DE BRAUW
BLACKSTONE
WESTBROEK

ICSID
Case number: ARB/21/4
Date: 5 September 2022

RESPONDENT'S COUNTER-MEMORIAL

in the matter of:

RWE AG,

RWE EEMSHAVEN HOLDING II B.V.,

Claimants,
Counsel: Luther Rechtsanwaltsgesellschaft mbH

against:

THE KINGDOM OF THE NETHERLANDS,

Respondent,
Counsel: De Brauw Blackstone Westbroek N.V.

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1 INTRODUCTION

1. The Kingdom of the Netherlands ("**the Netherlands**") submits this Counter-Memorial in response to the Memorial of 18 December 2021 submitted by RWE AG and RWE Eemshaven Holding II B.V. (jointly referred to as "**RWE**" or "**Claimants**").

2. For the reasons set forth in this Counter-Memorial, the Netherlands respectfully submits that the Tribunal lacks jurisdiction over the dispute, that RWE's claims are inadmissible and that RWE's claims are without merit and should be dismissed.

3. In this brief Introduction, the Netherlands sets out in an executive summary what in its submission constitutes the core of the case (**Section 1.1**), describes the structure of the Memorial (**Section 1.2**) and presents the materials accompanying its submission (**Section 1.3**).

1.1 Core of the case

4. RWE operates a coal plant in Eemshaven, the Netherlands. According to RWE, it made the decision to invest in the Eemshaven plant ("**Eemshaven**") in 2009. Eemshaven started operations in 2015.

5. On 20 December 2019, the Netherlands enacted the Act on prohibition of coal for electricity production (the "**Coal Act**"), which precludes the use of coal to generate electricity. The Coal Act provides that newer coal plants, such as Eemshaven, can no longer produce electricity by burning coal as of 2030.[1] Such plants were thus granted a transitional period of ten years to transition to alternative use, such as biomass-fuelled electricity generation, while being permitted to burn coal until 2030. After 2030, such plants may use alternative fuels or be converted to other use. Moreover, the Coal Act provides a ground to offer compensation to an individual coal plant operator in case the Act would place an excessive and individual burden on that operator. To date, no requests for compensation by Claimants have been submitted invoking this ground.

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[1] For older plants with lower efficiency than Eemshaven, earlier dates are set.

6. Instead, RWE initiated this arbitration against the Netherlands. It argues that through the enactment of the Coal Act, the Netherlands has violated Articles 10 and 13 of the Energy Charter Treaty (the "**ECT**"). On this basis, RWE claims damages amounting to EUR [redacted] plus interest.[2]

7. As explained in this Counter-Memorial, this Tribunal does not have jurisdiction, RWE's claims are inadmissible, and they are without merit. The Coal Act does not constitute a breach of the ECT. Rather, it is a legitimate exercise of the Netherlands' right to regulate in the public interest to curb global warming.

8. In **Sub-section 1.1.1** below, the Netherlands provides an executive summary of this Counter-Memorial, setting out why RWE's claims cannot be awarded. In **Section 1.1.2**, the Netherlands describes the factual background of the debate at hand.

1.1.1 Executive summary

9. Global warming is an urgent challenge, perhaps one of the most urgent global challenges, of current times. There is international consensus – notably in the Paris Agreement of 2015 – that, in order to avoid the most severe consequences of global warming, the increase of the Earth's average temperature should be kept to well below 2ºC compared to the average temperature in pre-industrial times, and preferably be limited to 1.5ºC[3] – a target that can only still be met if immediate and effective action is taken. This is not in dispute.

10. Global warming is primarily caused by the emission of greenhouse gases, in particular carbon dioxide ("**CO2**"). In the Netherlands CO2 emissions are in large part attributable to electricity production: in 2016, 56.4 million tonnes of CO2-equivalents were emitted by the electricity production sector, out of total emissions of 197 million

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2 Memorial, para. 19.

3 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Article 2(a); **Exhibit R-0016**, IPCC, Climate Change 2021: The Physical Science Basis, 07 August 2021, p. 10 (pdf).

tonnes.[4] Within the electricity production sector, coal-fired power plants are by far the largest source of CO2 emissions. RWE has consistently been one of the largest emitters of CO2 in the Netherlands since it opened Eemshaven.[5]

11. Limiting global warming to 1.5ºC requires that by 2030 CO2 emissions have been reduced by 50% compared to 1990 levels and that by 2050 emissions amount to net zero.[6] It also requires that by 2030 electricity no longer be produced from the burning of coal.[7]

12. Several countries, such as the United Kingdom, France and Germany, have announced or executed coal phase-out schemes. Similarly, the Netherlands enacted the Coal Act in 2019 to realise its ambition of reducing CO2 emissions by 49% by 2030 (as compared to 1990) and to meet the goal of limiting global warming to 1.5ºC as set by the Paris Agreement.

13. There is no dispute that the Coal Act serves its intended purpose. Claimants "*do not by any means question the coal phase-out*".[8] There is equally no dispute that the Coal Act was adopted in accordance with due process, and that it is non-discriminatory.[9]

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4 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 2 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

5 See for example: **Exhibit R-0018-EN**, Dutch Emissions Authority, Report 'Progress emissions trading 2018', 10 September 2018, p. 13 (**Exhibit R-0018-NL**, Dutch Emissions Authority, Report 'Progress emissions trading 2018', 10 September 2018; **Exhibit R-0019-EN**, NOS.nl, 'Ten companies emit large part of entire Dutch business industry', 27 November 2018 (**Exhibit R-0019-NL**, NOS.nl, 'Ten companies emit large part of entire Dutch business industry', 27 November 2018); **Exhibit R-0020-EN**, Dutch Emissions Authority, Report 'Progress emissions trading 2019', 11 September 2019, pp. 13-14 (**Exhibit R-0020-NL**, Dutch Emissions Authority, Report 'Progress emissions trading 2019', 11 September 2019); **Exhibit R-0021-EN**, Nu.nl, 'These were the largest emitters in the Netherlands in 2021', 20 April 2022 (**Exhibit R-0021-NL**, Nu.nl, 'These were the largest emitters in the Netherlands in 2021', 20 April 2022).

6 **Exhibit R-0022**, DW, 'IPCC: World must halve emissions by 2030', 04 April 2022, pp. 1-2.

7 **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, Executive Summary, p. VI.

8 **Exhibit R-0024**, RWE Press Release: 'RWE Expressly Supports Dutch CO2 Reduction Targets', 11 February 2021.

9 Memorial, para. 21.

14. Rather, Claimants claim that they should be compensated for the fact that, by 2030, their plant can no longer use coal for electricity production so as to achieve the necessary CO2 emission reductions.

15. In support of this claim, Claimants argue that the Netherlands "*actively tried to convince investors to build* [coal] *power plants*",[10] triggering Claimants to invest in Eemshaven.[11] They further assert that, once built, these plants' "*CO2 emissions would be regulated exclusively by the European Union's emissions trading system (ETS)*",[12] and that the Netherlands subsequently implemented "*a radical and unexpected change of government policy*",[13] as a result of which Eemshaven "*may not do what it was built and permitted for*": firing coal.[14]

16. Claimants submit that accordingly, the Netherlands has breached Articles 13 and 10 ECT by "*unreasonably interfering with Claimants' investments*", "*indirectly expropriating Claimants' investments*", "*failing to observe obligations entered into with Claimants' investments*", "*not treating Claimants' investments fairly and equitably*" and "*failing to provide most constant protection and security to Claimants' investments*".[15]

17. The Netherlands respectfully submits that the Tribunal has no jurisdiction over the claims and that the claims are inadmissible. Moreover, Claimants' allegations are not reconcilable with the facts and are without legal merit.

18. Claimants' claims presuppose that Claimants have a compensable right to continue to emit CO2 from the burning of coal from 2030 until the end of Eemshaven's technical life, in 2054. Such right does not exist. The Netherlands summarises the main grounds for dismissal of Claimants' claims below.

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10 Memorial, para. 8.
11 Memorial, para. 9.
12 Memorial, para. 9, Emissions trading system ("**ETS**").
13 Memorial, para. 10.
14 Memorial, paras. 14-15.
15 Memorial, para. 18.

19. First, the Netherlands respectfully submits that the Tribunal lacks jurisdiction over the dispute and that Claimants' claims are, in any event, inadmissible.

20. The Tribunal lacks jurisdiction over the claims, because they are intra-EU claims. The consent to arbitration pursuant to Article 26(2)(c) ECT is not applicable to disputes between an European Union ("**EU**") Member State (the Netherlands) and EU investors (Claimants).

21. Moreover, Claimants' claims are not ripe for adjudication and therefore inadmissible. An examination of Claimants' claims requires speculation about economic, market and regulatory conditions from 2030 and beyond. Such an exercise would be undertaken not just to assess the extent of any alleged loss, but to assess whether Claimants have any basis to allege violations of the ECT. For instance, Claimants allege that they have today been substantially deprived of their investment – not because of any harm that Eemshaven has suffered today (or even during this arbitration), but because of (potential) harm that Claimants say Eemshaven will for the first time suffer from 2030 onwards. The same applies to Claimants' other allegations.

22. Claimants thus make the Netherlands' compliance or non-compliance with the ECT contingent on assumptions about circumstances that will first materialise in 2030, years after this arbitration has concluded. The Netherlands respectfully submits that such an exercise in speculation is not permissible or admissible. If Claimants have actually suffered harm after 2030, they may seek to commence proceedings then, at a time that an assessment can be made based on fact rather than assumption.

23. Second, the Coal Act is a valid exercise of the Netherlands' right to regulate. The Netherlands has a right to regulate in the public interest, particularly where that public interest is to avoid the most severe consequences of climate change – which, as Claimants agree, is the purpose of the Coal Act. That right has not been restricted under the ECT. The ECT recognises in its preamble the "*increasingly urgent need for measures to protect the environment*",[16] recalls in this context

[16] **Exhibit CL-0002**, Energy Charter Treaty, Preamble.

the United Nations Framework Convention on Climate Change ("**UNFCCC**", of which the Paris Agreement is an implementation), and stipulates in Article 19 ECT that *"the polluter* […] *should, in principle, bear the cost of pollution*".[17]

24. Third, Claimants' assertion that the Netherlands has indirectly expropriated Eemshaven without paying compensation is without any merit.[18] An expropriation requires the formal taking of an investment or measures that totally or substantially deprive the investment of its value.[19] Claimants agree that they are and will remain in ownership of Eemshaven following the adoption of the Coal Act and that therefore "*it is evident that no formal expropriation has taken place*".[20]

25. There is no total or substantial deprivation of the value of Eemshaven either. Claimants may continue to burn coal in Eemshaven for more than a decade after the adoption of the Coal Act without any restriction. The Coal Act has not had and will have no impact at all on Eemshaven's ability to generate cash flows and value for Claimants until 2030. This in itself excludes that the investment was deprived of substantially all of its value.

26. Moreover, after 2030 Claimants may freely continue to run Eemshaven on any fuel of their choosing other than coal, including biomass, meaning that Eemshaven can continue to generate value for Claimants after 2030 as well. Claimants' assertions that Eemshaven cannot be run profitably after 2030 on any fuel other than coal is without basis.[21] Eemshaven is currently already permitted to burn up to 30% biomass[22] and Claimants have successfully converted their other coal plant in the Netherlands – the Amer plant, in respect of which Claimants raise no complaints in this arbitration[23] – to run for 80% on biomass.

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17 **Exhibit CL-0002**, Energy Charter Treaty, Article 19.
18 Memorial, para. 18, second dash.
19 This is not in dispute. See Memorial, para. 458.
20 Memorial, para. 456.
21 Memorial, para. 18, second dash.
22 Memorial, para. 48.
23 Memorial, para. 251.

27. Additionally, Claimants consistently declared well before the Coal Act that they want to convert Eemshaven to fire 100% biomass by 2030 (i.e., before the plant would be precluded from burning coal). In July 2017 it was announced that "*RWE wants to run the plant in Eemshaven entirely on biomass*". [24] In January 2018 Claimants announced that "*before 2030 we want to burn* [Eemshaven] *on biomass for 100 percent"*,[25] and in October 2018 Claimants again confirmed that their "*goal is to run on 100% biomass by 2030*".[26] Claimants continued to make such declarations and to take steps to realise such conversion after it was clear that biomass-fuelled energy generation would no longer be subsidised.

28. Moreover, Claimants' experts' modelling – even assuming it is correct (which the Netherlands rejects) – shows that in a majority of situations where coal can be burnt profitably beyond 2030, biomass is also profitable. This is leaving aside other alternative fuels, in respect of which Claimants have not in any way showed that they cannot be profitable from 2030 onwards.

29. Consequently, contrary to Claimants' allegations, Eemshaven continues to have significant value. Claimants were not substantially deprived of the value of their investment such as to amount to an expropriation under Article 13 ECT.

30. Fourth, the Coal Act is consistent with the Netherlands' long-standing policy.

31. The need to achieve CO2 emission reductions to curb climate change has been prominent on the global agenda since 1992 when the UNFCCC was adopted. The Netherlands – which is among the first signatories of the UNFCCC – had a corresponding policy of ensuring

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24 **Exhibit R-0025-EN**, Eemskrant, 'RWE Wants to Run Plant in Eemshaven Entirely on Biomass', 01 July 2017 (**Exhibit R-0025-NL**, Eemskrant, 'RWE Wants to Run Plant in Eemshaven Entirely on Biomass', 01 July 2017).

25 **Exhibit R-0026-EN**, Article AD.nl 'Coal plant owners want to get rid of coal', 05 January 2018 (**Exhibit R-0026-NL**, Article AD.nl 'Coal plant owners want to get rid of coal', 05 January 2018).

26 **Exhibit R-0027-EN**, Agro & Chemie, 'Key role Eemshaven plant in the energy transition', 05 October 2018 (**Exhibit R-0027-NL**, Agro & Chemie, 'Key role Eemshaven plant in the energy transition', 05 October 2018).

that "*as little CO2 is emitted as possible*",[27] and that eventually "*no CO2 is released in the atmosphere*" [28] from fossil-fuel electricity production (2002).

32. From 1999 onwards, the Netherlands made clear that coal plants would need to significantly reduce CO2 emissions in order to have a future. This applied also to new coal plants, such as RWE's Eemshaven. Any such new coal plants would need to "*fit within the environmental policy of this government*"[29] (2004). Coal as a fuel for electricity production "*will only be used under the condition that it does not interfere the realisation of the CO2 emission agreements*" [30] (2005). The Netherlands also put developers of new coal plants on notice that "*it* [was] *impossible to guarantee that there will be no subsequent tightening of emission requirements*"[31]in the future (2005).

33. Moreover, the Netherlands emphasised at several points in time – including in the permit that was issued for the construction of Eemshaven – that CO2 emissions of coal plants would eventually have to be captured and stored ("**CCS**"): "*coal-fired plants will ultimately only be acceptable through* […] *the application of CO2 capture and underground storage*"[32] (2007). This was because "*in time, the CO2 emissions from coal-fired power plants are* […] *not compatible with the climate ambitions of Europe and of this government*"[33] (2007) – as was also stated in the permit issued for Eemshaven. Accordingly, the Netherlands' policy was that the

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27 **Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003, p. 19 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

28 **Exhibit R-0029-EN**, Energy Report 2002, p. 46 (**Exhibit R-0029-NL**, Energy Report 2002).

29 **Exhibit C-0038**, Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions asked by members of Parliament and answers given by the government.

30 **Exhibit R-0030-EN**, Energy Report 2005, p. 10 (**Exhibit R-0030-NL**, Energy Report 2005).

31 **Exhibit C-0039**, Energy Report 2005, Now for Later, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

32 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

33 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

application of CCS at coal plants was "*essential*"[34] to achieve CO2 emission reduction goals (2008).

34. As set out in an agreement concluded with the energy sector in 2008, energy producers were expected – among other measures – to reduce their CO2 emissions "*very substantially from 2015 onwards*"[35] and to make "*large-scale investment*" [36] in CCS. Energy producers were expected to demonstrate the application of CCS at sufficiently large scale by 2015, such that by 2020 CCS would be applied at coal plants on "*large scale*"[37] (2008). In sum, coal plants were "*welcome provided that they take their efforts to compensate for the increase in CO2 emissions seriously*"[38] (2008).

35. Claimants have failed to do so in every respect. After certain initial efforts to launch a CCS demonstration project, Claimants ceased to develop CCS from 2011, while continuing to develop their Eemshaven coal plant. Claimants also did not realise any substantial CO2 emissions reductions from 2015 onwards. By the time the Coal Act was adopted in 2019, nothing had materialised of Claimants "*concrete plans to develop a 'zero CO2 emission' plant*"[39] – as Claimants had described Eemshaven to the Netherlands' Prime Minister in 2006.

36. The Coal Act was introduced to curb dangerous climate change following a failure by the energy sector to demonstrate CCS (as was expected of the energy sector when the permits were issued), and in the absence of other meaningful CO2 reduction measures from the energy sector. Far from a radical change of policy, the Coal Act was consistent with the Netherlands' long-standing policy that coal can only be used as a fuel for electricity production if it does not interfere

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34 **Exhibit C-0009 EN**, 2008 Energy Report, p. 85 (**Exhibit R-0032-NL**, Energy Report 2008).

35 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

36 , preamble: "*The energy sector is going to make large-scale investments in sustainable energy and **the capture and storage of CO2***." (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

37 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.2.1 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

38 **Exhibit C-0009 EN**, 2008 Energy Report, p. 86 (**Exhibit R-0032-NL**, Energy Report 2008).

39 **Exhibit R-0034-EN**, RWE's letter to the Prime Minister, 22 March 2007 (**Exhibit R-0034-NL**, RWE's letter to the Prime Minister, 22 March 2007).

with the realisation of CO2 reduction targets, and that the application of CCS in coal plants is essential to achieve those reduction targets.

37. Fifth, the Coal Act does not violate any legitimate expectations within the meaning of Article 10(1) ECT.[40] Legitimate expectations under the ECT can only arise from specific commitments made to the investor. The Netherlands did not enter into any specific commitment towards Claimants, let alone a specific commitment to the effect that Claimants could unabatedly emit CO2 from the burning of coal for the entire lifetime of their plant (which according to Claimants would mean until 2054). Claimants do not refer to any such commitment either.

38. The environmental permit that was issued to Claimants is certainly not such a commitment. To the contrary, that permit notes that "*in time, the CO2 emissions from coal-fired power plants are* […] *not compatible with the climate ambitions of Europe and of this government"*[41] and that "*coal-fired plants will ultimately only be acceptable through* […] *the application of CO2 capture and underground storage"*.[42] Far from suggesting that Claimants could unabatedly emit CO2 from coal, the permit rather expressly notes that doing so will in time not be acceptable, certainly not if there is no prospect of CCS being applied.

39. The alleged "*political promises*"[43] and "*representations*"[44] to which Claimants refer are without basis. They are in any event not specific

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40 Memorial, para. 18, fourth dash. In the same vein, the Coal Act did not constitute a violation of the obligation to provide most constant protection and security, contrary to what Claimants allege: Memorial, para. 18, fifth dash. Such protection does not cover legal security, so Claimants' allegations fall flat for that reason alone, but even if it did, the Coal Act is clearly not a "*dismantling*" of the legal framework for Claimants' investment.

41 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

42 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

43 Memorial, para. 485.

44 Memorial, para. 531.

commitments that Claimants could unabatedly emit CO2 from the burning of coal for the entire lifetime of Eemshaven:

- Claimants allege that the Netherlands "*confirmed*" to them that "*the CO2 emissions of coal plants would be governed only by the ETS*", i.e., the EU's emission trading system.[45] This was not confirmed to Claimants. The contrary was communicated. For instance, in 2007 the Netherlands summarised its policy as follows: "*The government makes agreements with operators of new coal plants for the currently envisaged new coal plants for a best efforts obligation* ***in addition to the ETS****. From 2015 onwards, very substantial CO2 reductions need to have been achieved* […]".[46] Similarly, the Netherlands noted that "[i]*n the EU-context*" ETS is the most important instrument to achieve sustainability of energy supply, but that "*for the Netherlands, the Government adopts* ***in addition*** *a large number of policy instruments*" (2008).[47]

- It is also inconceivable that the Netherlands – which has independent obligations to reduce emissions under the UNFCCC and other treaties – would have relied exclusively on an EU policy over which it has limited control to meet those obligations. Indeed, since the 1990s the Netherlands has adopted and executed its own policy to reduce CO2 emissions that is more encompassing than merely relying on the EU-controlled ETS.

- The fact that Claimants allege in this arbitration that they had obligations only under the ETS further confirms that Claimants did not take their obligations to significantly reduce CO2 emissions and to develop CCS seriously.

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45 Memorial, para. 531.

46 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

47 **Exhibit C-0009 EN**, 2008 Energy Report, p. 86 (**Exhibit R-0032-NL**, Energy Report 2008).

- Claimants further refer to the provision in the 2008 Sector Agreement that "[i]*n shaping government policy, the national government will not focus on measures that compulsorily determine the number or type of (coal) power stations*".[48] The Netherlands complied with this provision. The 2008 Sector Agreement was agreed to expire in 2020, when CCS was expected to be applied at coal plants. The Coal Act takes effect for Eemshaven only a decade later, in 2030. That the 2008 Sector Agreement did not extend beyond 2020 confirmed that after that date the Netherlands was at liberty to focus on measures that determined the number or type of power plants, certainly in circumstances where CCS had not at all been developed.

