected to close down its business because it was *"not obvious that the overall amount of its claims would be reduced"*.[558] This shows that tribunals

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554 **Exhibit CL-0122**: William Richard Clayton et al. v. Canada, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 204; affirmed in **Exhibit CL-0124**: Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-07, Award, 21 December 2020, para. 1887.

555 See **Exhibit CL-0128**: Middle Eastern Cement v. Egypt, ICSID Case ARB/99/6, Award of 12 April 2002, para. 168; **Exhibit CL-0123**: Achmea B.V. v. Slovak Republic, PCA Case No. 2008-13, Final Award, 7 December 2012, para. 320.

556 **Exhibit CL-0125**: AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, 7 October 2003, para 10.6.4(5)(a).

557 **Exhibit CL-0125**: AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, 7 October 2003, para 10.6.4(4); **Exhibit CL-0129**: Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 172.

558 **Exhibit CL-0126**: Union Fenosa Gas v. Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 10.128. Cf. also **Exhibit CL-0130**: Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Award, 17 December 2015, para. 217.

expect a high degree of certainty that a proposed measure would have actually mitigated the damage.

2. Converting Eemshaven to alternative fuels is not a damage mitigation measure, even less so a reasonable one

654 While, as set out above, the burden of proof is on Respondent, it is clear that Respondent will not be able to meet this burden. Following from the standard set out above, converting Eemshaven to alternative fuels goes already conceptually beyond the scope of damage mitigation (**a**). In any event, such a conversion would not be a reasonable damage mitigation measure since it would not be economically viable and moreover unclear whether it would be legally feasible (**b**)

(a) Converting Eemshaven to alternative fuels is already conceptually beyond the scope of damage mitigation

655 Converting Eemshaven to alternative fuels is already conceptually beyond the scope of damage mitigation. It would require Claimants to convert their coal-fired plant, which can co-fire biomass, into a 100% biomass plant.

656 By prohibiting the firing of coal in Claimants' coal-fired power plant, Respondent has destroyed Claimants' existing business. The Environmental Permit for Eemshaven allows the co-firing of biomass besides coal. For firing only biomass beyond the limits currently imposed by the permit (800k tons) Claimants would need a changed permit or, since only biomass would be fired, very likely a new permit. And if Claimant were to convert Eemshaven to some fuel not mentioned in the current permit such as gas, it would certainly need to apply for a new permit. Moreover, Claimants would need to make substantial additional investments. Even for converting the existing coal-fired power plant into a fully biomass-fuelled power plant, roughly EUR [redacted] to 457 million would be required.[559]

657 Claimants would therefore need to change their coal plant into a different type of plant and effectively make a new investment. Otherwise, they have no further business. As explained above, obliging a Claimant to develop new business activities is beyond what is required

[559] **Exhibit CER-0001**: NERA Expert Report, para. 23.

under damage mitigation standards. An investor cannot be expected to effectively tear down an existing power plant and invest hundreds of millions of euro to build a new one just to mitigate damages. That is beyond the scope of damage mitigation.

(b) In any event, converting Eemshaven to alternative fuels was and is not expected to be profitable

658 Even if converting Eemshaven to alternative fuels would fall – in principal – in the scope of possible damage mitigation measures, Respondent further would need to establish that converting Eemshaven is legally and technically feasible and economically viable.

659 Claimants note that it is already unclear whether they could obtain a permit to convert Eemshaven to biomass or other alternative fuels. Moreover, given the current debate in the Netherlands on phasing out biomass for electricity generation purposes (see above sec. X 3), it would be unclear for how long a biomass plant could still be effectively operated. Already for these reasons, an investor could not reasonably be expected to invest hundreds of millions of euros in converting Eemshaven to alternative fuels, in particular biomass, where the Government explicitly states it wants to stop that line of business.[560]

660 The Tribunal will recall that Respondent in 2017 itself had doubts whether a 100% biomass operation could ever be economical without subsidies.[561] And the Explanatory Memorandum for the Coal Ban Act explicitly does not review the issue of whether such operation would be economical, instead trying (in vain) to shift the burden for that to the operators such as Claimants.[562]

661 In any case, a proof that a conversion to and operation with 100% biomass would be economical could not succeed. Claimants have asked NERA to assess from an economic perspective whether an investor would reasonably invest in converting Eemshaven to alternative fuels and to focus their assessment on the conversion to biomass. They conclude

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[560] **Exhibit CER-0001**: NERA Expert Report, Sections 2.1 and 3.2.

[561] See **Exhibit C-0093**: Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), measure 29.