- Claimants allege that the Netherlands "*openly advocated*" the construction of new coal-fired plants.[49] This is incorrect. For instance, in 2008 (shortly before Claimants took their alleged investment decision) the Netherlands made clear that its policy was that "*none"* of the different types of energy production – whether coal, nuclear or gas – is "*by definition better than any other*" (2008).[50] The Netherlands noted on the same occasion that when coal is used, the development of CCS is "*essential*"[51] to reduce CO2 emissions. Similarly, in the environmental permit for Eemshaven (2009) it was noted that "*the Minister indicated that she did not have the option of blocking the granting of permits*"[52] – hardly an endorsement of, let alone open advocacy for, coal.

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48 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.1 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

49 Memorial, para. 531.

50 **Exhibit R-0032-EN**, Energy Report 2008, p. 85 (**Exhibit R-0032-NL**, Energy Report 2008).

51 **Exhibit C-0009 EN**, 2008 Energy Report, p. 85 (**Exhibit R-0032-NL**, Energy Report 2008).

52 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 50 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

- The Netherlands' policy was that coal was permitted, provided it fit within environmental policies. Coal was not preferred over other forms of energy production, nor advocated.

40. Claimants further allege that the Netherlands "*actively tried to convince investors to build* [coal-fired] *power plants*".[53] This is again incorrect. The Netherlands did not approach Claimants, certainly not in an effort to 'convince' them to build a coal plant. Nor did the Netherlands approach other energy companies to convince them to invest. To the contrary, it was Claimants that approached the Netherlands (in this case: the regional authorities of Groningen) for the first time in April 2006.[54]

41. Moreover, the Netherlands never offered any inducement to Claimants or any other energy company to invest. No legislation or regulation was adopted or amended to incentivise Claimants' investment (or any other investment in coal) – certainly not any legislative or regulatory guarantee of stability, and Claimants rightly do not allege the existence of any such guarantee. Claimants invested because they believed that the Netherlands was an interesting investment opportunity, not because the Netherlands had convinced or induced them to do so.

42. Sixth, the Coal Act is reasonable and not arbitrary within the meaning of Article 10(1) ECT.[55] Claimants are among the largest emitters of CO2 in the Netherlands. The use of coal must be phased out by 2030 to comply with CO2 emission reduction goals, including the need to keep global warming well below 2ºC. Claimants agree that with the Coal Act the Netherlands "*pursued a rational policy objective*", namely "*CO2-reduction*".[56] The Coal Act is a necessary act that does not go further than what is needed to achieve these internationally recognised (and binding) norms.

43. The Coal Act was also adopted with due regard to the interests of investors Under the Coal Act. Claimants can unrestrictedly operate

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53 Memorial, para. 21.

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

55 Memorial, para. 18, first dash.

56 Memorial, para. 431.

Eemshaven until 2030 – the very last moment that coal-fuelled energy generation in the EU is still environmentally responsible – and from 2030 can operate it on an alternative fuel of their choosing other than coal.

44. Eemshaven was designed and permitted to fire not just coal, but also alternative fuels such as biomass. Indeed, when they announced their intention to build Eemshaven, Claimants described the plant to the Netherlands as a "*biomass / coal plant*".[57] As noted, Eemshaven may currently fire up to 30% biomass, and Claimants have repeatedly announced before the adoption of the Coal Act their intention to increase this to 100%. Under the Coal Act Claimants are given ten years to convert to an alternative fuel – two to three times more than the time needed to convert to biomass.

45. Moreover, the phasing out of coal that the Coal Act requires by 2030, is something that Claimants would have undertaken in any event, regardless of the Coal Act. In September 2019 – before the adoption of the Coal Act – RWE announced a company-wide "*phasing out of fossil fuels*",[58] such that RWE would be "*a carbon neutral company by 2040*".[59]

46. In early 2020 RWE announced that it would not operate any coal-fired power plant within the EU by 2030 (with the exception of one plant in Germany that would be phased out by 2040). RWE was "*fully supportive of the Paris Climate Agreement*",[60] which requires the phasing out of coal plants by 2030. Asked whether RWE would "*operate coal-fired power plants in other parts of Europe where they have not been phased out*", RWE responded that it would "*definitely not*".[61] Accordingly, Claimants would have phased out coal at Eemshaven by 2030, regardless of the Coal Act. The Coal Act cannot

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57 **Exhibit R-0037-EN**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006 (**Exhibit R-0037-NL**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006).

58 **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019.

59 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 2.

60 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020 , p. 14.

61 See **Exhibit R-0041**, Transcript RWE declarations at ABC 'Climate in the Courtroom Part 2: A fossil fuel company is sued. Now it speaks', 12 July 2020.

be unreasonable for requiring RWE to do what it would have done in any event.

47. Finally, under the polluter pays principle (the "**PPP**") codified in Article 19 ECT and in other international law instruments, Claimants are in principle to bear the environmental costs of their own CO2 emissions or of preventing them. The reasonableness requirement in the ECT is not a means to shift the burden of atmospheric pollution from the polluter to society, in contravention of the polluter pays principle enshrined in the ECT. Accordingly, the Coal Act cannot be unreasonable for potentially imposing on Claimants a part of the costs that are to come for Claimants' account in any event under the polluter pays principle, even assuming such costs are incurred. To the contrary, it would be unreasonable to allow Claimants to evade the responsibility that they have under the ECT to bear the costs of their own pollution.

48. Seventh, Claimants are not entitled to damages.

49. Claimants have not demonstrated a causal link between the Coal Act and their alleged losses. They are claiming compensation for the inability to burn coal from 2030, while their prospects of making a profit from the burning of coal from 2030 are speculative to say the least. Eemshaven had such a poor financial outlook that almost half of RWE's investment in it was written off before it had started operations in 2015. Data from Claimants' experts shows that as of the experts' chosen valuation date, it was [redacted] that Eemshaven would have been forced by market developments (including an increasing CO2 price) to close down before 2030, regardless of the Coal Act.

50. Moreover, even if a causal link is assumed to exist, Claimants' claim for damages is unfounded. It is based on incorrect assumptions and an incorrect and speculative methodology. Even if there were any damages, these are in significant part attributable to Claimants' own conduct, including their failure to reduce CO2 emissions significantly and to develop CCS, as was expected of Claimants when the permit was issued.

51. Eighth, the additional claim (the "**Additional Claim**") is also without merit as the pending proceedings between Claimants and the Netherlands before the Higher Court of Cologne are not in breach of the ICSID Convention.

1.1.2 Factual background

52. The following sections summarise: the relevant international, EU and Dutch policy from the 1990s until RWE's investment decision in 2009 (**Section 1.1.2.1**), RWE's decision to invest in 2009 and its failure to develop CCS (**Section 1.1.2.2**), the Paris Agreement in 2015 (**Section 1.1.2.3**), the adoption of the Coal Act (**Section 1.1.2.4**) and subsequent events (**Section 1.1.2.5**).

1.1.2.1 International, EU and Dutch policy prior to RWE's investment

53. In the 1992 UNFCCC, which had 166 signatories at the time and currently has 198 Parties, the international community expressed its unanimous concern that the Earth is warming up as a result of CO2 emissions. Contracting Parties, including the Netherlands, committed to seek to reduce CO2 emissions to 1990 levels.

54. As scientific understanding of global warming progressed, it became clear that a reduction to 1990 levels was insufficient and that emissions had to be reduced at a higher pace. Under the 1997 Kyoto Protocol, the Netherlands committed to reduce emissions to 6% below 1990 levels, to be achieved by 2012, and to 20% below 1990 levels, to be achieved by 2020. Under the Bali Road Map of 2008, a further reduction target of 25 to 40% below 1990 levels was suggested for developed countries such as the Netherlands, to be achieved by 2020.

55. In accordance with these international and EU targets and commitments, the Netherlands' energy policy since the 1990s has been aimed at achieving CO2 emissions reductions, and specifically within energy production – which is among the Netherlands' largest CO2 emitters.

56. In the late 1990s, the Netherlands developed what would become known as its 'clean fossil' policy. As later explained, that policy sought

to ensure that in the "*conversion of carbon-containing substances into energy* […] *as little CO2 is emitted as possible*".[62]

57. In a public policy note of 1999 the Government set out that fossil fuels could remain part of the energy mix only "*within the conditions of climate policy*".[63] The policy note referred to CCS as a promising option, and a potentially indispensable one. It noted that if CCS were not used, CO2 emissions reductions "*must be achieved by reducing the … carbon intensity of the energy supply*."[64]

58. In 2002 the Netherlands released its Energy Report – a comprehensive statement of its energy policy.[65] In that report it spoke of a "*sense of urgency*" caused by "*CO2 emissions and the applicable reduction targets*".[66] The report noted that climate constraints required that eventually "*no CO2 is released in the atmosphere*" from fossil-fuel electricity production.[67]

59. In a 2003 policy document on security of supply, it was noted that coal plants offer more security of supply than gas-fired power plants. However, it was also noted that any security of supply benefits would not detract from, or be prioritised over, the policy to reduce CO2 emissions. To the contrary: "*extra emissions from new coal-fired*

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62 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19. (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

63 **Exhibit R-0042-EN**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 73 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

64 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

65 Energy Reports are key policy documents which the Minister of Economic Affairs, pursuant to the requirements set in the Electricity Act and the Gas Act, publishes at least once every four years. Effectively, they outline the Government's policy regarding energy provision in the medium to long-term.

66 **Exhibit R-0029-EN**, Energy Report 2002, p. 48 (**Exhibit R-0029-NL**, Energy Report 2002).

67 **Exhibit R-0029-EN**, Energy Report 2002, p. 46 (**Exhibit R-0029-NL**, Energy Report 2002).

power stations must fit within hard national ceilings and the sectoral targets".[68]

60. Similarly, in 2004 the Minister of Economic Affairs remarked that the construction of any new coal plants was premised on "*the condition* […] *that it must fit within the environmental policy of this government*".[69]

61. The subsequent Energy Report of 2005 again noted that coal will only be used as a fuel "*under the condition that it does not interfere the realization of the CO2 emission agreements*."[70] In the same report the Government put developers on notice that "*it* [was] *impossible to guarantee that there will be no subsequent tightening of emission requirements*"[71] in the future. Rather, as noted in April 2006, the Government was "*assuming that the investor will also take into account future developments in national and European energy and environmental policy*".[72]

62. This message was understood by Claimants at the time. In its starting memorandum of April 2006 – submitted by RWE with a view to obtain approvals to construct Eemshaven – RWE recognised that climate policy was continuously developing, as the need for emission reductions had been increasing over time. RWE noted that "*more stringent requirements will be imposed with respect to the emissions*

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68 **Exhibit R-0043-EN**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II 2002/03, 29 023, no. 1, 03 September 2003, p. 11 (**Exhibit R-0043-NL**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II, 2002/03, 29 023, no. 1, 03 September 2003).

69 **Exhibit C-0038**, Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions asked by members of Parliament and answers given by the government.

70 In addition, the report noted that possibly "*a decision on CO2 capture and storage will have to be taken within ten years of the power station becoming operational.*" Moreover, it was noted that "*in time, an interconnection between the use of coal and CO2-caputure and storage will almost certainly be inevitable*." The report also assumed that CCS would be possible in the future: "*In the future it will be possible at coal-fired power plants to capture and safely store CO2 emissions.*"

71 **Exhibit C-0039**, Energy Report 2005, Now for Later, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

72 **Exhibit R-0044-EN**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2014/2015, 30 196, no. 300, 18 March 2015 (**Exhibit R-0045-NL**, Answer from the Minister of Economic Affairs, Acts II 2005/06, no. 1224, p. 2611, 10 April 2006).

of power plants", and that it is important to "*take this, but to the extent possible also future, additional tightening into account*".[73]

63. In its December 2006 application for an environmental permit for Eemshaven, RWE again confirmed that it "*expected social desirability and need of CO2 removal in the long term*".[74] And in a March 2007 letter to the Prime Minister, RWE conveyed that it had "*concrete plans to develop a 'zero CO2 emission' plant*".[75]

64. RWE's environmental permit application for Eemshaven stirred controversy in Dutch society and Parliament. In response, the Minister of Housing, Spatial Planning and the Environment in a letter of June 2007 again clarified the Netherlands' policy that CO2 emissions reductions from coal plants were in time not acceptable. Coal plants would only be acceptable if they applied a combination of reduction measures, including CCS. Among others, the Minister noted:

- "*In time, the CO2 emissions from coal-fired power plants are* […] *not compatible with the climate ambitions of Europe and of this government*".[76]

- "*Coal-fired plants will ultimately only be acceptable through a combination of the highest possible generation efficiency, the use of a substantial proportion of biomass, utilization of released heat and the application of CO2 capture and underground storage*",[77] i.e., CCS.

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73 **Exhibit R-0046-EN**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006, p. 10 (**Exhibit R-0046-NL**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006).

74 **Exhibit R-0047-EN**, Request for environmental permit, 20 December 2006, p. 11 (**Exhibit R-0047-NL**, Request for environmental permit, 20 December 2006).

75 **Exhibit R-0034-EN**, RWE's letter to the Prime Minister, 22 March 2007 (**Exhibit R-0034-NL**, RWE's letter to the Prime Minister, 22 March 2007).

76 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

77 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

65. The June 2007 letter from the Minister of Housing, Spatial Planning and the Environment was deemed of such importance by the permitting authorities, that verbatim citations from the letter (including the citations in para. 64 above) were included in the environmental permit for Eemshaven when it was issued in December 2007. In addition, the permit prescribed that "*the emission of CO2 equivalents must be drastically reduced in the coming years*".[78]

66. Similarly, in August 2007, the Government published the Clean and Efficient Work Programme, which expressed that "*from 2015 onwards, very substantial CO2 reductions need to have been achieved*"[79] by the operators of coal plants.

67. The Energy Report of 2008 similarly noted that new coal plants were "*welcome provided that they take their efforts to compensate for the increase in CO2 emissions seriously*".[80] The report further noted that "*for coal plants, capture and storage of CO2 (CCS) is essential to achieve CO2 emission reductions goals.*"[81]

68. The Sector Agreement of 2008, concluded between the Government and three associations of electricity producers and network operators, prescribed that "*operators of new coal-fired power stations in the Netherlands will have reduced CO2 very substantially from 2015 onwards*".[82]

69. To achieve this, energy producers would – among other measures – make "*large-scale investment*"[83] in CCS. By 2020 CCS would have to

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78 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 61 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

79 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

80 **Exhibit C-0009 EN**, 2008 Energy Report, p. 86 (**Exhibit R-0032-NL**, Energy Report 2008).

81 **Exhibit C-0009 EN**, 2008 Energy Report, p. 85 (**Exhibit R-0032-NL**, Energy Report 2008).

82 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

83 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, preamble: "*The energy sector is going to make large-scale investments in sustainable energy and **the capture and storage of CO2***." (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

be applied at coal plants on "*large scale*".[84] To this end, the energy companies would seek to demonstrate CCS at a sufficiently large scale by 2015, in the form of demonstration projects.

70. RWE was aware of what was expected of it in this regard. In an annex to the Sector Agreement of 2008 entitled "*Investment agenda RWE*", RWE expressed that it "*expected that in 2015* [CO2] *capture could be demonstrated and that around 2020 capture could be applied at sufficiently large scale*".[85]

71. Similarly, in discussions with the Minister of Economic Affairs in June 2008, RWE acknowledged that "*the responsibility for taking the lead* [in CCS] *lies predominantly with the industry.*" [86]

1.1.2.2 RWE's decision to invest in 2009, and its failure to proceed with CCS

72. In March 2009, RWE allegedly decided to invest in Eemshaven. Construction was then expected to be completed by 2013,[87] one year later than initially planned.[88]

73. Around the time of its investment decision, RWE still formed part of a partnership between public and private parties that was dedicated to realising CCS in the North of the Netherlands.

74. In its Action Plan of February 2009[89] the partnership had identified feasible on-shore and off-shore locations for the storage of CO2 emitted by Eemshaven, in either case in empty gas fields. Because on-shore storage was marginally cheaper, the partnership focused initially on on-shore storage. However, after it became clear in

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84 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.2.1 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

85 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Appendix 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

86 **Exhibit R-0048-EN**, RWE's email to M. Frequin, 05 March 2008 (**Exhibit R-0048-NL**, RWE's email to M. Frequin, 05 March 2008).

87 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 19 (pdf).

88 **Exhibit R-0049**, RWE, 2006 Annual Report, p. 38.

89 **Exhibit R-0050-EN**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

February 2011 that there were objections to on-shore storage from the local population, RWE did not proceed to develop off-shore storage instead.

75. RWE did not develop a demonstration project at any point in the four years thereafter either. The timeline set in the Sector Agreement of 2008 – that CCS would be demonstrated at sufficiently large scale by 2015 – passed without any demonstration project having been realised.

76. Nor was there any other effort on the part of RWE to ensure that from 2015 onwards CO2 emissions would be substantially reduced compared to what was anticipated in 2008, as also prescribed in the Sector Agreement of 2008. Other energy producers also did not follow through and abandoned their subsidised CCS project in 2017.

77. RWE did proceed with the construction of Eemshaven, which was completed in 2015, three years later than originally planned.

1.1.2.3 The *Urgenda* judgment, the Paris Agreement and the Coalition Agreement

78. In June 2015, the District Court of The Hague ordered the Government, in legal proceedings commended by public interest party Urgenda, to procure emissions reductions of 25% below 1990 levels by the end of 2020.[90]

79. Following the District Court's decision, Parliament adopted a motion in September 2015 that called on the Government to examine which measures are needed to comply with the *Urgenda* judgment, including a potential closure of coal plants. In a subsequent motion adopted by Parliament in November 2015, the Government was called on to phase out coal plants and to prepare a plan to that effect together with the electricity production sector.

80. In December 2015, the Paris Agreement was adopted. The Paris Agreement requires global warming to remain well below 2ºC and

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90 **Exhibit C-0080**, Rb. Den Haag 24 June 2015, ECLINLRBDHA20157145 (Urgenda), para. 4.31. The order was later upheld by the Court of Appeal of The Hague in October 2018 and by the Supreme Court in December 2019.

preferably below 1.5ºC. These goals require at EU level emission reductions of 55% below 1990 levels, to be achieved by 2030, with a view to achieving net zero carbon emissions by 2050. The Netherlands signed the Paris Agreement in April 2016, along with 170 other States and the EU.

81. In January 2017, the Government reported on a study that it had conducted to comply with the aforementioned motions from Parliament (see para. 79 above). The study identified 29 potential measures, of which only a limited number were deemed legally and practically possible and sufficiently effective to reduce CO2 emissions in the Netherlands. These included a forced closure of coal plants, the withdrawal of permits, or a forced conversion of coal plants to biomass.

82. In February 2017, the policy institute Climate Analytics issued a report according to which, based on all available scientific evidence, all remaining unabated coal-fired power plants in the EU should be phased out by 2030 to keep global warming below 2ºC and in line with commitments under the Paris Agreement.[91]

83. The Coalition Agreement of October 2017, concluded between the political parties that constituted the new government, expressed that it was the Netherlands' duty to meet the Paris Agreement goals. As a measure to achieve this, the Coalition Agreement provided that coal plants would be closed ultimately in 2030, and that the time path would be agreed with the electricity production sector.

1.1.2.4 The Coal Act

84. The Coal Act that was proposed (in 2018) and adopted (in 2019) did not provide for a forced closure of coal plants. Instead, the Government opted for a less far-reaching measure, namely that coal as a fuel can no longer be used for electricity production as of a future date (which, for Eemshaven, is 2030).

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91 **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, Executive Summary, p. VI.

85. The Coal Act was adopted to achieve CO2 emissions reductions so as to meet the Netherlands' obligations under the Paris Agreement. The report by Climate Analytics, which concluded that coal plants in the EU must be phased-out by 2030 to meet the Paris Agreement obligations, is referenced in the Explanatory Memorandum to the Coal Act.

86. The Explanatory Memorandum sets out that the expectation at the time the permits for the coal plants were issued (2009) was that CO2 reductions could be achieved within the short term, including through CCS, and that within 10 years CCS could be implemented at large scale. However, different from what was foreseen at that time, CCS cannot presently be applied as a means to reduce CO2 emissions. Other means to reduce CO2 emissions, as analysed in the study reported on in January 2017, are not sufficiently effective, legally impossible or further-reaching than the Coal Act.

87. The Coal Act does not force the closure of the power plants currently running on coal, let alone their immediate closure. For plants like Eemshaven, the Coal Act only takes effect on 1 January 2030. Up until then, Eemshaven is free to either burn coal and make a profit out of it, plan and effectuate the transition to an alternative fuel, or a combination of both. A conversion to alternative fuels is technically feasible, and RWE itself had announced its intention well before the Coal Act to convert fully to biomass.

88. The Explanatory Memorandum further refers to the PPP. It notes that since the coal plants are causing environmental damage, it is in principle justified that they bear the costs incurred as a result of measures to limit this damage.

89. Finally, the Coal Act provides for a hardship clause that permits operators to request compensation in the event the act imposes an individual, excessive burn on one of the coal plant owners. This safeguard accounts for individual circumstances of any Dutch coal plant.

1.1.2.5 RWE's intention to step out of coal

90. In July 2017, before the Coalition Agreement, RWE had announced that it was planning to convert Eemshaven to fire 100% biomass. In January 2018, RWE confirmed that "*before 2030 we want to burn* [Eemshaven] *on biomass for 100 percent*",[92] and again in October 2018 that the "*goal is to run on 100% biomass by 2030*".[93]

91. In an environmental impact assessment of April 2019, supporting a request for a revision of the existing environmental permit in order to increase the biomass allowance to 30%, RWE again confirmed that it had "*the ultimate goal of 100% production on biomass.*" [94]

92. In September 2019, still before the adoption of the Coal Act, RWE AG went a step further. It announced in a dedicated press conference at group level that it "*will become a carbon neutral company by 2040*", and that it would engage in a company-wide "*responsible phasing out of fossil fuels*".[95]

93. In March 2020, RWE AG announced that it would decommission all of its 23.2 GW coal plants by 2030 (with the exception of one plant in Germany that would be phased out in 2038).[96] RWE also clarified that it was "*stepping out of coal-based power generation*" irrespective of whether coal phase-out legislation had been passed in countries where it operated. [97]

1.2 Structure

94. This Counter-Memorial is structured as follows.

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92 **Exhibit R-0026-EN**, Article AD.nl 'Coal plant owners want to get rid of coal', 05 January 2018 (**Exhibit R-0026-NL**, Article AD.nl 'Coal plant owners want to get rid of coal', 05 January 2018).

93 **Exhibit R-0027-EN**, Agro & Chemie, 'Key role Eemshaven plant in the energy transition', 05 October 2018 (**Exhibit R-0027-NL**, Agro & Chemie, 'Key role Eemshaven plant in the energy transition', 05 October 2018).

94 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. S.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

95 **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019.

96 RWE Presentation, Capital Market Day, 12 March 2020, p. 13.

97 See **Exhibit R-0041**, Transcript RWE declarations at ABC 'Climate in the Courtroom Part 2: A fossil fuel company is sued. Now it speaks', 12 July 2020.

95. Following the introduction presented in this **Chapter 1**, this Counter-Memorial is divided into ten Parts.

Part A – International and EU climate policy (1992-2022)

96. **Chapter 2** describes the climate policy of the international community and the European Union (the "**EU**") from the 1990s to the present day, in particular the consistent and increasingly urgent efforts to reduce CO2 emissions in view of the irreversible climate change that such emissions cause.

Part B – The Netherlands' climate policy prior to the construction of Eemshaven (1998-2009)

97. **Chapter 3** describes the Netherlands' climate policy from the 1990s until RWE's decision to construct Eemshaven in 2009, in particular the consistent target of reducing CO2 emissions. The Netherlands' climate policy focussed in significant part on electricity producers, which are among the largest emitters of CO2 in the country. Special attention was paid to the CO2 emission reduction needed to take place in coal plants, both existing and new. It was made clear to electricity producers, including RWE, that the use of coal in power generation would be incompatible with climate policy in the absence of CO2 emission reduction measures, such as CCS whether or not in combination with the firing of biomass.

Part C – Inception of RWE's Eemshaven project and the first years of its operations (2006-2019)

98. Against the backdrop of the international, EU and Dutch climate policy, **Chapter 4** addresses RWE's decision to construct the Eemshaven coal-fired power plant in 2009. RWE made this decision while being fully aware that Dutch policy required coal plants to reduce CO2 emissions. RWE had made representations that it would reduce CO2 emissions. Further, the decision was made despite the fact that RWE's projections showed that the investment would not be profitable for RWE. RWE subsequently reneged on earlier promises to implement an important project that would develop CCS at Eemshaven, and did not develop CCS at any point thereafter.

Part D – The Netherlands' climate policy during the Eemshaven plant's construction and first years of operation (2009-2019)

99. **Chapter 5** describes the Netherlands' climate policy after RWE's decision to construct Eemshaven in March 2009. This policy continued to emphasise the importance of CO2 emission reduction. Meanwhile, the increasing need for further CO2 emission reductions raised discussions in Parliament about a potential coal phase-out. Subsequently, the Government started investigating possible measures to this effect.

100. **Chapter 6** summarises the Dutch climate policy from the 1990s until the introduction of the Coal Act and its focus on CO2 emission reduction.

101. **Chapter 7** describes that in 2019 the Government submitted a draft bill to the Parliament that would not require coal plants such as the Eemshaven plant to close, but rather precluded the burning of coal to generate electricity. The Coal Act gave the newest coal plants, including Eemshaven, a decade (until 2030) to phase out coal and – at the option of the coal plant operators – convert into a facility that would emit less CO2 than would the firing of coal, while providing for a mechanism that would offer financial compensation in the event of individual hardship. This measure would be an integral part of the Netherlands' target to reduce CO2 emissions by 49% by 2030. The chapter describes the process towards the adoption of the Coal Act in December 2019, its rationale, purpose and effects.

Part E – RWE's evolution into a coal-free energy producer (2017-2030)

102. **Chapter 8** describes that RWE had decided to phase out the use of coal prior to the Coal Act, irrespective of whether coal phase-out legislation had been passed in countries where it operated. This decision was driven by a need to operate in a market where energy companies are required to take responsibility for their own emissions.

103. **Chapter 9** explains that RWE has always intended – and still intends – to fully convert Eemshaven to a 100% biomass plant before 2030. It

repeatedly confirmed this in public declarations and has taken steps to that end, both before and after the Coal Act.

Part F – Other recent developments (2015-2022)

104. Societal changes have resulted in a rise in climate litigation, which has been forcing heavy emitters such as RWE to reconsider their business model, is described in **Chapter 10**.

105. Finally, other events after the Coal Act are briefly addressed in **Chapter 11**, including the Government's statements confirming that biomass subsidies for coal plants will lapse as previously announced, as well as the decision to lift the temporary limitation on coal generation following Russia's invasion of Ukraine.

Part G – ICSID does not have jurisdiction over the dispute and Claimants' claims are inadmissible

106. **Chapter 12** sets out the Netherlands' jurisdictional objection. Article 26 ECT does not contain the Netherlands' consent to submit the present dispute to ICSID. As is clear at least since the Court of Justice of the European Union (the "**CJEU**") issued its *Achmea* judgment, more recently followed by the *Komstroy* and *PL Holdings* judgments, Article 26(2)(c) ECT is not applicable to disputes between an EU Member State (the Netherlands) and an EU investor (Claimants).

107. **Chapter 13** describes that the claims submitted by Claimants are inadmissible. Claimants will not have suffered any losses before the end of this arbitration, while they allege breaches that require the existence of losses. An assessment of Claimants' claims requires unwarranted speculation about exclusively future circumstances.

Part H – The Netherlands had the right to pass the Coal Act

108. As will be explained in **Chapter 14**, the Netherlands has a right to regulate. The ECT recognises this right as a balancing act performed between different interests, including environmental interests. The Coal Act falls within the Netherlands' the right to regulate.

109. **Chapter 15** explains that the Netherlands has not breached Article 13 ECT by enacting the Coal Act. The Coal Act is a valid exercise of the Netherlands' police powers. Moreover, the Coal Act does not constitute a measure having effect equivalent to nationalisation or expropriation.

110. **Chapter 16** explains that the adoption of the Coal Act is also compatible with the requirements of Article 10(1) ECT. By adopting the Coal Act, the Netherlands did not violate that standard: the Netherlands has not defeated legitimate expectations created in order to induce investment and the Coal Act is a reasonable and proportionate measure to address global warming. Moreover, the Netherlands has not breached the umbrella clause or violated the obligation to provide the most constant protection and security.

Part I – Claimants are not entitled to compensation

111. **Chapter 17** sets out that Claimants have not demonstrated a causal link between their alleged losses and the Coal Act. They have not demonstrated that Eemshaven will still be in operation by the time the Coal Act precludes firing coal, nor have they demonstrated that Eemshaven would still fire coal by 2030 rather than having been converted to alternative use.

112. **Chapter 18** explains that Claimants' position on quantum is flawed on several counts. Their damages claim is based on an incorrect valuation date and an inappropriate "But-For" case. The expert report of Dr Serena Hesmondhalgh and Mr Dan Harris of The Brattle Group ("**Brattle**"), on which Claimants rely to support their damages claim, is tainted by a variety of flaws. Resovling these flaws decreases Brattle's damages estimate to nil. Moreover, the principles of mitigation of damages and contributory fault apply. Claimants' claims for interest and a tax gross-up should further be dismissed. Lastly, in light of parallel proceedings pending before a Dutch court, the risk of double recovery should be accounted for in case any damages are awarded.

Part J – The Additional Claim has no merit

113. **Chapter 19** explains that the proceedings between the Claimants and the Respondent which are pending before the Higher Court of Cologne are not in breach of the ICSID Convention.

Request for relief

114. The Netherlands requests that the Tribunal dismisses Claimants' claims on the grounds of lack of jurisdiction, inadmissibility or merits, as applicable. The Netherlands further requests that Claimants be ordered to reimburse the costs incurred by the Netherlands in this arbitration.

Appendix – Important flaws in NERA's analysis

115. Claimants rely on an expert report of Mr Tomas Nikolaus Haug and Mr Bastian Gottschling of NERA Economic Consulting ("**NERA**") to substantiate their claim that a conversion of Eemshaven to biomass would not be economical. As set out in the **Appendix**, this report is flawed: it is based on (i) an irrelevant reference date, (ii) sources that suggest that a conversion to biomass can actually be profitable, (iii) an incorrect estimate of the capital expenditures required for a conversion, and (iv) other incorrect assumptions.

1.3 Materials

116. Together with this Counter-Memorial, the Netherlands submits 264 documentary exhibits R-0001 to R-0264 and 206 legal authorities RL-0001 to RL-0206.

117. Further, the Netherlands submits an expert report by Professor Pablo T. Spiller, Ph.D, and Alan Rozenberg of Compass Lexecon ("**Compass**"), reviewing and commenting on the reports of Brattle and NERA.

PART A: INTERNATIONAL AND EU CLIMATE POLICY (1992-2022)

2 THE FIGHT AGAINST CLIMATE CHANGE AT INTERNATIONAL AND EU LEVELS

118. Before turning to Dutch energy and climate policies, it is useful to look at global and European developments, that largely influenced the development of Dutch policies. Since the 1990s, there has been a growing global awareness that the climate is adversely affected and changed by human activity.[98]

119. The driving force behind climate change is the greenhouse effect. Industrialisation has brought with it substantial emissions of greenhouse gases, particularly CO2, that are changing the composition of the atmosphere at an unprecedented rate. The consequences of climate change are far reaching and diverse: shifting climate zones, rising sea levels, disruptions of biodiversity and extreme weather situations are only a few examples.

120. In the international community there has long been a consensus that the Earth's average temperature should not increase by more than 2°C from the average temperature in pre-industrial times. If the concentration of greenhouse gases in the atmosphere does not rise above 450 parts per million ("**ppm**") by 2100, climate science has indicated that there is a reasonable chance of achieving this objective.

121. In recent years, it has become clear that a safe temperature increase should preferably be limited to 1.5°C, with an associated concentration level of greenhouse gases of no more than 430 ppm in 2100.

122. To keep within the limit of the 1.5°C band, drastic reductions of CO2 emissions are urgently necessary. Last year, the International Panel on Climate Change (the "**IPCC**") noted that in "*2019, atmospheric CO2*

98 **Exhibit RL-0031**, United Nations Framework Convention on Climate Change, 14 June 1992. The United Nationals Framework Convention on Climate Change (UNFCCC) was adopted in 1992. By June 1993, it had been signed by 166 States. It entered into force in March 1994.

concentrations were higher than at any time in at least 2 million years".[99]

123. There is a direct, linear relationship between man-made emissions of greenhouse gases, caused by the burning of fossil fuels, and global warming. As the IPCC has concluded, the increase in CO2 in the atmosphere that has taken place "*since around 1750* [is] *unequivocally caused by human activities*".[100] Electricity generation through the burning of coal, in particular, is one of the largest contributors to CO2 emissions.[101]

124. The current concentration level of greenhouse gases is 401 ppm. The total global space remaining to emit greenhouse gases is referred to as the carbon budget. At present, global CO2 emissions amount to 40 Gt CO2 per year. Accordingly, every year that CO2 emission remain at this level 40 Gt is deducted from the carbon budget. For a 50% chance of warming of 1.5°C, a carbon budget of 580 Gt CO2 was still available from 2017, according to the best estimate. In 2021, more than 120 Gt CO2 has been used and less than 460 Gt CO2 remains. If emissions remain the same, the carbon budget will run out in the foreseeable future.

125. According to the IPCC Report, global CO2 emissions will have to be reduced to (well) below 35 Gt by 2030 to limit the global warming to 1.5˚C. The IPCC Report further points out that half of the models used show that global CO2 emissions need to be reduced to between 25 Gt and 30 Gt by 2030. As a result of these findings, limiting the global warming to 1.5°C would require a net 45% reduction in global CO2 emissions by 2030 (range 40 to 60%) compared 2010, and a net 100% reduction by 2050.

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99 **Exhibit R-0016**, IPCC, Climate Change 2021: The Physical Science Basis, 07 August 2021, p. 10 (pdf).

100 **Exhibit R-0016**, IPCC, Climate Change 2021: The Physical Science Basis, 07 August 2021, p. 6 (pdf).

101 See e.g., **Exhibit R-0052**, International Energy Agency, Global Energy & CO 2 Status Report - The latest trends in energy and emissions in 2018, 01 March 2019, p. 4, from which follows that coal plants are responsible for 30% of CO2 emissions from the energy sector.

126. Climate change is a dynamic and ever more pressing global problem, which has been high on the national and international agenda since the 1990s but was also identified as a major global challenge even before that. On the basis of new scientific insights, climate policy has also been strongly developing since the 1990s. This Chapter describes climate policy at the International and EU level, and the efforts of the international community and the EU to battle climate change, affecting the Netherlands and its climate policy.

127. It first addresses the efforts of the international community in the 1990s, resulting in the adoption of the Rio Declaration on Environment and Development and the United Nations Framework Convention on Climate Change ("**UNFCCC**") in 1992 (**Section 2.1**). The ECT, adopted in 1994, recognises the importance of the environmental protection and international agreements concluded for that purpose (**Section 2.2**).

128. Subsequently, it addresses the adoption of the Kyoto Protocol and the resulting increasingly tightened climate norms (**Section 2.3**), followed by a section on the EU's Emission Trading System and the pioneering role of the EU (**Section 2.4**).

129. **Sections 2.5** to **2.6** will give an account of the main climate policy developments culminating in the Paris Agreement of 2015, followed by a description of the current state of play (**Section 2.7**).

2.1 The international community initiates global action against climate change: the 1992 Rio Declaration and UNFCCC

130. Since 1972, the United Nations has organised an "Earth Summit" every ten years, where world leaders meet and discuss solutions to problems that can only be tackled on a global scale.

131. From a climate perspective, the Earth Summit of 1992, taking place in Rio de Janeiro, Brazil, played a pivotal role and led to two important documents that helped to shape the principles of global climate policy.

132. First, the Earth Summit of 1992 adopted the "Rio Declaration on Environment and Development" (the "**Rio Declaration**"). This

declaration sought to "*protect the integrity of the global environmental and developmental system*."[102]

133. To this end, the Rio Declaration included a series of universal principles for the international community to follow. These emphasised the responsibility of States to protect the environment through legislation, including as a matter of precaution (the 'precautionary principle'). The Rio Declaration also called for the internalization of environmental costs, and the notion that the polluter should in principle bear the costs of pollution (the PPP):

- States have "the responsibility to ensure that activities within their jurisdiction […] do not cause damage to the environment" beyond their jurisdiction (Principle 2);
- States "*shall enact effective environmental legislation*" (Principle 11);
- To protect the environment, "*the precautionary approach shall be widely applied by States*", including that where there are threats of serious damage, a lack of full scientific certainty shall not be used as a reason for postponing measure to prevent environmental degradation (Principle 15); and
- National authorities should promote the "*internalization of environmental costs*", taking into account "*the approach that the polluter should, in principle, bear the cost of pollution*" (Principle 16).[103]

134. Second, a further important milestone of the Earth Summit of 1992 was the adoption of the UNFCCC.[104] The UNFCCC entered into force in March 1994 and has near-universal ratification today.

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102 **Exhibit RL-0032**, Rio Declaration on Environment and Development, 03 August 1992, preamble.

103 **Exhibit RL-0032**, Rio Declaration on Environment and Development, 03 August 1992, Principles 2, 11, 15 and 16.

104 **Exhibit RL-0031**, United Nations Framework Convention on Climate Change, 14 June 1992.

135. The Netherlands signed the UNFCCC in June 1992 and ratified it in December 1993.

136. In the preamble to the UNFCCC, the Contracting Parties express their concern that the Earth is warming up as a result of the greenhouse effect, as caused by CO2 emissions.[105] As a principal obligation, the Contracting Parties commit to undertake measures to mitigate climate change by limiting human-induced CO2 and other greenhouse gas emissions (Article 4(2)(a)). This obligation applies particularly to so-called Annex I countries[106], which expressed the aim to reduce their CO2 emissions to no more than the level that CO2 emissions had in 1990 (Article 4(2)(b)).[107] The Netherlands is listed as an Annex I country.

137. The UNFCCC further established frequent meetings between the Contracting Parties, known as the Conferences of the Parties (the "**COP**"), the relevance of which will be seen in the following Sections.

138. The outcome of the Earth Summit in Rio de Janeiro of 1992 serves as an important reference point, which shaped the subsequent adoption of various climate policies around the globe. From 1992 on, it has no longer been in question that every State is responsible for pursuing an effective climate policy aimed at limiting and reducing CO2 emissions.

2.2 The Energy Charter Treaty enters into force in 1994 and recognises the need for measures to protect the environment

139. The ECT was negotiated and adopted in 1994 against the backdrop of the international environmental response to the climate crisis.[108]

140. The ECT is a multilateral framework for energy cooperation. Its provisions pertain to trade in energy materials, products and equipment (Part II) and investment in the energy sector (Part III).

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105 **Exhibit RL-0031**, United Nations Framework Convention on Climate Change, 14 June 1992, preamble.

106 Developed countries and countries undergoing the process of transition to a market economy, as listed in Annex I to the UNFCCC.

107 **Exhibit RL-0031**, United Nations Framework Convention on Climate Change, 14 June 1992, Article 4(2).

108 **Exhibit CL-0002**, Energy Charter Treaty.

141. The ECT further contains provisions on sustainability, environmental impact assessments, renewable energy, and coordination of energy policy among Contracting Parties.[109]

142. The ECT reflects a balance between the objectives of the ECT negotiators to foster energy cooperation, without jeopardising the equally important environmental objectives. The environmental objects are illustrated in the preamble to the ECT recalls "*the United Nations Framework Convention on Climate Change* [UNFCCC], *the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects*". The preamble also recognises "*the increasingly urgent need for measures to protect the environment* […] *and for internationally-agreed objectives and criteria for these purposes*".[110]

143. This is further recognised in Article 19 ECT, which makes reference to key environmental principles from the Rio Declaration, including the 'precautionary principle' and the PPP. In its chapeau, 19 ECT obliges Contracting Parties, including the Netherlands, to take "*into account its obligations under those international agreements concerning the environment* [and to] *strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle*".[111]

144. Similarly, Article 24(2) ECT expresses that, barring certain exceptions, the provisions of the ECT shall not preclude a Contracting Party from adopting or enforcing measures necessary for the protection of human, animal or plant life or health.[112]

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109 **Exhibit CL-0002**, Energy Charter Treaty, preamble, Articles 19 and 24(2). See also **Exhibit RL-0033**, Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, 17 December 1994, as further detailed in Section 14.3.

110 **Exhibit CL-0002**, Energy Charter Treaty, preamble.

111 **Exhibit CL-0002**, Energy Charter Treaty, Article 19(1).

112 See Sub-section 14.3.4.

145. Notably, when the ECT was adopted in 1994, the treaty's language on environmental protection and energy efficiency was unusual in international investment agreements.[113]

146. The ECT provisions relevant to the present case, including the preamble and Articles 19 and 24, are discussed in detail later in this Counter-Memorial.[114]

2.3 The Kyoto Protocol is adopted in 1997

147. In 1997 the UNFCCC was expanded and reinforced by the Kyoto Protocol, adopted at the third Conference of the Parties to the UNFCCC (COP3). [115] The Kyoto Protocol tightened the emission reductions targets for Annex I countries. To this end, Annex I countries must implement various measures to limit and reduce greenhouse gas emissions.[116]

148. The Netherlands signed the Kyoto Protocol on 29 April 1998 and ratified it in April 2002. In doing so it committed itself to abiding by emission reductions targets for the period 2008 to 2012. Specifically, the Netherlands committed to a 6% emission reductions compared to 1990 levels.[117]

2.4 The EU takes a pioneering and leading role in the climate change battle from 2000

149. Shortly after the adoption of the Kyoto Protocol, in 2000, the Commission of the European Communities (currently the European Commission) presented the "Green Paper on greenhouse gas emissions trading within the European Union" (the "**Green Paper**").[118] The Green Paper successfully launched the discussion on

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113 **Exhibit R-0053**, Anja Ipp, Annette Magnusson and Andrina Kjellgren, 'The Energy Charter Treaty, Climate Change and Clean Energy Transition', Climate Change Counsel, 15 March 2022, p. 27.

114 See Chapters 14.3, 15 and 16.

115 **Exhibit RL-0034**, Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997.

116 The importance of the Kyoto Protocol is recognised by RWE, which notes that "*the Kyoto Protocol gave the* [UNFCCC] *teeth*". Memorial, para. 103.

117 **Exhibit RL-0034**, Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, Annex B.