[562] See Section **B.IX.4**.

that, irrespective of whether one assesses this question from the perspective of 2017 or today, a reasonable investor would not invest in the conversion of Eemshaven to biomass.[563]

662 NERA explains that an investor would only make a conversion investment if he considered it to be profitable, i.e. if he expected to generate sufficient margins from the sale of electricity to be able to recoup at least its investment costs for the conversion ("**conversion CAPEX**") and earn at least some margin on its investment.[564] The latter is also necessary to effect any damage mitigation. If the operation with biomass does not lead to profits sufficient to reduce the damages suffered, then such investment would not and need not be made. It would be unreasonable.

663 NERA show that already an analysis of market fundamentals suggests that a conversion project would not be profitable.[565] In a competitive electricity market, like the Dutch one, the ability of a power plant to sell electricity at a given point in time depends on its costs of generating an incremental amount of electricity ("**marginal costs**") and, thereby, mainly on its fuel costs and the price of emission allowances. If electricity demand at a given point in time can be met by plants with lower marginal costs, plants with higher marginal costs cannot sell electricity profitably.[566]

664 For biomass plants, this means that they are not competitive. Due to the high prices for their fuel, namely wood pellets, biomass plants have the highest marginal costs among the major generation technologies in the Dutch electricity system and therefore rarely operate.[567] That biomass plants are not viable without subsidies can also be seen from the fact that, to NERA's knowledge, there is no biomass conversion project in Europe which was realised without subsidies.[568] In a number of instances planned biomass conversion projects were even cancelled or constructed plants shut down when the expected subsidies were not received or ran out.[569] Furthermore, already in 2017, the future regulatory outlook for

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[563] **Exhibit CER-0001**: NERA Expert Report, para. 22.

[564] **Exhibit CER-0001**: NERA Expert Report, para. 9, 14.

[565] **Exhibit CER-0001**: NERA Expert Report, Section 1.

[566] **Exhibit CER-0001**: NERA Expert Report, para. 13 and Section 1.

[567] **Exhibit CER-0001**: NERA Expert Report, Section 1.2.

[568] **Exhibit CER-0001**: NERA Expert Report, Section 1.3 and Appendix D.

[569] **Exhibit CER-0001**: NERA Expert Report, paras 16, 43-44 with Table 1.1.

biomass plants was rather grim. In particular, there was a risk that regulatory changes (such as stricter sustainability standards for biomass or subjecting CO2 emissions of biomass plants to the ETS) could further increase the costs of biomass plants.[570]

665 As NERA explain, all of the above considerations apply equally in an assessment from today's perspective. Indeed, the outlook for biomass – both economically and politically – has rather deteriorated since 2017.[571]

3. Conclusion

666 Eemshaven may not fire coal from 1 January 2030 onwards. Firing only biomass (without state subsidies which Respondent had abolished) is uneconomical due to the high marginal costs for biomass, irrespective of whether the plant is operated with 15 % of its capacity or with its full capacity. For the same reason, a conversion to 100 % biomass would be uneconomical. Thus, Respondent's assumption that coal plants after the transition period could be converted to full biomass is unfounded and disproven. This holds true, both as of 2017 and as of today. Recent statements by the Government (see Section **B.X.3.**) confirm that biomass co-firing has no future.

[570] **Exhibit CER-0001**: NERA Expert Report, Section 2.

[571] **Exhibit CER-0001**: NERA Expert Report, Section 3.

F. THE NETHERLANDS' VIOLATION OF THE EXCLUSIVITY OF ICSID ARBITRATION

667 In this section, Claimants will demonstrate that the Netherlands' petition asking German courts to declare these proceedings inadmissible violates the ICSID Convention's self-contained character (**I.**). As a consequence, the Netherlands must withdraw its petition and compensate Claimants for any damages suffered, in particular for all their expenses and litigation costs irrespective of the German Proceedings' outcome (**II.**).

668 The Tribunal's jurisdiction extends to this ancillary claim under Article 46 of the ICSID Convention and Arbitration Rule 40. There should be no doubt that a sufficiently close legal and factual relationship exists between Claimants' main claim and their claim in relation to the German Proceedings. In fact, the Respondent's initiation of the German Proceedings is a direct consequence of the initiation of the present arbitration. Legally, the procedural integrity of this arbitration is intrinsically linked to Claimants' right to have the present dispute settled by this Tribunal, including any jurisdictional objections based on EU law.

I. Respondent's initiation of the German Proceedings violates the exclusivity of ICSID arbitration

669 It is generally accepted that ICSID proceedings are self-contained and, once initiated, the sole remedy for any given dispute. This exclusivity of ICSID proceedings is reflected in and given content to by several provisions of the ICSID Convention. Article 26 of the ICSID Convention provides in relevant part:

> "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy*." (emphasis added)

670 As the Report of the Executive Directors on the ICSID Convention gives further guidance:

> "*It may be presumed that when a State and an investor agree to have recourse to arbitration […] the intention of the parties is to have recourse to arbitration to the*

> *exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26.*"[572]

671 In particular the question whether parties to a dispute have consented to ICSID arbitration is covered by the system's self-contained regime. In its interplay with Article 41 of the ICSID Convention, Article 26 ensures that an ICSID tribunal remains the sole judge of its competence, subject only to review by an annulment committee under the Convention's Article 52. Specifically, Article 41(2) of the ICSID Convention stresses that "*any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal*"[573].