118 **Exhibit R-0054**, Commision, Green Paper on greenhouse gas emissions trading within the European Union, COM(2000) 87 final, 08 March 2000.

greenhouse gas emissions trading within the European Communities (currently the EU) as a measure to combat climate change.

2.4.1 The Emission Trading System is introduced in 2003

150. In part as a result of the Green Paper, Directive 2003/87/EC (the "**ETS Directive**") was adopted on 13 October 2003, creating the ETS.[119]

151. The ETS is one of the means by which EU Member States can pursue their climate policy, but not the only one.[120] It is aimed at reducing emissions and works on the "cap and trade" principle. The goal is to achieve an EU ceiling on CO2 emissions on the basis of the allocated CO2 emission rights, and to provide an incentive to heavy emitters to reduce their emissions – otherwise they would have to buy additional emission rights, or at least have no surplus to trade.

152. A cap is set on the total amount of greenhouse gases that can be emitted by installations covered by the system. The cap is designed to decrease over time, thus reducing the number of allowances available to installations covered by the ETS.[121]

153. Within the cap, installations buy or receive emissions allowances, which they can trade with one another as needed. The limit on the total number of allowances available ensures that these have a value.

154. The ETS operates in trading phases, each being defined a few years before the beginning of the phase.[122] Over the years, the ETS has undergone several changes. Lessons from previous phases are taken into consideration in the design of the following phase so as to continuously improve the system. It has been shown *inter alia* that the system did not provide sufficient incentives and so more allowances needed to be taken out of the market. The scope of the ETS in terms

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119 **Exhibit RL-0035**, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

120 See also Chapter 3.

121 **Exhibit R-0055**, European Commission, EU ETS Handbook, dated 2015.

122 **Exhibit R-0056**, European Commission, 'Climate Action: EU Emissions Trading System', 20 July 2022.

of geography, sectors and greenhouse gases has broadened and the cap has become increasingly stringent.[123]

155. The first three phases have developed as follows:

- The 1st phase, from 2005 to 2007, was a pilot phase to test the system. The EU Member States had the freedom to decide how many emission allowances to allocate in total. Almost all emission allowances were allocated for free and were based on historic emissions under a system referred to as 'grandfathering'.

- The 2nd phase, from 2008 to 2012, ran concurrent with the first commitment period of the Kyoto Protocol. As a result, the EU imposed a tighter emission cap by reducing the total volume of emission allowances by 6.5% as compared to 2005.

- The 3rd phase, from 2013 to 2020, was shaped by lessons learned from the previous two phases, providing for fewer free allocations of emission allowances, and a greater emphasis on auctioning of emission allowances. This phase also reduced the number of emission allowances available each year.

156. Currently in its 4th phase (from 2021 to 2030), the ETS framework has undergone several revisions to maintain the system's alignment with the overarching EU climate policy objectives.[124] This phase's ETS legislative framework was revised in 2018 to ensure emissions reductions in support of the EU's 2030 emission reduction target and as part of the EU's contribution to the Paris Agreement. The revision focused on *inter alia* strengthening the ETS as an investment driver by increasing the pace of annual cap reduction to 2.2% as of 2021.[125]

157. As of 1 January 2019, the ETS has been supplemented by the Market Stability Reserve (the "**MSR**"), which is intended to dampen price fluctuations of emission allowances: if the number of emission allowances in circulation in a particular year exceeds a certain limit, a

123 **Exhibit R-0055**, European Commission, EU ETS Handbook, dated 2015.
124 **Exhibit BR-66**, European Commission, EU Emissions Trading System (EU ETS).
125 **Exhibit R-0056**, European Commission, 'Climate Action: EU Emissions Trading System', 20 July 2022.

part of the allowances is placed in the MSR in the following year. If there are insufficient allowances in circulation, they can be sold from the MSR. The relevant limits are set by the European Commission.

158. With the entry into force of the 2018 revision of the ETS Directive[126], a cancellation mechanism was also added: from 2023, any allowances in the MSR that exceed the auction volume of the previous year will no longer be valid. This means that the non-auctioned allowances will be destroyed and never come back on the market. This way, the volume of allowances in the MSR is kept limited, and the overall number of allowances is further reduced. Market analysts expect this cancellation mechanism to lead to around 2 billion allowances being cancelled in the 2024 to 2030 period. In other words, the MSR leads to a faster reduction of the number of available allowances and an increase of CO2 price.

159. On 14 July 2021, the European Commission published plans for its Green Deal.[127] As part of this Green Deal, the port transport sector will become part of the ETS, which will, in turn, increase the demand for available rights and, therefore, the price. Furthermore, from 2026 onwards, the number of available ETS rights will further decrease annually by 4.6%, compared to the current aforementioned 2.2 %. Undeniably, this will put more upward pressure on ETS prices.

160. By reducing the number of allowances available on the market, the ETS allows for the rise (and increased profitability) of "*clean, low-carbon technologies*",[128] to the detriment of more polluting ones, up to a point where carbon intense energy sources are no longer profitable and need to be taken out of the market.

161. CO2 emissions within the ETS are finite. The emission ceiling – in the form of available emission rights – will fall at a pace determined from time to time by the European Commission's policy decisions until no more rights are available. The price of emission rights has been on the rise even before the announcement of the Green Deal and will

126 **Exhibit BR-66**, European Commission, EU Emissions Trading System (EU ETS).
127 **Exhibit R-0057**, European Commission, 'A European Green Deal', 20 July 2022.
128 **Exhibit BR-66**, European Commission, EU Emissions Trading System (EU ETS), p. 1.

eventually be so high that the last emission rights available will no longer be used profitably. Once the Fit for 55 legislative package has been implemented, no more rights are expected to be available as of 2040.[129]

162. Above all, the ETS is a policy instrument and not a mere 'market'. While supply and demand determine the price of tradable ETS allowances, the number of tradable allowances is solely dependent on policy choices: the number of available allowances decreases every year, and the share of "expiring" allowances will increase from 2026. The MSR removes allowances from trade. Indeed, the price of ETS allowances also responds to climate policies, especially those of the European Commission.

2.4.2 The EU sets significant emission reduction targets in 2007

163. The ETS is one element of the EU climate policy. Previously, the EU had already adopted Directive 2001/77/EC on the "*promotion of electricity produced from renewable energy sources in the internal electricity market*"[130] that allowed the use of biomass to generate electricity.

164. In January 2007, the European Commission presented two communications relevant to the present case:

- 'Global climate change to 2 degrees Celsius - The way ahead for 2020 and beyond'[131]; and

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129 **Exhibit R-0058**, Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757, 30 June 2022, p. 53. The European Commission has proposed to accelerate the annual reduction of the number of ETS allowances available, from now 2.2% to 4.2% annually. This trajectory can be extrapolated and results in the number of available ETS allowances will be reduced to nil in 2040.

130 **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.

131 **Exhibit R-0059**, Limiting global climate change to 2 degrees Celsius - The way ahead for 2020 and beyond, Communication from the Commission, 10 January 2007.

- 'An Energy Policy for Europe'.[132]

165. In the former, the EU presented its policy views on the (future) climate policy of the EU. Specifically, the European Commission emphasised the importance for the increase in global temperature to not exceed 2°C. In practice, this would require global CO2 emissions to be 50% lower in 2050 than they had been in 1990. Given that emissions have only increased since 1990, developed countries, including the Netherlands, must reduce their emissions by 60% to 80% by 2050. In its communication, the European Commission listed several objectives, such as increasing the share of renewable energy to 20%, and introducing an EU policy in the field of capture and storage of greenhouse gas emissions (also called carbon capture and storage or "**CCS**", described further in Sub-section 3.2.1).

166. In the latter communication, the European Commission elaborated on measures to achieve the EU's sustainability objectives. The European Commission announced that it would present a European Strategic Energy Technology Plan in 2007. This would include that from 2030 on, electricity would be produced as much as possible from sources with low CO2 emissions, and that combustion plants burning fossil fuels – such as coal – would operate with minimal emissions, capturing and storing CO2. It was expected that by 2050, the shift to low carbon would be complete. The European Commission believed that it should be possible to require all new coal-fired power plants to be equipped with CCS by 2020, and that then-existing coal-fired power plants would immediately follow suit.

2.5 The international developments prior to the adoption of the Paris Agreement

Bali

167. In 2007, COP13 took place in Bali, Indonesia, and resulted in the adoption of the 'Bali Road Map'[133], which included the 'Bali Action

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132 **Exhibit R-0060**, An energy policy for Europe, Communication from the Commission, 10 January 2007.

133 **Exhibit R-0061**, Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, 14 March 2008.

Plan'.[134] In these instruments, the participating States reiterated the importance of reducing CO2 emissions.

168. Although no consensus was reached at the conference on emission specific reduction levels, the EU strongly advocated for a reduction of well below half of 2000 levels by 2050, in line with the IPCC's Fourth Assessment Report.[135] For developed countries, the target was to reduce emissions by 25% to 40% by 2020, as compared to 1990 levels.[136] In the final text of the Bali Road Map, it was agreed that "*deep cuts*" in global emissions were necessary. [137]

EERP Regulation

169. On 13 July 2009, the European Parliament and the Council adopted Regulation 663/2009 (the "**EERP Regulation**") establishing a programme to aid economic recovery in the field of energy and climate action. The EERP Regulation called on the EU Member States to propose energy investment projects in three energy sectors, including CCS, which could be financially supported by the EU. The Netherlands nominated ROAD – the Rotterdam Storage and Capture Demonstration project – in the CCS energy sector for this subsidy. The subsidy for this project was granted.

Cancún

170. In 2010, COP16 took place in Cancún, Mexico. During this conference, the "Cancún Agreements" were adopted.[138] Under the Cancún Agreements, Annex I countries urged themselves to collectively

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134 **Exhibit R-0061**, Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, 14 March 2008, Bali Action Plan.

135 The IPPC states that if the Annex I countries want to meet their ultimate reduction targets for 2100, their collective CO2 emissions must be 25% to 40% lower than the 1990 level. **Exhibit R-0062**, Intergovernmental Panel on Climate Change, Climate Change Synthesis Report, 17 November 2007, p. 7.

136 **Exhibit R-0061**, Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, 14 March 2008.

137 **Exhibit R-0061**, Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, 14 March 2008, preamble.

138 **Exhibit RL-0036**, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancun from 29 November to 10 December 2010, 15 March 2011.

achieve the necessary emission reductions targets as identified in the Fourth Assessment Report of the IPCC.

171. Shortly after, in 2011, the EU sought to link its own climate policy to the outcome of the Cancún conference (much like the EU had introduced ETS following adoption of the Kyoto Protocol). In its communication of 8 March 2011, the European Commission presented a "Roadmap for moving to a competitive low-carbon economy in 2050".[139] The Roadmap included the objective of reducing emissions to 25% below 1990 levels by 2020. In 2030, the reduction target was 40% and in 2040, 60%, making it possible to reduce CO2 to 80% to 95% below 1990 levels in 2050. As a point of reference, in 2011, about 16% less CO2 was emitted than in 1990.

Doha

172. At the end of 2012, the first commitment period of the Kyoto Protocol was due to expire. The Doha Amendment to the Kyoto Protocol (the "**Doha Amendment**") was agreed just before the end of that period at COP18, held in Doha, Qatar.[140]

173. Annex B to the Kyoto Protocol set emission reductions targets for the second commitment period, running from 2013 to 2020.[141] In the Doha Amendment, the Netherlands and the EU committed to a 20% reduction in emissions as compared to 1990 levels.[142]

European Union level

174. In line with the abovementioned international efforts, the framework for the EU climate and energy policy was revisited by the European Council in October 2014. The result was a binding target at the EU level to reduce emissions by at least 40% by 2030, as compared to 1990 levels. This target was to be achieved along two paths: (i) a 43% reduction in emissions compared to 2005 for sectors covered by the

139 **Exhibit R-0063**, A Roadmap for Moving to a Competitive Low Carbon Economy in 2050, Communication from the Commission, 08 March 2008.
140 **Exhibit RL-0037**, Doha Amendment to the Kyoto Protocol, 08 December 2012.
141 **Exhibit RL-0037**, Doha Amendment to the Kyoto Protocol, 08 December 2012.
142 **Exhibit RL-0037**, Doha Amendment to the Kyoto Protocol, 08 December 2012.

ETS; and (ii) a 30% reduction in emissions compared to 2005 for other sectors.[143]

2.6 The Paris Agreement is adopted in 2015 and the Glasgow Climate Pact in 2021

175. In 2015, COP21 took place in Paris, France. The most important outcome of the conference was the conclusion of the Paris Agreement (the "**Paris Agreement**"), the first global agreement in which States made legally binding commitments to "*pursue domestic mitigation measures*"[144] and achieve the nationally determined contributions (the "**NDCs**").

176. The Paris Agreement has been ratified by 192 Parties, including the Netherlands and the EU, representing over 98 percent of the world's emissions.[145] This represents a near-universal global consensus on the goals embodied in the Paris Agreement, which are:

- to limit the rise of global average temperature to "well below" 2°C, preferably 1.5°C, above pre-industrial levels[146]; and
- to reach "net zero" carbon emissions by mid-century (i.e., 2050).[147]

177. In line with the UNFCCC, developed countries in particular are urged to "*continue taking the lead*"[148] and adjust their NDCs so as to accelerate their CO2 emission reductions aims and spearhead climate change prevention efforts. To this end, the Paris Agreement foresees the option for the Contracting Parties to regularly update or enhance their NDCs.[149] This is characteristic of the inherent flexibility of climate policy instruments, which adjust in line with developing insights and needs.

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143 **Exhibit R-0064**, Conclusions of the European Council of 23 and 24 October 2014, 24 October 2014.
144 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Articles 4(2)-4(4).
145 **Exhibit R-0065**, Paris Agreement, United Nations Treaty Collection, Status of Treaties, 03 September 2022.
146 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Article 2(1)(a).
147 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Article 4.
148 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Article 4.11.
149 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Article 14.

178. At the EU level, the Paris Agreement was ratified by the EU in October 2016. To achieve its objectives, the EU adopted the 'European Climate Act' in June 2021, the aim of which is having a climate-neutral EU by 2050.[150] To this end, net greenhouse gas emissions must be **at least 55% lower in 2030 than in 1990**. This is a goal that must be pursued collectively by the EU Member States and will require the necessary measures at both the EU and Member State level.

179. More recently, the Glasgow Climate Pact, the result of COP26 in 2021, included an explicit commitment to phase out the use of unabated coal. During the meeting, over 40 countries, including the Netherlands, pledged to move away from coal in the 'Global Coal to Clean Power Transition Statement', published on 2 November 2021.[151]

180. These ambitions fit within the global movement – driven by both policy and market factors and catalysed by the Paris Agreement – towards the removal of coal from the energy mix.[152] In the aftermath of the Paris Agreement, a vast majority of EU countries passed legislation phasing out coal from energy production – by mostly before or around 2030.[153] The United Kingdom, France and Germany have each executed or set into motion phase-out plans.[154] In the same vein, the EU and UK have "*opted to carve-out fossil fuel related investments from investment*

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150 **Exhibit R-0066**, Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), 30 June 2021.

151 **Exhibit R-0067**, Global Coal to Clean Power Transition Statement, 04 November 2021.

152 More than 75% plans for coal-fired plants were scrapped following the Paris Agreement. **Exhibit R-0068**, UNFCCC, 'The End of Coal?', 05 October 2021.

153 **Exhibit R-0069**, Europe Beyond Coal, Coal Exit Tracker. See also **Exhibit R-0070**, Europe Beyond Coal, 'Europe's Coal Exit: Overview of National Coal Phase Out Commitments', 13 January 2022.

154 The United Kingdom: **Exhibit R-0071**, Department of Business, Energy and Industrial Strategy, Anne-Marie Trevelyan MP and Alok Sharma MP, UK, 'End to Coal Power Brought Forward to October 2024', Press Release, UK.GOV, 30 June 2021; France: **Exhibit R-0072-EN**, Public Affairs, France, 'Phasing out Fossil Fuels and Developing Renewable Energies," Announcement on French Coal Phase-out Law, 08 November 2019 (**Exhibit R-0072-FR**, Public Affairs, France, 'Energy and Climate Act of November 8, 2019', Announcement on French Coal Phase-out Law, 08 November 2019); Germany: **Exhibit R-0073**, The Federal Government of Germany, 'Federal Government Adopts Coal Phase-out Law: Ending Coal-generated Power', 03 August 2022.

protection under the ECT"[155] as part of the discussions to modernise the ECT.

181. In response to the war in Ukraine, the European Commission presented on 18 May 2022 the plan REPower EU.[156] This plan aims to cut the dependency for energy import of the EU from Russia as quickly as possible. This means, for example, that the 2030 goal for green energy generation capacity has increased from 1067 GW to 1236.[157] In short, the transition away from fossil fuels has sped up even more.

2.7 The current state of play

182. The IPCC has issued a number of increasingly alarming scientific assessments on the risks and implications of climate change, calling for increasingly tightened and reduced emission targets. Similarly, the International Energy Agency (the "**IEA**") has stated that reaching the global climate targets require the immediate curtailment of fossil fuel investments.[158] The global alertness is, and has been since at least 1992, clear.

183. Since the end of the 20th century, there has also been a clear trend to tighten climate targets: emission reductions targets have been revised upwards, and the 2°C target has been moved further down to 1.5°C. At the international level and within the EU, climate policy has gradually been aligned with the latest scientific research and has been tightened as the need for mitigating measures became ever more urgent. The awareness over the acuteness of the climate crisis and the importance of swift action has increased over the years and will have to be accompanied by corresponding CO2 emission reductions measures as the carbon budget will soon be depleted.

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155 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 3.

156 **Exhibit R-0138**, REPowerEU plan, Communication from the Commission, 18 May 2022.

157 **Exhibit R-0074**, REPowerEU plan, Communication from the Commission, 18 May 2022, p. 3.

158 **Exhibit R-0053**, Anja Ipp, Annette Magnusson and Andrina Kjellgren, 'The Energy Charter Treaty, Climate Change and Clean Energy Transition', Climate Change Counsel, 15 March 2022, p. 31.

184. In line with the references to the UNFCCC in the ECT's Preamble, all ECT Contracting Parties have become Contracting Parties of the Paris Agreement and have committed to reducing carbon emissions. Additionally, the ECT is currently undergoing a modernisation process to make express that it is aligned with the global climate goals and supports the clean energy transition.[159]

185. Moreover, in a historic move, the United Nations General Assembly has recently declared healthy environment a human right. The United Nations General Assembly noted that climate change and environmental degradation were some of the most pressing threats to humanity's future and called on States to step up efforts to ensure their people have access to a "*clean, healthy and sustainable environment*."[160]

186. The above mentioned international and EU climate policy directly impact Dutch climate policy, but the Netherlands also has tangible incentives to address climate change as it will have to contend with a multitude of problems.

187. The consequences of global warming are already noticeable in the Netherlands.[161] According to the Royal Netherlands Meteorological Institute (the "**KNMI**"), the Netherlands will have to take into account a faster rising sea level. The KNMI's projections from 2014 indicate that the sea level could rise up to 1 meter by 2100.[162] The Netherlands will also have to contend with changing weather patterns, such as wetter winters and drier summers,[163] that will lead to more flooding and

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159 **Exhibit CL-0068**, Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, 2012; **Exhibit R-0053**, Anja Ipp, Annette Magnusson and Andrina Kjellgren, 'The Energy Charter Treaty, Climate Change and Clean Energy Transition', Climate Change Counsel, 15 March 2022.

160 **Exhibit R-0075**, UN General Assembly, Resolution A/RES/76/300, The human right to a clean, healthy and sustainable environment, 28 July 2022.

161 For example the flood in the south of the Netherlands in summer 2021, see **Exhibit R-0076**, BBC News, 'Europe's floods Lessons from German tragedy', 29 October 2021.

162 **Exhibit R-0077-EN**, KNMI, Climate scenarios for the Netherlands, 14 May 2015, p. 16 (**Exhibit R-0077-NL**, KNMI, Climate scenarios for the Netherlands, 14 May 2015).

163 **Exhibit R-0077-EN**, KNMI, Climate scenarios for the Netherlands, 14 May 2015**Exhibit R-0077-EN**, KNMI, Climate scenarios for the Netherlands, 14 May 2015 pp. 12 and 14 (**Exhibit R-0077-NL**, KNMI, Climate scenarios for the Netherlands, 14 May 2015).

droughts.[164] Further, it is expected that health problems such as heat stress will increase.[165]

164 **Exhibit R-0077-EN**, KNMI, Climate scenarios for the Netherlands, 14 May 2015, p. 22 (**Exhibit R-0077-NL**, KNMI, Climate scenarios for the Netherlands, 14 May 2015).

165 **Exhibit R-0077-EN**, KNMI, Climate scenarios for the Netherlands, 14 May 2015, p. 27 (**Exhibit R-0077-NL**, KNMI, Climate scenarios for the Netherlands, 14 May 2015).

PART B: THE NETHERLANDS' CLIMATE POLICY PRIOR TO THE CONSTRUCTION OF EEMSHAVEN (1998-2009)

3 THE GOAL OF THE NETHERLANDS' CLIMATE POLICY WAS EMISSION REDUCTION

188. Climate policy has for decades shaped Dutch energy policy. The Organisation for Economic Co-operation and Development (OECD) observed that a distinguishing feature of Dutch energy policy was that it was "*strongly influenced*" by policies to reduce CO2 emissions:[166]

> *"The current **Dutch electricity sector is distinguished by the influence of environmental and energy security policies** on the type and composition of generating capacity* […] *The Dutch electricity sector is **strongly influenced by the Dutch Government's policies to reduce carbon dioxide emissions**."*

189. Dutch climate policy was aimed at emission reduction since the 1990s. The 'clean fossil' policy was implemented to realise significant greenhouse gas emission reduction. Clean fossil means the "*extraction, transport and conversion of carbon-containing substances into energy and/or other substances, in such a way that as little CO_2 is emitted as possible*".[167] Specifically in the context of coal plants, the largest emitters of CO2 in the Netherlands, this meant that they would need to comply with emission reduction policies and targets. Electricity producers were made aware that the use of coal in power generation was incompatible with climate policy in the absence of CO2 emission reduction measures (**Section 3.1**).

190. The market participants and Government viewed CCS and the co-firing of biomass as promising methods of reducing CO2 emissions in coal plants. Choosing the means of CO2 emission reduction was up to market participants. The Netherlands would facilitate, and in the case of CCS, provide subsidies for research and development and demonstration projects to develop the technologies. It was for the

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166 **Exhibit R-0078**, OECD country studies, 'Netherlands - Regulatory Reform in the Electricity Industry' (1998), p. 5.

167 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 5 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

market participants to set up demonstration projects and make CCS state of the art and then apply it on a large scale. Agreements were made in that regard (**Section 3.2**).

3.1 The 'clean fossil' policy meant coal plants would have to progressively reduce CO2 emissions

191. Following the adoption of the Kyoto Protocol in 1997, and with a view to meeting the emission reduction targets set therein, the Netherlands implemented clear policies on fossil fuels. This policy was known as 'clean fossil'.

192. A coalition agreement is concluded between the parties that formed the new Government. The agreement contains the ambitions of the new Government for the coming four years and introduces strategies to implement the ambitions. In the Coalition Agreement of 1998 the Government emphasised the importance of the emissions reductions goals set in the Kyoto Protocol. In particular, the Coalition Agreement made it clear that the Government would promote sustainable energy and reductions in energy use to meet the Kyoto Protocol's targets for 2008 to 2012.[168]

193. On 21 June 1999, the Government published the Implementation Note on Climate Policy.[169] Implementation notes are policy documents setting out the measures the Government plans to implement to realise certain goals. In this instance the Implementation Note detailed how the Kyoto Protocol targets would be met. In addition, it included a forward-looking chapter on how further emission reduction could be achieved after 2012.

194. In the Implementation Note the Government explained that if fossil fuels were to play a part in the energy mix, they would have to fit

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168 **Exhibit R-0079-EN**, Governing Agreement for the Cabinet of Wim Kok II of 1998, 03 September 1998, pp. 55-56 (**Exhibit R-0079-NL**, Governing Agreement for the Cabinet of Wim Kok II of 1998, 03 September 1998).

169 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

"*within the conditions of climate policy*".[170] Additionally, to comply with the Kyoto Protocol's targets for 2008 to 2012, the Implementation Note explains that the emissions of coal plants would need to be reduced to the emission level of gas combustion by 2008.[171]

195. The Implementation Note also provides guidance on what, at the time, were seen as ways to reduce emissions. A reduction of the CO2 emissions of coal plants could be achieved by a combination of: (i) increasing the efficiency of coal plants; (ii) co-firing biomass; and (iii) converting coal plants to gas plants.[172] Next to a benchmark covenant based on an agreement between the Government and coal plant owners that would realise CO2 emission reductions by achieving an agreed increase in efficiency, the coal plant owners could determine which measures they wanted to implement to further reduce their CO2 emission levels.[173]

196. The Implementation Note further contained a forward-looking chapter. For the period after 2012 the Implementation Note stated that "*CO2 reductions domestically will have to play an increasing role in policy*".[174] In this regard CCS was referenced in the Implementation Note as "*an option that will have to receive further attention in Dutch climate policy*".[175] It was further stated that if CCS "*is not used, reversing the growth of CO_2 emissions in the* [amongst others the energy sector] *must be achieved by reducing the energy consumption*

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170 **Exhibit R-0042-EN**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 73 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

171 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

172 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, pp. 34-35 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

173 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 35 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

174 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 68 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

175 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 72 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

and carbon intensity of the energy supply".[176] The latter can be done by using sustainable energy sources and by reducing the use of coal.

197. The 'VROM-raad', an advisory body in the field of public housing, spatial planning and environmental management, issued an opinion on the Implementation Note. It agreed that less CO2 would need to be emitted in fossil energy consumption and that CCS would have to be given further attention in Dutch climate policy:[177]

> "*Fifthly, it is also necessary that less CO2 is emitted during fossil energy consumption itself, if only because this will remain very large for the time being. Decarbonisation of processes using fossil fuels will therefore have to be done, if only because in large parts of the world the use of oil and coal will inevitably increase. This includes the capture, storage and sometimes reuse of CO2. In particular, the safe and responsible storage of CO2 in the subsurface requires attention. This option may seem like a symptomatic treatment, but decarbonizing fossil fuels to produce hydrogen fits well in the transition to a hydrogen economy and the large-scale use of clean and energy efficient fuel cells.* "

198. In October 1999, the Government emphasised in response to questions from Parliament[178] again that the electricity generation sector must contribute to the Government's environmental goals, regardless of the level playing field that the liberalisation of the energy market[179] had intended to create:[180]

> "*The government realises that the liberalisation of the energy supply brings with it great changes and, consequently, also*

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176 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

177 **Exhibit R-0080-EN**, VROM-Council, Transition to a low-carbon energy management: Advice for the Implementation Note on Climate Policy, 23 December 1998, p. 35 (**Exhibit R-0080-NL**, VROM-Council, Transition to a low-carbon energy management: Advice for the Implementation Note on Climate Policy, 23 December 1998).

178 Where the Netherlands refers to the 'Dutch Parliament' or the 'Parliament' in this brief, it refers specifically to the House of Representatives unless otherwise specified.

179 In 1998 the energy market was liberalised, in that energy production would be undertaken by private parties rather than the State. Energy companies previously owned by the State were privatised.

180 **Exhibit R-0081-EN**, Implementation Note on Climate Policy - List of Questions and Answers, Parliamentary papers II 1999/20, 26 603, no. 4, 22 October 1999, p. 29 (**Exhibit R-0081-NL**, Implementation Note on Climate Policy - List of Questions and Answers, Parliamentary papers II 1999/20, 26 603, no. 4, 22 October 1999).

> *uncertainties. The companies involved are in a conversion process. In a liberalised market, the costs of electricity generation which are partly determined by environmental investments, will become even more important than before.*
> ***The government is of the opinion that striving for a level playing field does not mean that the electricity generation sector does not have to make a contribution to the government's environmental goals***."

199. The importance of CO2 emission reduction from fossil fuel-consuming energy producers was once again confirmed shortly thereafter in the Energy Report of 1999 (the "**Energy Report 1999**"). Energy Reports are key policy documents which the Minister of Economic Affairs, pursuant to the requirements set in the Electricity Act and the Gas Act, publishes at least once every four years.[181] Effectively, they outline the Government's policy regarding energy provision in the medium to long-term.

200. In the Energy Report 1999, the Government highlighted the importance of "*limiting the CO2 emissions associated with fossil energy production*" when reiterating the importance of achieving the Kyoto Protocol targets.[182] The Government also explained that its long-term policy would focus on 'clean fossil': techniques used to reduce the CO2 emissions resulting from fossil fuel-consuming energy generation.[183]

201. To reach the required CO2 emission reduction targets, measures would need to be taken with respect to coal plants in particular. As the 2000 International Energy Agency report on the Netherlands stated, "*the need to reduce CO2 emissions also has an adverse impact on coal use*".[184]

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181 **Exhibit RL-0039-EN**, Electricity Act 1998, Official Gazette 1998, 427, Article 2 (**Exhibit RL-0039-NL**, Electricity Act 1998, Official Gazette 1998, 427).

182 **Exhibit R-0082-EN**, Energy Report 1999, 15 November 1999, p. 7 (**Exhibit R-0082-NL**, Energy Report 1999, 15 November 1999).

183 **Exhibit R-0082-NL**, Energy Report 1999, 15 November 1999, p. 48 (**Exhibit R-0082-NL**, Energy Report 1999, 15 November 1999).

184 **Exhibit C-0033**, International Energy Agency, Energy Policies of IEA, Countries the Netherlands 2000 Review, 2000, p. 50. The report further noted on the same page that "[d]*espite low coal prices, the economic prospects for new coal-based electricity generation are poor in the medium term*".

202. In the Environmental Programme of 2001 to 2004, the Government reiterated that the goal for coal plants was "*to reduce the emissions from power stations to the level of natural gas combustion*". This would entail a reduction of 6 Mton CO2 emissions.[185]

203. Shortly thereafter on 24 April 2000, coal-fired power plant operators and the Government reached agreement on the principles for CO2 emission reduction.[186] This agreement was expanded upon to form a benchmarking covenant that was signed on 24 April 2002. This covenant was the first agreement between the Government and the energy sector on the reduction of CO2 output. As part of the agreement, coal plants agreed to a reduction of their CO2 emissions by 6 Mton per year for the period 2008 to 2012.[187] This would bring the emissions of coal plants down to the level of gas combustion plants as had been envisaged in the Implementation Note of 1999.

204. The envisaged 6 Mton reduction of CO2 emissions on an annual basis was to be achieved by a combination of co-firing biomass (3 Mton), improving efficiency (2 Mton) and other smaller measures (1 Mton). In the event of a sale of a coal plant, the buyer would also need to comply with this emission reduction target. The Government, in turn, would support the realisation of the emission reduction by enacting fiscal measures such as changes to the fuel tax regime. In particular, the Government committed to stimulate the co-firing of biomass until 2012. The agreement was subsequently formalised in the Covenant

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185 **Exhibit R-0083-EN**, Environmental Programme 2001-2004, Parliamentary papers II 2000/01, 27 404, no. 2, 19 September 2000, p. 96: "*The Implementation Memorandum states that the government wants to reach an agreement with the owners of coal-fired power stations to reduce the emissions from these power stations to the level of natural gas combustion* […] *At the beginning of June 2000, agreement was reached on the content of an outline policy agreement, which was signed by the parties in the course of the summer. This agreement will be worked out in more detail in a covenant during 2000*." (**Exhibit R-0083-NL**, Environmental Programme 2001-2004, Parliamentary papers II 2000/01, 27 404, no. 2, 19 September 2000).

186 **Exhibit R-0084-EN**, Outline Policy Agreement Coal-Fired Power Plants and CO2 Reduction, 24 April 2000 (**Exhibit R-0084-NL**, Outline Policy Agreement Coal-Fired Power Plants and CO2 Reduction, 24 April 2000).

187 **Exhibit R-0085-EN**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002 (**Exhibit R-0085-NL**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002).

on coal plants and CO2 emission reduction that was signed on 24 April 2002.[188]

205. On 13 June 2001, the Ministry of Economic Affairs along with the Ministry of Agriculture, Nature and Food Quality published the Fourth National Environmental Policy Plan. It stated that as "*part of the transition to a sustainable energy system, the focus is on reducing CO2 and NOx emissions, as these are the most persistent energy-related emissions*".[189]

206. The transition could be achieved along separate tracks: (i) the use of renewable energy sources, such as sun, wind and biomass, (ii) a reduction in energy consumption per activity by improving efficiency, particularly in buildings (heating), electrical appliances, vehicles and production processes and (iii) development of advanced energy technology.[190] The third track was aimed at ensuring that fossil fuels would exhaust next to no greenhouse gases (such as by applying CCS). The phrase used to describe these measures was 'clean fossil'.

207. In the subsequent Energy Report of 2002 (the "**Energy Report 2002**"), which followed up on the earlier policy framework, the Government continued to pursue its climate policy goals. Reducing CO2 emissions was driving energy policy. As the Energy Report 2002 notes, CO2 emissions and reduction targets – rather than other considerations such as security of supply – were causing a sense of urgency:[191]

> "*However, **the sense of urgency is currently determined by the development of CO2 emissions and the applicable reduction targets**. Circumstances may change in the future such that security of supply becomes the decisive factor. **At the moment, however, there is no reason to do so**, so the government is basing its energy saving policy on the question of the pace required to reduce CO2 emissions.*"

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188 **Exhibit R-0085-EN**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002 (**Exhibit R-0085-NL**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002).

189 **Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001, p. 147 (**Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001).

190 **Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001, p. 149 (**Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001).

191 **Exhibit R-0029-EN**, Energy Report 2002, p. 48 (**Exhibit R-0029-NL**, Energy Report 2002). This is contrary to what RWE implies in the Memorial, para. 81.

208. The practical implications of the climate policy on the use of fossil fuels in energy production was that in meeting the "*energy demand Europe will have to remain within the constraints imposed by the climate problem*".[192] For fossil fuels this meant that eventually "*no CO2 is released into the atmosphere during the production of these energy carriers*", i.e., electricity. In other words: that fossil-fuelled energy generation would over time have to become CO2-neutral through technologies such as CCS.[193]

209. In the Energy Report 2002, the Government also pushed for the harmonisation of climate policies within Europe as a means to address any cross-border price differences that existed. A study by the Brattle Group from 2002 on energy prices had found that small and medium-sized industrial consumers in the Netherlands paid lower prices for energy than their competitors in Germany. By contrast, larger industrial customers paid slightly more than competitors in Germany, although this difference "*turns out to be limited*".[194]

210. The Government noted that differences in climate policy, including different fiscal regimes and certain subsidies (such as a subsidy on coal in Germany), had an adverse effect on the free operation of the market.[195] Harmonising European climate policies would reduce any price differences,[196] and was considered "*essential*" to achieve a level playing field.[197] The Government also indicated that an increase of the import capacity in the following years would likely reduce any price differences within Europe.[198] The construction of new coal plants in the

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192 **Exhibit R-0029-EN**, Energy Report 2002, p. 46 (**Exhibit R-0029-NL**, Energy Report 2002).

193 **Exhibit R-0029-EN**, Energy Report 2002, p. 46 (**Exhibit R-0029-NL**, Energy Report 2002).

194 **Exhibit R-0029-EN**, Energy Report 2002, p. 32 (**Exhibit R-0029-NL**, Energy Report 2002). This is contrary to RWE's suggestion in the Memorial, Section B.IV.1.

195 **Exhibit R-0029-EN**, Energy Report 2002, p. 33 (**Exhibit R-0029-NL**, Energy Report 2002).

196 **Exhibit R-0057-EN**, Energy Report 2002, p. 31 (**Exhibit R-0029-NL**, Energy Report 2002).

197 **Exhibit R-0057-EN**, Energy Report 2002, p. 33 (**Exhibit R-0029-NL**, Energy Report 2002).

198 **Exhibit R-0029-EN**, Energy Report 2002, p. 31: "*If import capacity continues to increase in the coming years and environmental policies are further harmonised, price differences in Europe are expected to decrease*". See also p. 38: "*As the import capacity increases in the coming years, the price differences in Europe will become smaller.*" (**Exhibit R-0029-NL**, Energy Report 2002).

Netherlands was not mentioned as a possible action to mitigate cross-border price differences.

211. As a follow-up to the Energy Report 2002, the Government issued a policy memo on the future use of fossil fuels on 22 September 2003 (the "**Clean Fossil Policy Memo**"). In the memo, the Government again stated in clear terms that "[t]*he climate problem is growing and continued international climate policy (post-Kyoto), is likely to lead to further restrictions on greenhouse gas emissions*".[199] Further, the Clean Fossil Policy Memo singled out CO2 as the greenhouse gas that would likely be the target of future restrictions and consequently climate policy measures.[200] Measures needed to achieve post-Kyoto targets would likely be "*considerably more expensive*".[201] In light of the expected post-Kyoto tightening of CO2 emission reduction requirements, it would "*most likely* [be] *a necessity*" to use 'clean fossil'.[202]

212. The memo, was based on the premise that the use of fossil fuels should fit "*within the constraints of a more stringent environmental and*

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199 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 6. See also p. 19: "[…] *a further tightening of emission targets in the post-Kyoto period is conceivable"* (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

200 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 6 (pdf) "*Meeting the post-Kyoto CO2 reduction targets is expected to be much more difficult than meeting the Kyoto targets. The post-Kyoto package of measures (i.e. when targets are tightened) will generally be much more expensive than the Kyoto package, which still relies heavily on emission reductions of the remaining greenhouse gases*". "*Het invullen van post-Kyoto CO2-reductiedoelstellingen zal naar verwachting veel moeilijker worden dan het halen van de Kyoto doelstellingen. Het maatregelenpakket post Kyoto (dus in geval van aanscherping van doelstellingen) zal over het algemeen flink duurder zijn dan het Kyoto pakket, waarin nog zwaar wordt geleund op emissiereducties bij de overige broeikasgassen*" (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

201 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 6 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

202 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19. On p. 5, 'clean fossil' is defined as the extraction, transport and conversion of carbon-containing materials into energy and/or other materials, so that so that as little CO2 is emitted to the atmosphere as possible in the process (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

climate policy".[203] Clean fossil fuels were considered "*an interim solution on the long road to sustainable energy management*".[204] In other words, the Netherlands was transitioning to a sustainable energy supply and fossil fuels could be part of that transition, provided that they complied with stringent conditions requiring the emission of little or no CO2 (through technical means such as CCS). In the words of the Clean Fossil Policy Memo, 'clean fossil' would make "*it possible to use all available fossil energy sources within a more stringent climate policy*."[205]

213. Also in 2003, the Government set out to transpose the EU's ETS into national law. This would allow for the rise (and increased profitability) of "*clean, low-carbon technologies*"[206] at the expense of more polluting technologies.

214. ETS is not an exclusive system. Details concerning the development of ETS are not known in advance,[207] as they are influenced by political developments at the EU level.[208] In contrast, reduction targets would be set at a national level. The Government made clear from the outset that emission reduction targets would be achieved through a combination of measures. In the explanatory note to the law implementing the ETS Directive in the Netherlands, published in 2004, the Government stated that there "*is not one instrument that deserves preference in all situations.* […] *Also often, a mix of instruments is*

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203 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 6 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

204 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 6 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

205 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

206 **Exhibit BR-66**, European Commission, EU Emissions Trading System (EU ETS), p. 2.

207 E.g., Memorial, para. 145.

208 RWE recognises that the price of CO2 would be "*dependent on policy choices*". Memorial, para. 599. See also, Memorial, para. 109, fn. 73 in which RWE recognises that the targets in phase 4 (2021-2030 were "*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*" and **Exhibit CER-0002**, Brattle Expert Report, paras. 253 and 301.

suitable"[209] and that "*new, more market influence oriented instruments are a necessary addition to the existing instruments*".[210]

215. It further made clear that the ETS would work alongside other CO2 emission reduction measures, rather than to their exclusion.[211]

> "*For the Netherlands, the Kyoto goal* […] *roughly boils down to a reduction of 6% as compared to the emissions in 1990. The Netherlands realises this commitment partly through the purchase of emission rights abroad by the Dutch government, in accordance with the mechanisms allowed for in the Kyoto Protocol* […] ***For the rest, emission reductions are realised through a policy package for the different sectors that emit CO2 or other greenhouse gases***."

216. The Government subsequently proceeded to adopt policy instruments in addition to ETS to reduce CO2 emissions. For example, as described in para. 204, the Government agreed in 2002 to introduce fiscal measures as part of the Covenant with coal plant owners to facilitate coal plants in reducing CO2 emissions.[212] In a similar vein the Government enacted changes to its coal tax in 2008[213] and 2013[214]. More recently the Government has introduced a levy to establish a

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209 **Exhibit R-0087-EN**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II, 29 565, no. 3, 24 May 2003, p. 4 (**Exhibit R-0087-NL**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II 2003/04, 29 565, no. 3, 24 May 2004).

210 **Exhibit R-0087-NL**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II 2003/04, 29 565, no. 3, 24 May 2004, p. 4 (**Exhibit R-0087-NL**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II 2003/04, 29 565, no. 3, 24 May 2004).

211 **Exhibit R-0087-NL**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II 2003/04, 29 565, no. 3, 24 May 2004, p. 9 (**Exhibit R-0087-NL**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II 2003/04, 29 565, no. 3, 24 May 2004).

212 **Exhibit R-0085-EN**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002 (**Exhibit R-0085-NL**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002).

213 **Exhibit RL-0040-NL**, Environmental Taxes Act, Official Gazette, 1, 01 January 2008, Article 44 (**Exhibit RL-0040-NL**, Environmental Taxes Act, Official Gazette, 1, 01 January 2008).

214 **Exhibit RL-0041-EN**, Amendment Environmental Taxes Act, Official Gazette 2012, 321, 12 July 2012, Article 44 (**Exhibit RL-0041-NL**, Amendment Environmental Taxes Act, Official Gazette 2012, 321, 12 July 2012).

minimum price for CO2.[215] Other measures have therefore been used, on top of ETS, to curtail CO2 emissions.