672 The rationale for the ICSID system's exclusivity is, in the words of Professor Christoph Schreuer, "*to provide an effective forum and to dispense with other proceedings which for a variety of reasons appear unattractive to the parties*"[574]. Additionally, in the words of former World Bank Senior Counsel Georges R. Delaume, for disputing parties, next to the "*assurance that they may take full advantage of procedural rules specifically adapted to their needs*", it is "*equally important, that the administration of these rules will be exempt from the scrutiny or control of domestic courts in states that are parties to the Convention (contracting states)*."[575]

673 ICSID tribunals have therefore consistently affirmed the exclusivity of ICSID arbitration, in particular in relation to their exclusive mandate to determine their jurisdiction:.

674 In the words of the tribunal in *Perenco v. Ecuador*,

> *"[u]nless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of*

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[572] **Exhibit CL-0131**: International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 , para. 32.

[573] Emphasis added.

[574] **Exhibit CL-0132**: Christoph Schreuer et al., The ICSID Convention: A Commentary (2nd edition, 2009) p. 352.

[575] **Exhibit CL-0133**: Georges R. Delaume, ICSID Arbitration and the Courts, 77 AJIL 784 (1983), pp. 784-785.

> *Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration.*
>
> […]
>
> *In the Tribunal's view, once putatively vested with jurisdiction to hear a claim (subject to resolving any objections thereto definitively), an ICSID tribunal has the duty to protect its jurisdiction to resolve the dispute that has been put before it.*"[576]

675 In *Tokios Tokelés v. Ukraine* the tribunal further held that Ukraine was

> "*under the legal obligation to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize the principle of exclusivity of ICSID proceedings or aggravate the dispute before it*."[577]

676 Additionally, in *Lanco v. Argentina*, the tribunal pointed out that

> "*consent of the parties to arbitration is considered as consent to such arbitration to the exclusion of any other remedy, unless otherwise stated. In other words, when the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum, domestic or international, and it therefore presupposes the non-interference of any other forum with the ICSID arbitration proceeding once such proceeding has been instituted*".[578]

677 Scholarly writing confirms this position. As the Honorable Charles N. Brower and Ronald E.M. Goodman observed and summarized,

> "*the consensus of national courts and publicists has been that […] parties to an ICSID arbitration agreement must bring to ICSID all their disputes (which are the subject of such agreement) and thus forego submitting any claims to national courts. Several jurisdictions and a number of publicists have insisted further that*

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[576] **Exhibit CL-0134**: Perenco Ecuador Ltd. v. Ecuador, ISCID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paras 61 and 64.

[577] **Exhibit CL-0096**: Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18ARB0218, Procedural Order No. 1, 1 July 2003, para. 3.

[578] **Exhibit CL-0135**: Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision - Jurisdiction of the Arbitral Tribunal, 8 December 1998, para. 36.

> *the ICSID system dictates jurisdictional exclusivity so complete […] that it prohibits even applications to national courts for conservatory measures*"[579]

678 Professor Gabrielle Kaufmann-Kohler and Michele Potestà conceptually illustrate this as follows:

> *"In the case of ICSID arbitration, the Washington Convention establishes a 'delocalized' procedural framework, governed exclusively by public international law. In ICSID arbitration, the arbitration law of the seat (or* lex arbitri*) plays no role and national courts have no jurisdiction in aid or control of the arbitration. In other words, the 'self-contained' process which States designed under the ICSID Convention is geared towards making arbitration independent of domestic courts."*[580]

679 The treaty obligation to observe the system's exclusivity is on all ICSID member states. In particular, it is incumbent on an ICSID member state involved in an investment dispute. Steps taken in circumvention of the ICSID Convention's exclusivity rule bring about the relevant state's international responsibility.

680 Specifically for this situation, the late Professor Pierre Lalive noted that

> "*parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general not allow any step of any kind to be taken which might aggravate or extend the dispute*"[581].

681 As Claimants have already pointed out in their letter of 27 May 2021, Respondent's initiation of the German Proceedings is in grave violation of its obligations under the ICSID Convention. The ICSID Convention's Article 41(1) makes it particularly clear that this "*Tribunal shall be the judge of its own competence*." This Tribunal's *Kompetenz-Kompetenz* is at the core of what the exclusivity rules seeks to protect.

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[579] **Exhibit CL-0136**: Charles N. Brower and Ronald E.M. Goodman, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6(2) ICSID Review 431 (1991) , 436.