217. In the 2000s, the Netherlands also consistently communicated that power plants, including new coal plants, would need to comply with and fit within its climate policy. This policy included CO2 emission reduction goals (including by means of CCS, biomass and other measures). In this context, the R&D-platform CATO was also launched in 2003, active in the field of research and development of CCS.[216]

218. In September 2003, the Government issued a memorandum on the Long-Term Vision for Security of Supply. Even in this memorandum, which addressed uncertainties relating to security of supply that had emerged at the time, the Government highlighted the detrimental effects of coal plants on the environment and clarified that emissions from any additional coal plants "*must*" fit within "*hard*" policy targets and ceilings:[217]

> "***coal-fired power plants*** *also* ***have environmental drawbacks****. Using coal in the conventional way leads to emissions of the greenhouse gas CO2 and of the acidifying gases NOx and SO2* […] *The main environmental requirements that (will) apply to these units are derived from European and other international policies* […] *In concrete terms, this means that* ***extra emissions from new coal-fired power stations must fit within hard national ceilings and the sectoral targets*** *that are currently being prepared.*"

219. The Minister of Economic Affairs repeated this premise in a list of answers that he submitted on 1 July 2004 in response to questions from Parliament.[218] The Minister reiterated that it was a "*condition*" that any additional coal plants fit within the Government's environmental

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215 **Exhibit RL-0042-EN**, Amendment to Environmental Taxes Act, Official Gazette 2022, 132, 16 March 2022 (**Exhibit RL-0042-NL**, Amendment to Environmental Taxes Act, Official Gazette 2022, 132, 16 March 2022).

216 See further Sub-section 3.2.1.

217 **Exhibit R-0043-EN**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II 2002/03, 29 023, no. 1, 03 September 2003, p. 11 (**Exhibit R-0043-NL**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II, 2002/03, 29 023, no. 1, 03 September 2003). This is contrary to RWE's suggestion in the Memorial Sub-section B.IV.2.

218 **Exhibit C-0038**, Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions asked by members of Parliament and answers given by the government.

policies, and that any additional coal plant would have to comply with these "*strict*" environmental policies.

220. Accordingly, the Minister's being "*positive*" about the construction of a new coal plant was premised on "*the condition* […] *that it must fit within the environmental policy of this government*".[219] The Minister also stated that "[a]*fter all, even a new coal-fired power station has to comply with the strict, market-based and generic environmental policy*".[220] In other words, new coal plants – even though they could play a role in energy supply in the medium term – would be subject to policy and regulation aimed at reducing CO2.

221. There was no invitation, and certainly no unconditional invitation, to invest in coal in the Netherlands.[221] Coal plants were never exempted from climate policy. To the contrary, it was emphasised that the construction of any coal plant was conditional on compliance with stringent environmental policies. This meant that coal plants would have to reduce their CO2 emissions.

222. In the subsequent Energy Report of 2005 (the **"Energy Report 2005**"), it was once again reiterated that CO2 emission reduction formed a core tenet of Dutch policy.[222] The Government stated *inter alia* that "*the reduction of CO2 emissions on the basis of prolonged climate policy will influence the options for use of fossil fuels*".[223] Thus, it was made clear that the use of fossil fuels would be dependent on CO2 emission reduction such as CCS. As further noted in the Energy

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219 **Exhibit C-0038**, Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions asked by members of Parliament and answers given by the government.

220 **Exhibit C-0038**, Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions asked by members of Parliament and answers given by the government.

221 RWE is therefore incorrect to argue that the Netherlands invited it to invest in a new coal plant, see Memorial, Sub-section B.IV.4.

222 **Exhibit R-0030-EN**, Energy Report 2005, p. 7 "*The government has therefore opted for an integrated approach and always looks at the three objectives of energy policy (security of supply, environmental quality, economic efficiency) in their mutual context.*" (**Exhibit R-0030-NL**, Energy Report 2005).

223 **Exhibit R-0030-EN**, Energy Report 2005, p. 13 (**Exhibit R-0030-NL**, Energy Report 2005).

Report 2005, the electricity sector had offered to co-invest in a CCS demonstration project.[224]

223. In relation to coal specifically, the Energy Report 2005 stated that the use of coal was only acceptable if it did not interfere with achieving CO2 emission targets:[225]

> "*However, this fuel* [coal] *will only be used* ***under the condition that it does not interfere the realisation of the CO2 emission agreements****. Nor should it interfere with other policies.*"

224. Importantly, the Government also noted that climate policy would become ever more stringent over time, and that this would impact coal plants in the long run. The Government explained that, under current policy, new coal plants would no longer be allowed to emit CO2 by the time they would reach the end of their life span:[226]

> "*However, the environmental impact is a disadvantage of this option: the CO2 emissions are almost twice as high as with a high-efficiency natural gas power plant. A coal-fired power station that is built now has a life span until around 2050.* ***Around that time, this power station may no longer emit CO2. This is something that promoters*** **[of new coal-fired power]** ***must be fully aware of when deciding on new coal-fired power stations***."

225. Additionally, the Government noted that further ("*subsequent")* tightening of emission requirements should be expected, and that no "*guarantee*" was given that emissions requirements would not be further tightened:[227]

> "*Of course, the most modern techniques will be used during construction* [of coal plants]*, but even then* ***it is impossible to guarantee that there will be no subsequent tightening of emission requirements***."

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224 **Exhibit R-0030-EN**, Energy Report 2005, p. 10 (**Exhibit R-0030-NL**, Energy Report 2005).

225 **Exhibit R-0030-EN**, Energy Report 2005, p. 10 (**Exhibit R-0030-NL**, Energy Report 2005).

226 **Exhibit R-0030-EN**, Energy Report 2005, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

227 **Exhibit R-0030-EN**, Energy Report 2005, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

226. On 10 April 2006 the Minister of Economic Affairs similarly emphasised that potential investors in coal plants should take future developments in Dutch and European environmental policy into account:[228]

> "*Yes, I do not consider the construction of such a coal-fired power station to be a strange idea.*
> *In my opinion, the choice of technology is up to market players. The government does set the preconditions for the construction, insofar as public interests are at stake. A new power station may only be built using the latest environmental insights and techniques. In doing so, the various emissions are considered: CO_2, NO_x, SO_2, particulates and heavy metals.* ***In doing so, I am assuming that the investor will also take into account future developments in national and European energy and environmental policy***."

227. The Minister of Economic Affairs also informed Parliament that he had facilitated discussions between a consortium made of members of the energy-intensive industry and several energy producers, including RWE. The Minister did not refer to the prospect of a new coal plant being needed to meet the needs of industry nor did he indicate that such a plant was desirable.[229] The Netherlands would also not be a party to any agreement but only brought the parties into contact.[230] The negotiations between the consortium took place throughout 2006.[231] The consortium ultimately reached agreement with E.ON, not with RWE,[232] on 24 December 2007.[233]

228. More than a month after the Minister indicated that investors in new coal fired plants should take future developments in national and

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228 **Exhibit R-0045-EN**, Answer from the Minister of Economic Affairs, Acts II 2005/06, no. 1224, p. 2611, 10 April 2006, (**Exhibit R-0045-NL**, Answer from the Minister of Economic Affairs, Acts II 2005/06, no. 1224, p. 2611, 10 April 2006).

229 Contrary to RWE's suggestion in the Memorial, paras. 97-99.

230 **Exhibit C-0043**, Parliamentary Papers II 2005/06, 30 300 XIII, no. 8, Letter from Minister for Economic Affairs, 7 October 2005.

231 **Exhibit R-0088-EN**, Energeia, 'Essent and Eon Still Negotiate with Consortium about Building Coal-fired Power Plant', 19 October 2006 (**Exhibit R-0088-NL**, Energeia, 'Essent and Eon Still Negotiate with Consortium about Building Coal-fired Power Plant', 19 October 2006).

232 Memorial, para. 98.

233 **Exhibit R-0089-EN**, Energeia, 'Consortium of Large-scale Consumers Closes Deal with Eon, Still Talks with Essent', 24 December 2007 (**Exhibit R-0089-NL**, Energeia, 'Consortium of Large-scale Consumers Closes Deal with Eon, Still Talks with Essent', 24 December 2007).

European energy and climate policy into account, RWE informed the Government on 18 May 2006 of its plan to build a biomass/coal plant in the Netherlands.[234]

229. In her letter of 28 June 2007, the Minister of Housing, Spatial Planning and the Environment expressed several warnings about the expected compliance of potential new coal plants with the Netherlands' climate goals. Among others, she noted the following:

- The targets set as part of the climate policy "*will not be without consequences for the development of energy demand and for the use of fossil fuels*."[235]

- In light of the increased European and Dutch climate ambitions, it was "*very questionable whether the market conditions for power plants based on fossil energy sources are still the same as when the relevant environmental permits were applied for*" and that investors would need to take this into account.[236]

- "*The construction of new (coal)-fired power stations does not affect the government's efforts in the field of energy saving and renewable energy.*" On the contrary, it would be "*the other way around. The government's efforts will influence the choices for new power plants.*" The reason was that climate change goals as set out in the 2007 Coalition Agreement were the central priority.[237]

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234 **Exhibit R-0037-EN**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006 (**Exhibit R-0037-NL**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006). See further Sub-section 4.1.

235 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 2 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

236 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 2 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

237 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 2 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

- "*In time, the CO2 emissions from coal-fired power plants are* […] *not compatible with the climate ambitions of Europe and of this government*".[238]

- "*Coal-fired plants will ultimately only be acceptable through a combination of the highest possible generation efficiency, the use of a substantial proportion of biomass, utilisation of released heat and the application of CO2 capture and underground storage.*"[239]

230. The Minister explained that the Government would pursue a "*strict additional policy*", imposing requirements on the construction of new coal plants to mitigate the consequences of coal plants for the climate ambitions.[240] These requirements were also aimed at CO2 emission reduction. For instance, the Government mandated that new coal plants be designed 'capture ready' to allow for CO2 emission reduction through CCS in the future.[241]

231. Further, the Minister addressed the impact of ETS on any potential new coal plant. She warned that there was no framework yet for the ETS after 2012 and that coal plant operators should anticipate that the system would "*dramatically"* change after that date. Coal plants should expect that fewer emission certificates would be issued under the ETS in the future and that these certificates would be auctioned off rather than allotted (as the Netherlands supported full auctioning):[242]"*Operators of* [coal] *plants should expect the picture to*

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238 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

239 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

240 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 3 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

241 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 6 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

242 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

change dramatically after 2012 *with far fewer* [ETS] *rights becoming available* […].

> *The Netherlands is in favour of maximum auctioning* [of ETS rights] *for the electricity sector, preferably 100%.* ***I assume that initiators for new coal-fired power plants will be wise enough to take this into account when making the final decision on their investment plans****.*"

232. On that same day, the Minister of Housing, Spatial Planning and the Environment responded to questions from Parliament. In the answer the Minister again indicated that market conditions would change and that "[i]*nvestors in new powers plants will have to take this into account*":[243]

> "*A choice was made in favour of sharp ambitions for 2020, for reducing greenhouse gas emissions, for sharply increasing the pace of energy conservation and for sharply increasing the deployment of renewable energy sources. These ambitions, I am sure, will not be without consequences for the development of energy demand and for the use of fossil fuels. A rate of 2% energy saving per year will reduce demand and combined with the possibility of covering a third of the electricity demand with renewable sources, this cannot remain without consequences for the supply side of fossil generation.* ***It is therefore very questionable whether the market conditions for power plants based on fossil energy sources are still the same as when the relevant environmental permits were applied for. Investors in new power plants will have to take this into account****.*"

233. The Minister further noted that ETS would have to operate alongside other measures in order to make coal plants compliant with the Dutch climate ambitions:[244]

> "[…] *I have sufficient confidence that the CO2 emissions trading system, in combination with the application of CCS and the large-scale deployment of biomass, will ultimately be a sufficiently powerful instrument to allow coal-fired power*

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243 **Exhibit R-0090-EN**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007, p. 1 (**Exhibit R-0090-NL**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007).

244 **Exhibit R-0090-EN**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007, p. 2 (**Exhibit R-0090-NL**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007).

> *stations to be authorised within the climate ambitions of the Netherlands and Europe.*"

234. Shortly thereafter, in August 2007, the Government published the Clean and Efficient Work Programme. In this policy document, the Government explained that ETS was an important (but not the only) mechanism to stimulate CO2 emission reductions in the energy sector. It indicated that measures would be needed in addition to ETS in order to realise very substantial CO2 emission reductions:[245]

> "*The government makes agreements with operators of new coal plants for the currently envisaged new coal plants for a best efforts obligation in addition to the ETS.* ***From 2015 onwards, very substantial CO2 reductions need to have been achieved*** *in the relevant operators' plant portfolio. These agreements must give the cabinet security that the required reductions will be achieved. The investors must demonstrate how they materially realise those reductions. Agreements are concluded about the capture and storage of CO2 in the soil by entering into covenant. Clean fossil fuels can thus be used as a transition technology to a sustainable energy supply. The operators are also focusing on extra co-firing of biomass and even the early closure of old, inefficient coal plants that belong to their own production park. New coal plants must already be built capture-ready*"

235. On 11 December 2007, RWE was issued an environmental permit for the construction of Eemshaven (the "**Environmental Permit**"). In the Environmental Permit reference is made to the letter of the Minister of Housing, Spatial Planning and the Environment of 28 June 2007 (see paras. 229 and 231 above) as being of "*such importance in light of the initiative at hand*" that verbatim citations from the letter were included in the permit.[246] The cited parts reiterated the Minister's comments that the CO2 emissions of coal-fired plants would eventually no longer be compatible with the European and Dutch climate ambitions.

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245 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007 , p. 27 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

246 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 50 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

236. It was not just the Minister of Housing, Spatial Planning and the Environment and the Province of Groningen that signalled the future need for CO2 emission reduction. Besides the Government's concerns, the Environmental Permit also cites related concerns and objections raised by society at large such as individuals and non-profit organisations. Greenpeace, for example, suggested that RWE might not be able to abide by climate goals, especially in light of the uncertainty surrounding the feasibility of CCS in the future.[247] It questioned whether Eemshaven would even be viable, given the expected developments in CO2 emissions policies.[248]

237. On 29 February 2008 a member of Parliament, Wijnand Duyvendak, submitted a proposal to amend the Taxation of Environmental Resources Act. The purpose of the proposal was to limit CO2 within existing and future coal plants:[249]

> "*The purpose of this bill is to use a tax measure to limit CO2 emissions from coal-fired power plants in the Netherlands, both new and existing. The way in which the limitation is achieved is left to operators. In principle, there are several options open to the operators of coal-fired power plants operators of coal-fired power stations have several options open to them:*
> *- closing existing coal-fired power stations;*
> *- refraining from building new coal-fired power stations (with possible replacement by gas-fired power stations and/or sustainable energy);*
> *- co-firing of (sustainable) biomass;*
> *- switching to natural gas as fuel;*
> *- CO2 storage (Carbon Capture and Storage, further: CCS);*
> *- beneficial use of residual heat.*
> *From the point of view of the bill's objective, it is not relevant which of these options are chosen, as long as the intended reduction of CO2 emissions is achieved.*"

238. In the Government's response, which followed later on 20 May 2010, it stated that it "*underlines the importance of limiting greenhouse gas*

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247 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 36 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

248 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 34 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

249 **Exhibit R-0091-EN**, Explanatory memorandum to proposal of law by member Duyvendak, Parliamentary papers II 2007/2008, 31 362, no. 3, 29 February 2008 (**Exhibit R-0091-NL**, Explanatory memorandum to proposal of law by member Duyvendak Parliamentary papers II 2007/2008, 31 362, no. 3, 29 February 2008).

emissions". Although it ultimately advised against the change the Government stated that "*the government has already indicated that if the price for CO2 emission rights within the ETS develops in such a way that CCS does not become a commercial reality, it will have to consider alternative policy measures*".[250]

239. The Government issued another Energy Report (the "**Energy Report 2008**"), which explained that measures needed to be taken to mitigate the environmental impact of non-clean energy production (such as production in coal-fired plants).[251] It further stressed the responsibility of investors in coal plants, explaining that investors were "*welcome provided that they take their efforts to compensate for the increase in CO2 emissions seriously*".[252] In addition, this report makes it clear that CCS would become a necessary condition for the future of coal plants in the Netherlands.[253]

240. At the same time it became clear that the Netherlands would not suffer from security of supply issues. Tennet, the party responsible for maintaining infrastructure for the electricity grid, performed an analysis on security of supply for the Minister of Economic Affairs on an annual basis. In the analysis Tennet would make a projection of the available capacity for the subsequent years and take into account all planned projects. In its analysis dated June 2008, Tennet concluded that the Netherlands would have more than enough production capacity. In fact it found that "*even if only about 30% of the planned new large-scale production capacity is realised by 2015, there will be sufficient production capacity to meet the Dutch demand for electricity until the*

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250 **Exhibit R-0092-EN**, Letter from the Minister of Finance to Parliament, Parliamentary papers II 2009/2010, 31 362, no. 12, 20 May 2010, p. 2. (**Exhibit R-0092-NL**, Letter from the Minister of Finance to Parliament, Parliamentary papers II 2009/2010, 31 362, no. 12, 20 May 2010).

251 **Exhibit R-0032-EN**, Energy Report 2008, p. 15: "*Mitigating measures, such as the capture and storage of CO2, will be taken for options that are not clean but do contribute to a reliable energy supply*", see also p. 86 (**Exhibit R-0032-NL**, Energy Report 2008).

252 **Exhibit R-0032-EN**, Energy Report 2008, p. 86 (**Exhibit R-0032-NL**, Energy Report 2008).

253 **Exhibit R-0032-EN**, Energy Report 2008, p. 67 (**Exhibit R-0032-NL**, Energy Report 2008).

end of the review period".[254] The Dutch energy market was therefore continuing its trajectory of CO2 reductions with sufficient capacity to meet electricity needs.

241. On 28 October 2008, the Government reached an agreement with the association of energy producers, of which RWE was a member, on ways to achieve CO2 emissions reductions (the "**2008 Sector Agreement**").[255] The 2008 Sector Agreement recognised that efforts from both public and private parties would be required in order to achieve the energy and climate goals.[256] The efforts required on the part of private parties notably included the realisation of CO2 reductions. CCS featured prominently as a potential means of achieving CO2 reductions.[257] The Government and the association of energy producers reached a number of agreements to further CO2 reduction. The 2008 Sector Agreement could be terminated with three months' notice[258] but would otherwise expire on 31 December 2020.[259] The 2008 Sector Agreement was based on cooperation and consequently it was agreed that differences of opinion would not be submitted to a judicial body for dispute as "*that is not the way in which this necessary cooperation can really work*".[260]

242. Specifically, it was agreed in the 2008 Sector Agreement that "[i]*n shaping government policy, the national government will not focus on measures that compulsorily determine the number or type of (coal-fired) power stations*".[261]

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254 **Exhibit R-0093-EN**, Tennet, Monitoring Report on Security of Supply 2007-2023 dated June 2008, p. 13 (**Exhibit R-0093-NL**, Tennet, Monitoring Report on Security of Supply 2007-2023 dated June 2008).

255 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

256 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Preamble (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

257 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

258 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 11(1) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

259 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 14(1) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

260 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 13 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

261 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.1 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

243. In turn, it was agreed that "[t]*he energy sector will promote that operators of new coal-fired power stations in the Netherlands* ***will have reduced CO2 very substantially from 2015 onwards***."[262] In the same agreement, the sector and the Government committed to take action to pursue the goals of the agreement "*without requiring every guarantee from the other party beforehand*".[263]

244. It was moreover agreed that energy producers would prepare "***major investments***" and extend "***major efforts***" to break with the trend, and that such actions must be "***undertaken now***". As the 2008 Sector Agreement stated:[264]

> *"The Clean and Efficient Work Programme* […] *calls for* ***major efforts from the government****, non-public* ***and private parties****. A* ***break with the trend is needed****, not only in the measures to be taken but also in the way in which they are implemented. In order to achieve the desired objectives, a number of necessary steps are already foreseen and will have to be taken in the short term.* ***Measures must be prepared and actions undertaken now****, while neither the government nor the sector have full certainty in advance.* ***The sector must prepare major investments****. With this Energy Sector Agreement, the central government and the energy sector trust each other to meet these challenges head on without requiring full certainty from the other party beforehand."*

245. These investments and efforts also related to CCS. As detailed further in Sub-section 3.2.1 the 2008 Sector Agreement included provisions on CCS demonstration projects and express commitments made by RWE in that regard.

246. On 24 November 2008, RWE sent a letter to the Prime Minister in which it lists the advantages of Eemshaven including "*to accelerate the development of carbon capture and storage technology*".[265]

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262 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

263 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Preamble (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

264 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Preamble (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

265 **Exhibit R-0094**, RWE's letter to Prime Minister, 14 November 2008.

247. In summation, reducing CO2 emission formed a core tenet of Dutch climate and energy policy since the 1990s. Parties that wished to use fossil fuels would have the comply with the clean fossil policy and take steps to substantially reduce CO2 emissions. This was no different for coal plants. Investors in new coal plants were told that there was no guarantee emission targets would become more stringent in the future. Indeed the Government warned that the market conditions under which an investment was made could change. This was all to reinforce the point that coal plants would only be acceptable provided they complied with Dutch climate policy and reduced their CO2 emissions.

3.2 Choosing the means of CO2 reduction was up to market participants

248. Through policies emphasised between 1998 and 2008, the Government thus set the conditions within which new coal plants would be acceptable, namely that very substantial reductions of CO2 were required, and that coal plants were expected to make major investments and efforts to that effect.

249. However, the manner in which this would be achieved was for the actual operators of plants to decide. CCS (**Sub-section 3.2.1**) and co-firing of biomass (**Sub-section 3.2.2**) were seen as two of the most promising techniques that could reduce CO2 emissions in coal plants.

3.2.1 CCS was seen as a means for coal plants to comply with the Netherlands' climate policy

250. It was clear to market players that considerable measures would have to be taken to curb CO2 emissions. One of the options to do so was CCS. CCS is a technology to capture CO2 generated by industrial and energy-related sources as it is emitted.[266] By capturing CO2 before it

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266 CCS involves the separation of CO2 from the other components of a flue gas or an industrial waste gas, using chemical solvents for example, the subsequent compression of the separatedCO2 to a high density and transport to a geological storage location (for example, an empty gas field under land or beneath the sea), to be permanently stored away from the atmosphere. The Netherlands had a test project for CCS from 2004 and 2013 in a gas field called K12-B. Similarly, in Norway Equinor, the state oil company, has been storing CO2 in gas fields since 1996.

is released into the atmosphere, CCS allows fossil fuels to be used with low emissions of greenhouse gases or without any at all. Because of this, CCS is also referred to as a "clean fossil technology".

3.2.1.1 CCS was globally recognised as one of the most promising CO2 reduction measures, also by RWE

251. In the 2000s, CCS was considered one of the tools within a wider package of technologies that could contribute to lowering greenhouse gas emissions in the long term. CCS is not a single technical fix to curb climate change. Achieving climate goals requires the coming together of several technologies, such as increasing energy efficiency, switching to lower carbon fuels, and using sources of renewable energy.

252. Even so, the market saw a lot of promise in CCS – the fact that CCS could potentially allow for the continued use of fossil fuels by neutralising the harmful side-effects of CO2 emissions sparked particular interest with proprietors of fossil fuel fired power plants.

253. Due to CCS's potential to secure the role of coal as an energy source, CCS was globally recognised as one of the main mitigation measures in the energy supply sector.[267] Also within the EU, CCS became one of the key priority initiatives in the area of energy technology.[268] European legislators recognised the potential CCS could play as a bridging technology that could contribute to mitigating climate change; thus CCS was given a place within energy legislation.[269]

254. The Netherlands was aware of CCS as a budding technology and referred to it as a means of achieving the CO2 reduction goals of its climate policy. However, the success of CCS was not a given and

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267 See e.g., **Exhibit R-0095**, IPCC Third Assessment, Climate Change 2001: Mitigation, 03 March 2022, para. 3.8.4.4.5.

268 **Exhibit R-0096**, A European Strategic Energy Technology Plan (SET-Plan), 'Towards a low carbon future', Communication from the Commission, 22 November 2007.

269 **Exhibit RL-0043**, Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, 23 April 2009 ("**CCS Directive**").

depended on the market developing it further. If unsuccessful the Government stated that more regulation would be needed to reduce CO2 emissions.[270]

255. CCS became relevant as one of the potential means towards achieving the Netherlands' climate goals in the late 1990s. It was first mentioned in the Advice on behalf of the Climate Policy Implementation Note of 1998 and repeated in the Climate Policy Implementation Note of 1999 as a potential tool for reducing CO2 emissions in the following decades. However, the Government expressly noted that if CCS were not successful other actions would need to be taken to reduce CO2. It was a transitional tool on the road to a more sustainable energy household, rather than a goal in itself.

> "*CO2 capture and storage makes it possible to continue using fossil fuels as part of an energy supply based on climate-neutral energy carriers.*"[271]

> "***If CO2 capture and storage is not used**, **the curbing of the growth of CO2 emissions** in the sectors mentioned must be **achieved by** reducing energy consumption and by **lowering the carbon intensity of the energy supply**. The latter can be achieved by deploying renewable energy sources **and by reducing the use of coal**.*"[272]

256. The Fourth National Environment Policy Plan envisaged CCS as one of three tracks leading to a sustainable energy system in the long run, in addition to the use of renewables and improvement of energy

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270 **Exhibit R-0092-EN**, Letter from the Minister of Finance to Parliament, Parliamentary papers II 2009/2010, 31 362, no. 12, 20 May 2010 (**Exhibit R-0092-NL**, Letter from the Minister of Finance to Parliament, Parliamentary papers II 2009/2010, 31 362, no. 12, 20 May 2010).

271 **Exhibit R-0042-EN**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 72 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

272 **Exhibit R-0042-EN**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2). This is in line with the advice of the Council for Housing, Spatial Planning and the Environment, that also considers CCS to be an important component to the decarbonisation of the Dutch energy sector and the transition to renewable sources in the years to come **Exhibit R-0080-EN**, VROM-Council, Transition to a low-carbon energy management: Advice for the Implementation Note on Climate Policy, 23 December 1998, p. 35 (**Exhibit R-0080-NL**, VROM-Council, Transition to a low-carbon energy management: Advice for the Implementation Note on Climate Policy, 23 December 1998).

efficiency.[273] This set the framework for the road ahead towards reducing greenhouse emissions in the Netherlands. CCS was one of the main pillars.

257. Subsequent policy documents made clear that, should CCS prove not to be feasible, other measures would have to be scaled up to make up for it. A clear example is the Energy Report 2002:[274]

> "*For climate policy, it is very important to have certainty as soon as possible that this route is indeed feasible, i.e. that this option will also become available. If this is not the case, it will put additional pressure on the need for energy efficiency and renewable energy.*"

258. Though the technical development in the field of CCS was still in its infancy, it was expected that CCS would be important in the long term.[275] This was also noted in the Clean Fossil Policy Memo:[276]

> "*Given the ever-increasing urgency of the climate problem, a further tightening of emission targets in the post-Kyoto period is obvious. Since the Netherlands relies heavily on other greenhouse gases in the current Kyoto package and is struggling to reduce CO2 emissions, new solutions and instruments will be needed. Clean fossil applications are then not only an opportunity, but most likely a necessity as well."*

259. The subsequent Energy Report 2005 also emphasised that the use of fossil energy sources as it was used at the time, was no longer responsible, considering global developments.[277] The Energy Report 2005 zoomed in on the role CCS could play for coal-fired power plants in particular and envisaged its broad application in the short term. In order to comply with the stated target of zero CO2 emissions by 2050,

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273 **Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001, p. 149 and p. 155 (**Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001).

274 **Exhibit R-0029-EN**, Energy Report 2002, p. 47 (**Exhibit R-0029-NL**, Energy Report 2002).

275 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

276 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19 (**Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6).

277 **Exhibit R-0030-EN**, Energy Report 2005, p. 26 (**Exhibit R-0030-NL**, Energy Report 2005).

the new coal plants would need to start with CCS (in addition to other reduction measures) within 10 years:[278]

> "*In principle, coal use for electricity production is very attractive in terms of security of supply due to the large reserves and geographical spread. However, the environmental impact is a disadvantage of this option: the CO2 emissions are almost twice as high as with a high-efficiency natural gas power plant. A coal-fired power station that is built now has a life span until around 2050. Around that time, this power station may no longer emit CO2.* ***This is something that promoters*** **[of new coal-fired power stations]** ***must be fully aware of when deciding on new coal-fired power stations. It is possible that a decision on CO2 capture and storage will have to be taken within ten years of the power station becoming operational****. Co-firing and co-firing of biomass is then insufficient.*"

260. Subsequent parliamentary briefings clarified that any newly built coal-fired power plants were expected to be developed as "capture ready",[279] in anticipation of the expected developments in the CCS field.

> "*New coal-fired power stations that are to be built in the coming years must already be prepared for the future application of CCS and energy companies must also invest in the development, demonstration and application of CO2 capture and storage (CCS).*"[280]

> "***From 2015 onwards, very substantial CO2 reductions will have to be achieved in the power station fleet of the operator concerned****.* […] *Covenants will be concluded on the capture and storage of CO2 in the soil. Clean fossil fuels can*

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278 **Exhibit R-0030-EN**, Energy Report 2005, p. 47 (**Exhibit R-0030-NL**, Energy Report 2005).

279 **Exhibit R-0097-EN**, Letter from State Secretary for Housing, Spatial Planning and the Environment, Parliamentary papers II, 2006-07, 28 240, no. 72, 02 February 2007, p. 6 (**Exhibit R-0097-NL**, Letter from State Secretary for Housing, Spatial Planning and the Environment, Parliamentary papers II, 2006-07, 28 240, no. 72, 02 February 2007); **Exhibit R-0090-EN**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007, p. 6;, p. 4235 (**Exhibit R-0090-NL**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007).

280 **Exhibit R-0090-NL**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007, p. 4235 (**Exhibit R-0090-NL**, Answers to questions asked by Member of the House of Representatives, Parliamentary papers II 2006/07, no. 2001, 28 June 2007). See also **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. 5-6.

> *thus be used as a transition technology to a sustainable energy supply. The operators are also committed to additional biomass co-firing or even the early closure of old, inefficient coal-fired power plants that are part of their own production fleet.* ***New coal-fired power stations must already be built to be capture-ready****."*[281]

In the meantime, the electricity sector was expected to contribute to further technical advances aimed at making CCS market-ready for large-scale applications.[282]

3.2.1.2 It was up to the emitters to advance CCS

261. Before large-scale application of CCS could be realised, further research and development was needed. This required action from market participants.

262. The Government facilitated the market participants' first steps towards the realisation of CCS in the Netherlands and cooperated with various interested parties. For example, the Government facilitated the early stages of research and development of CCS technology by commissioning and financing the pilot project CRUST in 2004, which was the first operational CO2 storage project in the Netherlands,[283] and subsidised the demonstration project ROAD in 2010.[284] It also co-

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281 **Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007, p. 39 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007). See also **Exhibit R-0097-NL**, Letter from State Secretary for Housing, Spatial Planning and the Environment, Parliamentary papers II, 2006-07, 28 240, no. 72, 02 February 2007, p. 6 (**Exhibit R-0097-NL**, Letter from State Secretary for Housing, Spatial Planning and the Environment, Parliamentary papers II, 2006-07, 28 240, no. 72, 02 February 2007).

282 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007, p. 34 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

283 Since 2004 the CRUST project has stored an annual 20,000 tonnes of CO2, captured from the locally produced natural gas, into a nearly depleted gas field in sector K12-B in the North Sea. **Exhibit R-0098**, R. de Vos (ed), Linking the Chain, CATO-2, 01 July 2022, p. 28.

284 **Exhibit R-0099-EN**, Letter from the Minister of Economic Affairs and Climate, Parliamentary papers II 2019/20, 31 510, no. 70, 24 February 2020 (**Exhibit R-0099-NL**, Letter from the Minister of Economic Affairs and Climate, Parliamentary papers II 2019/20, 31 510, no. 70, 24 February 2022). The project was ultimately terminated by the initiators, Uniper and Engie.

funded CATO as from 2004, a large public-private R&D platform for CCS aimed at advancing the technology in order to make large-scale implementation of CCS possible.

263. While the Government was keen to provide support to the initial stages of CCS development, the primary responsibility laid with the market participants. That the energy sector itself was expected to play the leading role in advancing CCS technology was communicated from the outset in various policy documents.

264. For example, the Fourth National Environment Policy Plan of 2001 noted that the CCS 'ball' was primarily in the market participants' court – the Government could set the goals and frameworks, and provide guidance where needed, but it was ultimately up to market participants to take appropriate action.

> "*The market will primarily determine which combination of technologies is the most suitable for achieving the necessary reduction in energy-related emissions. The government steers for the effects here and ensures, by means of instruments that steer via the market, that companies are encouraged to make the most optimal choice themselves.*"[285]

265. Similarly, the Clean Fossil Policy Memo of 2003 noted that substantial investments were needed to carry out CCS. While the Government would contribute financially to initial research and development activities, advancing and implementing clean fossil technologies remained the responsibility of market participants.[286]

> "*Large-scale stimulation of clean fossil fuels by the government is not being considered. Incentives given by an emissions trading system, for example, should encourage market parties to consider clean fossil fuels as an option, alongside other options for reducing CO2 emissions. The government can,*

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285 **Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001, p. 161 (**Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001).

286 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 21 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003). Similarly, **Exhibit R-0032-EN**, Energy Report 2008, p. 114 (**Exhibit R-0032-NL**, Energy Report 2008) and **Exhibit R-0100-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers 2009/10, 31 510, no. 33, 06 February 2009, p. 3 also noted that the costs of CCS should be borne by the emitters (**Exhibit R-0100-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers 2009/10, 31 510, no. 33, 06 February 2009).

> *however, play a stimulating role in carrying out pilot/demonstration projects, which also require substantial investments."*

266. In a similar vein, subsequent parliamentary briefings of 2007 clarified that the role of the Government would be a supporting one, and that such support was meant to be temporary.[287]

> "*The companies have also expressed their willingness to invest in CCS provided the government contributes by creating the right conditions. The conditions and the appropriate role of the government will be worked out in the coming months. It is clear that financial support from the government (national and European) is temporary and will focus on the development and demonstration phase that we still have to go through. After that, CCS will have to be self-financing. If a company wants to build coal-fired power stations now, it will have to take this into account in its financial forecasts.*"

267. The Clean and Efficient Work Programme of 2007 expected the energy sector's cooperation to further CCS development, particularly by ensuring that any new coal plants were developed as capture-ready, setting up demonstration projects and participating in continued research development.[288] The aim was to realise two large-scale demonstration projects by 2015 or earlier. Once the technology was sufficiently developed, the Netherlands aimed at moving towards mandatory CCS for all new coal fired power plants throughout Europe.[289]

268. The way to achieve this was set out in concrete terms in the aforementioned 2008 Sector Agreement,[290] which the Government

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287 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 6 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

288 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007, p. 34 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

289 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007, p. 32 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

290 See paras. 241-244 above.

and various market participants in the energy sector (including RWE) entered into to carry out the objectives of the Clean and Efficient Work Programme. The energy sector committed to substantial CO2 reductions from 2015 on,[291] and undertook to make the necessary investments in CO2 reduction measures to this end, including CCS.[292] In fact the operators of new coal plants were required to report on their investments in CCS:[293]

> "*The energy sector will encourage energy companies, including* ***the operators of new coal-fired power coal-fired power stations, will report on how they implement the agreements in this declaration within their own power station agreements of this declaration and invest in sustainable energy and the application of technology to capture and store CO2 (CCS)*** *and have achieved a very substantial CO2 reduction by 2015. The start of the demonstration projects is a necessary step in this direction.*"

269. In the 2008 Sector Agreement, the energy sector also undertook to ensure further advancement of CCS technology.[294] This included *inter alia* making newly built power plants capture-ready; cooperating intensively with the authorities and other market parties to develop all necessary links in the CCS chain; having proposals ready in 2011 for two large demonstration projects;[295] and conducting research and development ("**R&D**") in the field of CCS. The initiative therefore remained in the domain of market participants.

270. The Government, on the other hand, would play a supporting role for market efforts by creating the appropriate framework and by cooperating with the energy sector's research into appropriate storage locations and infrastructure. Once CCS technology was further

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291 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, section 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

292 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, preamble: "*The energy sector is going to make large-scale investments in sustainable energy and* ***the capture and storage of CO2***." (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

293 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 5(1) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

294 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.4 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

295 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 5(3) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

developed and became state of the art, the Government would aim to make its application compulsory.[296]

271. Additionally, the parties agreed that the public's acceptance of CCS was an important precondition.[297] To this end, the Government and market participants would work together to garner public support at the national, regional and local levels.

272. The 2008 Sector Agreement further contained a number of company-specific undertakings. RWE expressed its intention to use CCS technology to achieve the progressive reduction of CO2, including at Eemshaven in particular.[298] To this end, RWE undertook to invest in a CO2 capture demonstration project in Eemshaven, subject only to technological possibilities being sufficiently advanced; the legal framework for CCS being in place; and the use of CCS being recognised as a CO2-reduction measure within the ETS.[299] No caveats were made in respect of CO2 prices being favourable.[300] All things considered, RWE expected to realise a demonstration project at the Eemshaven plant in 2015, and large-scale application by 2020:[301]

> "*RWE's aim is to promote the available CCS technology through the aforementioned developments* ***in such a way that large-scale CO2 capture can be achieved in Eemshaven by 2020*** *by means of a so-called 'first train'.* ***RWE expects to be able to demonstrate this capture in 2015 and to have capture on a sufficient scale by 2020****, provided the technological development is so advanced that capture is economically feasible without disproportionate energy loss.*"

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296 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.4.14 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

297 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.5.3 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

298 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

299 The latter conditions have since been fulfilled: the legal framework for CCS was put in place with the Netherlands' implementation of the CCS Directive (2009/31/EC) into the Dutch Mining Act and CCS is currently explicitly recognised by the ETS Directive, pursuant to which CO2 that is captured and safely stored is considered as “not emitted” under the ETS. Technological advancement to CCS is, as noted above in Sub-section 3.2.1.2, mainly the energy sector's (including RWE's) responsibility.

300 See also Section 4.1 below.

301 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Annex 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

273. Despite this, RWE did not follow through on its commitment to realise a CCS demonstration project (see Sub-section 4.4.2).

3.2.2 The Netherlands provided once more a temporary subsidy for the use of biomass to achieve CO2 reduction

274. Co-firing of biomass in coal plants was another means to reduce a coal plant's CO2 emissions, as it is considered CO2-neutral.[302]

275. Co-firing of biomass had been mentioned in the Covenant on coal plants and CO2 reduction that was signed on 24 April 2002.[303] The Energy Report 2002 similarly recognised biomass would continue to make a contribution to sustainable energy production.[304]

276. To further encourage coal plant operators to start co-firing biomass, the Netherlands introduced a temporary subsidy scheme to stimulate the use of environmentally friendly energy production in 2003. In 2007 the subsidy scheme for sustainable energy (the "**SDE Subsidy**") was introduced.[305] This replaced the earlier subsidy regime.

277. In 2010, during a debate with the lower house of Parliament about whether the SDE Subsidy should be expanded to also cover the co-firing of biomass, the Minister of Economic Affairs noted that that the sector continued to aim for subsidy for the co-firing of biomass but that she "*did not want to structurally subsidise the cofiring of biomass*".[306] The Government had been in discussions with the energy sector about

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302 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. 3.12 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

303 See para. 204.

304 **Exhibit R-0029-EN**, Energy Report 2002, p. 51 (**Exhibit R-0029-NL**, Energy Report 2002).

305 The SDE Subsidy was the successor to an earlier subsidy introduced on 1 July 2003, the "*environmental quality of electricity production*" ("*milieukwaliteit elektriciteitsproductie*" subsidy.

306 **Exhibit R-0101-EN**, Notes of meeting of 2 December 2009, Parliamentary Papers II 2009-2010, 21 239, no. 90, 02 December 2009, p. 32 (**Exhibit R-0101-NL**, Notes of meeting of 2 December 2009, Parliamentary papers II 2009/10, 21 239, no. 90, 02 December 2009).

voluntary co-firing of biomass and was considering making co-firing compulsory.[307]

278. Ultimately agreement was reached in the form of the Energy Agreement 2013.[308] The co-firing of biomass in coal plants built after 1990 would be subsidised temporarily. The subsidy was capped to support a maximum of 25 petajoules generated through co-firing biomass.

279. In 2015 the SDE Subsidy scheme (then called "**SDE+ Subsidy**") was opened up to include the co-firing of biomass in coal plants.[309] Successful applicants were granted a subsidy which covered both capital expenditure (for example, investments needed to adapt the coal plant so that it can co-fire biomass) and the unprofitable top of biomass as well as other variable costs (for example, costs of purchasing and storing biomass, and maintenance of the plant's biomass facilities). Once granted, a biomass subsidy runs for eight years.

280. On 18 March 2015, it was announced that the SDE+ Subsidy for biomass would be amended to allow experimental biomass flows to be used up to a maximum of 15%.[310] On 21 December 2018, at the behest of the market [redacted] the Government made it possible to use lignin up to a maximum of 25%.[311]

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307 **Exhibit R-0102-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2009/10, 31 239, no. 76, 23 November 2009, p. 7 (**Exhibit R-0102-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2009/10, 31 239, no. 76, 23 November 2009) and **Exhibit R-0103-EN**, Energy Report 2011, pp. 3-4 (**Exhibit R-0103-NL**, Energy Report 2011).

308 See further Sub-section 5.1.3.

309 **Exhibit R-0104-EN**, Letter from the Minister of Economic Affairs, Parliamentary Papers II 2014/15, 31 239, no. 180, 11 November 2014, pp. 1 and 4-5 (**Exhibit R-0104-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2014/15, 31 239, no. 180, 11 November 2014). In 2020, the SDE+ Subsidy was updated and expanded to the so-called SDE++ subsidy regime.

310 **Exhibit R-0044-EN**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2014/2015, 30 196, no. 300, 18 March 2015 (**Exhibit R-0044-NL**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2014/2015, 30 196, no. 300, 18 March 2015).

311 **Exhibit R-0105-EN**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2018/2019, 31 239, no. 294, 21 December 2018, p. 15 (**Exhibit R-0105-NL**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2018/2019, 31 239, no. 294, 21 December 2018).

281. In the spring round of 2017, the last subsidy was granted for co-firing of biomass in coal plants, which means that the 25 petajoules of biomass as agreed in het Energy Agreement 2013 had been used up in full.[312] Past that threshold, no more subsidies were granted.[313]

282. In total the Government has granted more than EUR 3.6 billion in subsidies to stimulate the co-firing of biomass and reduce CO2 emissions in coal plants.[314]

312 **Exhibit R-0104-EN**, Letter from the Minister of Economic Affairs, Parliamentary Papers II 2014/15, 31 239, no. 180, 11 November 2014, pp. 4-5 (**Exhibit R-0104-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2014/15, 31 239, no. 180, 11 November 2014). See also: **Exhibit R-0106-EN**, 2013 Energy Agreement, p. 73 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

313 This threshold of 25 PT was reached in 2017: **Exhibit R-0107-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II, 2016-17, 32 239, no. 261, 04 July 2017, p. 3 (**Exhibit R-0107-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2016-17, 32 239, no. 261, 04 July 2017).