[580] **Exhibit CL-0137**: Gabrielle Kaufmann-Kohler and Michele Potestà, Investor-State Dispute Settlement and National Courts (2020), p. 55.

[581] **Exhibit CL-0138**: Pierre Lalive, The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Prob-lems 51(1) British YB Int'l. Law 123 (1981), p. 134.

682 Respondent – as a prominent supporter of the international investment treaty regime and ICSID as a dispute resolution forum as well as advised by one of its country's most reputable law firms in this case – is well aware of this legal situation. It further had been in receipt of Claimants' Request for Arbitration for almost four months when initiating the German Proceedings. In willful disregard of this Tribunal's authority, and openly admitting so in its letter of 21 May 2021[582], it seeks a determination on jurisdiction in another forum, i.e. before German courts.

683 Whether or not Respondent will ultimately "*diligently take part in the present proceedings before ICSID while the proceedings in Germany are pending*", as it claims in said letter, is irrelevant to its obligations under the ICSID Convention. The mere initiation of the German Proceedings as such, irrespective of their outcome and irrespective of Respondent's procedural conduct in the present arbitration, engages its international responsibility. Respondent violated the ICSID Convention by filing the German Proceedings.

II. Claimants are entitled to declaratory relief, an order of cessation as well as compensation for the consequences of Respondent's violation of ICSID's exclusivity rule

684 A state that commits an international wrongful act is under an immediate obligation of cessation under customary international law. As Article 30 of the ILC restates:

> The State responsible for the internationally wrongful act is under an obligation:
>
> (a) to cease that act, if it is continuing;
>
> (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

685 Claimants are, therefore, entitled to declaratory relief and an order by this Tribunal that Respondent violated the exclusivity of ICSID arbitration and must consequently cease its wrongful conduct by withdrawing its petition. Should the German Proceedings already have

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[582] To recall, Respondent stated in that letter that it seeks to "obtain a decision from the courts in RWE's home jurisdiction on the validity of an arbitration agreement which RWE alleges exists between it and the Netherlands by virtue of Article 26 of the Energy Charter Treaty, and that is said to be the basis for these proceedings before ICSID." See Respondent's letter to ICSID of 21 May 2021, p. 1.

come to an end at the time of the Tribunal's decision, Claimants are still entitled to declaratory relief.

686 Independently from the above, Claimants are entitled to compensation for the consequences of Respondent's violation of the ICSID Convention through the initiation of the German Proceedings. Illegal conduct requires reparation. In line with the *Chórzow Factory* formula, "*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*."[583]

687 Respondent must therefore compensate Claimants for any and all of their costs associated with the German Proceedings, including, in particular, Claimants' litigation costs.

688 Also in this regard, the outcome of the domestic litigation is entirely irrelevant. The duty to compensate is triggered by Respondent's illegal conduct in the initiation of the German Proceedings. Whether or not these are successful under German domestic law cannot render their initiation lawful under international law. It equally cannot exonerate Respondent from its secondary obligations under the law of state responsibility.

583 **Exhibit CL-0091**: Factory at Chórzow (Merits), 1928 PCIJ Series A No 17, p. 47.

G. PRAYERS FOR RELIEF

689 Claimants respectfully request the Tribunal to

(A) DECLARE that the Kingdom of the Netherlands has breached its obligations towards Claimants under Part III of the Energy Charter Treaty;

(B) ORDER the Kingdom of the Netherlands to pay to RWE Eemshaven Holding II B.V. – alternatively, to RWE AG and RWE Eemshaven Holding II BV as joint creditors – damages in the amount of [redacted], together with interest thereon as from 9 October 2017 until the date of full payment, at a rate corresponding to the 12-month EURIBOR rate plus 2 percentage points and compounded annually;

(C) (1.) DECLARE that the Kingdom of the Netherlands has violated the ICSID Convention by initiating the German court proceedings currently pending under docket number 19 Sch 15/21 before the Higher Regional Court of Cologne;

(2.) ORDER the Kingdom of the Netherlands to withdraw its petition currently pending under docket number 19 Sch 15/21 before the Higher Regional Court of Cologne; and

(3.) ORDER the Kingdom of the Netherlands to compensate Claimants for their damages suffered as a result of this violation, in particular Claimants' litigation costs including but not limited to attorneys and experts fees;

(D) DECLARE that the Kingdom of the Netherlands shall compensate Claimants for any and all tax that may be levied on any of the Claimants by German or Dutch tax authorities as a consequence of any damages being awarded by the Tribunal to any of the Claimants; and

(E) ORDER the Kingdom of the Netherlands to compensate Claimants for their costs of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone to bear all costs for the arbitration, including compensation, fees and costs of the Tribunal and ICSID.

Claimants reserve the right to subsequently amend or supplement the relief sought in this arbitration.

Hamburg, 18 December 2021

Luther Rechtsanwaltsgesellschaft mbH