314 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

PART C: INCEPTION OF RWE'S EEMSHAVEN PROJECT AND THE FIRST YEARS OF ITS OPERATIONS (2006-2019)

4 RWE MADE A LOSS-MAKING INVESTMENT IN FULL KNOWLEDGE OF DUTCH POLICY ON CO2 REDUCTION

283. RWE publicly recognised that it would need to reduce CO2 emissions in accordance with Dutch policy (**Section 4.1**). It was against this background that RWE started the process to obtain permits for Eemshaven. These permits again underlined the need to invest in CO2 reduction measures at Eemshaven (**Section 4.2**).

284. In March 2009, RWE's board discussed whether to proceed with construction. RWE considered that its investment would be loss-making, but proceeded with construction nevertheless, which resulted in RWE writing-off a significant part of Eemshaven's value before operations started (**Section 4.3**). During this period, RWE also started to renege on its earlier promises. In particular, RWE cancelled its CCS project (**Section 4.4**). Finally, another investor opted against building a coal plant at roughly the same time as RWE decided to start construction (**Section 4.5**).

4.1 RWE recognised that it would need to reduce CO2 emissions

285. Before RWE decided to invest in Eemshaven, it was aware that CO2 emissions would need to be reduced substantially and that Dutch climate policy concerning CO2 emissions could and would become significantly more stringent in the future.

286. In a general sense, RWE acknowledged that it was a major CO2 emitter and that it should bear responsibility for mitigating CO2 emissions and their consequences. Already in its 2005 annual report, RWE explicitly acknowledged such responsibility in the development of climate-friendly technologies:[315]

> "*Since we are one of Europe's largest producers of CO2 emissions, we believe we shoulder a special responsibility in the development of climate-friendly technologies.*"

315 **Exhibit R-0108**, RWE, 2005 Annual Report, p. 79.

287. In its annual report over financial year 2007, RWE again noted that it was aware that its coal-fuelled energy production would need to become more sustainable. It explained that the only alternative to doing without coal would be "*to see to it that coal-based power generation becomes climate-friendly. This goal can only be attained using innovative technologies*", listing CCS as an example of such technologies.[316]

288. RWE also accepted and acknowledged such responsibility specifically with respect to the coal plant it intended to build in the Netherlands, as demonstrated by contemporaneous documents.

289. First, in a starting memorandum about the contemplated construction of a coal plant in Eemshaven dated April 2006, RWE recognised that climate policy was continuously being developed. RWE further recognised that, as a result, "*more stringent requirements will be imposed with respect to the emissions of power plants*".[317] Given that plants are built for longer periods into the future, it is important to "*take this, but to the extent possible also future, additional tightening into account*".[318]

290. It was with this context in mind that, in the same starting memorandum, RWE presented CO2 reduction measures, which include co-firing biomass and future application of CCS, as particular selling points of the Eemshaven project:[319]

"*The advantages of this special project are:*

316 **Exhibit R-0109**, RWE, 2007 Annual Report, p. 16.

317 **Exhibit R-0046-EN**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006, p. 10 (**Exhibit R-0046-NL**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006).

318 **Exhibit R-0046-EN**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006, p. 10 (**Exhibit R-0046-NL**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006).

319 **Exhibit R-0046-EN**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006, p. 4 (**Exhibit R-0046-NL**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006). See also p. 10: "*The discussion regarding environment is currently mainly focused on CO2 emissions. The concept chosen by RWE, a robust coal-fired plant, gives the opportunity to co-fire a percentage of (CO2 neutral) biomass. Also, the design takes into account that CO2 can be captured in the long run.*"

[…]

- *a contribution to the reduction of CO2 emissions through the realisation of a high electrical efficiency, the co-firing of biomass and possibly the capture of CO2*."

291. Second, on 18 May 2006, RWE sent a letter to the Ministry of Economic Affairs, in which it announced its intention to construct a coal plant in the Netherlands. In this letter, RWE stated that it was planning to build a "*hypermodern biomass / coal plant*". It explained that throughout the permitting procedure, it would be taking further decisions as to the technological applications of the plant, especially with respect to the minimising of the environmental impact of the plant, possibly through CCS and the use of biomass.

292. RWE also noted that it was well aware of the discussion in the Netherlands about possible alternatives for fossil fuels and reassured the Ministry of Economic Affairs that it wanted to "*play an active role in this discussion and show that, as a large energy supplier, it can also contribute to a cleaner environment.*"[320]

293. Third, after a new Government was appointed in July 2006, RWE sent a letter to the newly appointed Minister of Economic Affairs on 3 August 2006, which was similar in substance to the letter of 18 May 2006. RWE specifically reiterated that it would be taking further decisions with respect to the minimising of the environmental impact of the plant, possibly through CCS and the use of biomass, and again highlighted its desire to play an active role in the discussion about alternatives for fossil fuels.[321]

294. Fourth, on 22 March 2007, RWE sent a letter to the then Prime Minister of the Netherlands. In this letter, it again stressed that "*RWE, too, wants to make a significant contribution to a sustainable energy*

320 **Exhibit R-0037-EN**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006 (**Exhibit R-0037-NL**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006).

321 **Exhibit R-0110-EN**, RWE's letter to the Minister of Economic Affairs, 03 August 2006 (**Exhibit R-0110-NL**, RWE's letter to the Minister of Economic Affairs, 03 August 2006).

management" and that it had "*concrete plans to develop a 'zero CO2 emission' plant*".[322]

295. Fifth, RWE is bound by the 2008 Sector Agreement.[323] As noted above, as part of the agreement "[t]*he energy sector will promote that operators of new coal-fired power stations in the Netherlands will have reduced CO2 very substantially from 2015 onwards*." [324] RWE specifically committed to "*achieve a progressive reduction of CO2 emissions in general and of the Eemshaven power plant in particular*"[325], including through application of CCS.

296. Accordingly, before making its investment decision, RWE was aware of the Dutch climate policies, including RWE's obligation to very substantially reduce CO2 emissions and of the fact that future climate policies could impose further and more stringent CO2 emission reduction requirements. RWE also committed to develop CCS as a means to realise substantial CO2 emissions reductions, in line with Dutch policy to encourage CCS.

4.2 The permitting process also made clear to RWE that it would have to reduce CO2

297. RWE was issued the Environmental Permit for the construction of Eemshaven on 11 December 2007 by the Province of Groningen. Under national law the issuance of such a permit occurs at a provincial rather than national level. Nevertheless permit requests, including RWE's, are tested against the requirements stemming from the Law on Environmental Conservation ('*Wet milieubeheer*'), which is national legislation. Besides the Environmental permit, RWE was also granted a nature conservation permit. As the name suggests, and RWE recognises, the purpose of such a permit application is to analyse the impact a project could have on nature and wildlife.[326] This permit does

322 **Exhibit R-0034-EN**, RWE's letter to the Prime Minister, 22 March 2007 (**Exhibit R-0034-NL**, RWE's letter to the Prime Minister, 22 March 2007).

323 RWE recognises that the 2008 Sector Agreement is binding on it. Memorial, para. 164.

324 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

325 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Annex 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

326 Memorial, para. 188.

not form part of RWE's claims under Article 10 and 13 ECT and is therefore not the subject of these arbitral proceedings.

298. The Environmental Permit stated that the new coal-fired plants would not be allowed to emit CO2 without limitation and would ultimately only be acceptable due to a combination of the highest possible generation efficiency, the use of a substantial proportion of biomass, utilisation of released heat and the application of CCS.[327] Further, it noted that "*the emission of CO_2 equivalents must be drastically reduced in the coming years*" pursuant to the Kyoto Protocol.[328] More specifically the Environmental Permit stated:[329]

> "*It is recognised that the CO2 emissions of coal plants will in time no longer be compatible with the climate ambitions of Europe and this government. The new coal plants cannot therefore emit unlimited CO2 and will ultimately only be acceptable through a combination of the highest possible generation efficiency, the use of a substantial portion of biomass, the utlisation of released heat and the application of CO2 capture and storage (CCS).*"

299. In relation to CCS, RWE was informed that it should expect a requirement to implement it:[330]

> "[..]. *the large amount of CO2 released during energy production with fossil fuels, including coal, must, on the other hand, must be held responsible for some of the global warming/climate change. This has led to a number of policy developments, in which the European ambition and that of the national government is to make CO2 capture and storage (CCS) mandatory at coal plants form 2020 and to deliver new coal plants "CO2 capture ready" from 2010.*"

300. It is important to note that the Environmental Permit is not "*irrevocable*".[331] There is always a possibility to revoke a permit. The law governing the Environmental Permit specifically provides for the

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327 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 50 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

328 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 61 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

329 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 50 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

330 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 61 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

331 Memorial, paras. 9, 14, 15, 304, 364, 410, 461, 472, 529 and 535.

possibility to modify or revoke permits. This could be done if a new technology is designated best available technology and should therefore be used at Eemshaven. The law even explicitly provides for revocation of a permit for environmental reasons. It even orders the competent authority to modify or revoke a permit if "*the facility has unacceptably detrimental consequences for the environment*".[332]

301. Further, the Environmental Permit is not "*unlimited*" in a temporal sense.[333] The Environmental Permit does not have a defined end date, but this does not mean that it will be effective forever. The period of the Environmental Permit is simply undefined. This means that, in contrast to a permit with a definite, pre-set term, it is not clear *in advance* when the permit will lapse. The Environmental Permit thus does not confer the everlasting right to generate power through coal as its main fuel.

302. The granting of permits led to widespread social resistance. Besides the Government's concerns, the Environmental Permit also cites related concerns and objections raised by society at large such as individuals and non-profit organisations. Greenpeace, for example, suggested that RWE might not be able to abide by climate goals, especially in light of the uncertainty surrounding the feasibility of CCS in the future.[334] Indeed the Environmental Permit was the subject of dispute before the Administrative Jurisdiction Division of the Council of State following complaints from environmental organisations such as Greenpeace.

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332 **Exhibit RL-0044-EN**, The Environmental Law (General Provisions) Act, 06 November 2008, Article 2.30(1) stipulates that the competent authority must frequently assess whether the conditions of an environmental permit are still sufficient "*in light of the developments in the area of the technical possibilities to protect the environment and the developments with respect to the quality of the environment*". Article 2.31(1)(b) requires that the competent authority modify the permit, if it becomes clear from the assessment provided for in Article 2.30(1) that "*the detrimental consequences that the facility causes for the environment can* […] *or should* […] *be further limited*". Article 2.33(1)(d) stipulates that the authority must revoke the permit if a facility causes unacceptably detrimental consequences for the environment and these cannot be mitigated through a modification pursuant to Article 2.31 (**Exhibit RL-0044-NL**, The Environmental Law (General Provisions) Act, 06 November 2008).

333 Memorial, para. 472.

334 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007, p. 33 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

4.3 From the start of construction, RWE wrestled with Eemshaven's lack of economic viability

4.3.1 At the time of its investment decision, RWE knew that its investment in Eemshaven may not be profitable

303. The profitability of Eemshaven was a concern before construction started.

304. RWE allegedly made its investment decision on 16 March 2009 when, during an RWE Power AG board meeting, the board decided to proceed with the construction of Eemshaven.[335] At that time, according to RWE's internal documents, construction costs were estimated at EUR [redacted], with a potential fluctuation of EUR [redacted].[336]

305. The documents at the board meeting on 16 March 2009 painted a bleak picture of Eemshaven financial viability.

306. In particular, an internal presentation stated that the profitability of Eemshaven (referred to as "*EEM*" in the presentation) was "*below* [the] ***required*** *minimum rate of return*".[337] In a 40-year projection, the rate of return for the plant would not exceed the cost of capital, let alone RWE's hurdle rate; that is, the minimum rate of return that RWE required to invest. In other words, the investment in Eemshaven was expected not to be profitable for RWE.[338]

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335 Memorial, para. 194. **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 1 (pdf).

336 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, pp. 1, 3, 13, 18 , 20 (pdf).

337 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 19 (pdf).

338 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 24 (pdf).

C-0061, Annex 4 p. 8.

307. As explained by RWE's experts in this arbitration, a reasonable investor would not invest under these circumstances, because such an investment would be considered "*loss-making from the perspective of the investor*":[339]

> "*A project whose payoff falls short of investment costs including cost of capital would not be realised, because there are superior investment opportunities in the capital market.* ***If such a project was realised*** *(hypothetically),* ***it would be considered loss-making from the perspective of the investor****.*"

308. Moreover, as RWE's board documents show, this loss-making projection was based on favourable projections that might not materialise.

309. First, the projections did not take into account costs related to future emission reduction measures. For example, if RWE were to factor in the costs of its CCS research and development project (a "*demonstration facility*" expected to cost EUR), RWE's rate

339 **Exhibit CER-0001**, NERA Expert Report, para. 9, fn. 7.

of return would have reduced further.[340] If RWE were to take into account the costs of full implementation of CCS (which may amount to several hundreds of millions of euros),[341] the rate of return would decrease even further. RWE chose an investment that was not going to earn a positive return and one that would do even less so once measures to reduce CO2 emissions (which RWE was required to implement) would be adopted.

310. Second, RWE's projections were extrapolated from the "*EEO* [Energy & Economic Outlook] *data set of December 2008*".[342] However, actual forward prices for 2009 to 2011 indicated that profitability of the plant (the "*clean dark spread*")[343] was lower than what the EEO data suggested:

C-0061, p. 22 (pdf).

311. Third, [redacted].[344]

312. Fourth, RWE's projected rate of return assumed that construction would proceed without delays and that no additional costs would be incurred. Both assumptions were (even then) not realistic and, over time, proved to be incorrect:

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340 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 21 (pdf).

341 See for example the calculations by the International energy Agency Greenhouse Gas R&D Programme from 2014 **Exhibit R-0111**, IEAGHG, CO2 Capture at Coal Based Power and Hydrogen Plants, 01 May 2014, p. 12, where it was calculated that the costs of CCS would be roughly EUR 65 per tonne.

342 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 4 (pdf).

343 The clean dark spread is the difference between electricity prices (which are a measure of revenue) and coal and carbon prices (which are a measure of variable costs).

344 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 1 (pdf).

- Originally, in 2006, the project was planned to be completed in 2012.[345] By March 2009, the project had already accumulated delays, given that operations in the two units of the power plant were expected to start in April and October 2013 respectively,[346] and further "*delays in project implementation*" were deemed "*likely*". [347] Indeed, the commissioning of Eemshaven eventually would take place in 2015, three years after the planned completion.[348]

- Originally, RWE had planned for a capital expenditure of EUR [redacted] for Eemshaven. In March 2019, RWE expected construction costs to rise to EUR [redacted]. Costs would eventually increase further to "*nearly EUR* [redacted]".[349]

313. As RWE's documents show, delays in construction and/or an increase in costs would have a significant impact on the expected rate of return. By way of example, a delay of six months coupled with an increase of EUR [redacted] in costs (a more optimistic scenario than what actually materialised) would reduce the rate of return by [redacted].[350]

314. Already sustained project costs in the amount of "*approx.* [redacted] *euros*"[351] appear to have played a role in RWE's decision to proceed with an economically unviable project.

315. In particular, as RWE's internal documents show, RWE faced sunk costs in the amount of EUR [redacted] if it decided to cancel the project in March 2009.[352] However, if RWE began construction and then halted it, sunk costs would go down to EUR [redacted] and EUR

345 **Exhibit R-0049**, RWE, 2006 Annual Report, p. 38.
346 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 19 (pdf).
347 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 2 (pdf).
348 Memorial, paras. 252-253.
349 See Memorial, para. 363.
350 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, pp. 21-22.
351 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 25.
352 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 25 and **Exhibit C-0062**, RWE AG, Excerpt of the Minutes of the Board Meeting dated 17 March 2009, p. 2.

[redacted] according to the estimates.[353] As RWE's documents explain, the reason for this difference was RWE's inability to rely on "*privileged termination rights*"[354] with suppliers. If a necessary permit was withdrawn after construction had started, RWE would have to pay less than if it chose to cancel the project for being unprofitable before construction had commenced.[355]

316. On this basis, starting construction of Eemshaven was not going to be profitable for RWE, but could give rise to a reduction in sunk costs if RWE cancelled the project subsequently.

4.3.2 After construction started, RWE wrote off a significant part of the investment costs of Eemshaven

317. Two years later, in March 2011, RWE's management recognised publicly that construction should not have started, not because of "*environmental arguments*" but because of Eemshaven's lack of economic viability:[356]

> Q*: "with the knowledge of today, would you not build the* [Eemshaven coal-fired] *power plant?*"
>
> A: "*No, **I would not** do that. But that is not because of environmental arguments. Compared to three years ago, we have a much lower electricity price and a much higher coal price. **The return is no longer economic** at the moment".*

318. Eemshaven's bleak earning prospects translated into significant impairments for RWE, as recorded in 2012, 2013 and 2016.

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353 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 25 and **Exhibit C-0062**, RWE AG, Excerpt of the Minutes of the Board Meeting dated 17 March 2009, p. 2.

354 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 5 and **Exhibit C-0062**, RWE AG, Excerpt of the Minutes of the Board Meeting dated 17 March 2009, p. 2.

355 **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, p. 5 and **Exhibit C-0062**, RWE AG, Excerpt of the Minutes of the Board Meeting dated 17 March 2009, p. 2.

356 **Exhibit R-0112-EN**, Co2ntramine, 'Expensive Eemshaven Coal-fired Power Station Will Make a Loss' (http://www.co2ntramine.nl/dure-kolencentrale-eemshaven-gaat-verlies-opleveren/) accessed 4 April 2020 (**Exhibit R-0112-NL**, Co2ntramine, 'Expensive Eemshaven Coal-fired Power Station Will Make a Loss' (http://www.co2ntramine.nl/dure-kolencentrale-eemshaven-gaat-verlies-opleveren/) accessed 4 April 2020).

319. As indicated in RWE AG's 2012 Annual Report, in the course of that fiscal year RWE reported impairment losses totalling EUR 2.3 billion, EUR 1.7 billion of which was "*attributable to our Dutch power plants, the earnings prospects of which deteriorated considerably due to market conditions*".[357] RWE also acknowledged that "*the significant deterioration in the prospects for electricity generation is already casting its shadow: we have recognised substantial impairments for our Dutch power stations*."[358]

320. One year later, RWE AG again reported impairment losses totalling EUR 3.4 billion, EUR 2.4 billion of which was again "*attributable to our Dutch generation portfolio, the earnings prospects of which deteriorated significantly due to market conditions*."[359] [redacted].[360]

321. In its 2014 Annual Report, RWE AG reported a recoverable value of EUR 1.3 billion for its entire coal and gas generation portfolio in the Netherlands.[361] An independent study conducted in 2016 suggested that the value of Eemshaven was still significantly overestimated.[362] Later that year, RWE formally recorded a tax-deductible impairment of EUR [redacted] for Eemshaven. As Brattle puts it, "*even before the Coal Ban, the Eemshaven plant was worth significantly less than its replacement cost*".[363]

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357 **Exhibit R-0113**, RWE, 2012 Annual Report**,** p. 67.
358 **Exhibit R-0113**, RWE, 2012 Annual Report, p. 53.
359 **Exhibit R-0114**, RWE, 2013 Annual Report, p. 70.
360 **Exhibit CER-0002**, Brattle Expert Report, para. 61.
361 **Exhibit R-0115**, RWE, 2014 Annual Report, p. 140. In the Netherlands RWE also has a coal and biomass plant called the Amercentrale (600 MW) as well as three gas power stations: Moerdijk (426 MW), Maasbracht (1304 MW) and Geleen(230 MW).
362 **Exhibit R-0116**, Gerard Wynn, The Dutch Coal Mistake, Institute for Energy Economics and Financial Analysis (2016), p. 3(pdf) "*The discrepancy between our DCF valuation and the assessed book values of these three coal plants suggests that RWE, Uniper and Engie will have to take another, thorough look at their valuations*."
363 **Exhibit CER-0002**, Brattle Expert Report, para. 59.

322. The negative earnings trend continued when Eemshaven started producing electricity in 2015, as the plant recorded repeated losses every year prior to the announcement of the Coal Act.[364]

4.3.3 Around the same time, Eemshaven's twin project was partially abandoned due to market conditions

323. While developing the Eemshaven project, RWE began construction of a power plant in Hamm, Germany, which RWE described as "*virtually identical*"[365] to Eemshaven.

324. Hamm, also known as the Westfalen power plant, was designed as a two-unit plant, was intended to be CCS-ready[366] and was referred to by RWE as meeting "*the highest technical standards*".[367]

325. Similarly to Eemshaven, Hamm was subject to delays and financial difficulties due to increasingly adverse market conditions, to such an extent that RWE decided not to complete construction of one of the two units initially planned.

326. Initial planning on Hamm began in 2006, in parallel with Eemshaven.[368] In 2007, the approval processes of both power plants were underway:

> "*The construction of **two dual-block hard coal power plants of nearly identical design** in Hamm, Germany, (1,530 MW) and Eemshaven, Netherlands, (1,560 MW) is planned. **Approval processes** for both stations **are underway***"[369]

327. Hamm's construction began in 2008 and it was scheduled to start generating electricity in 2011, with an estimated total investment of EUR 2.1 billion.[370] However, only in July 2014 did the first of the two units (known as "Block E") begin generating electricity.[371] In 2015, the

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364 For 2015 see **Exhibit BR-76.F**, RWE, Eemshaven Annual Report, 2015, p. 7; for 2016 see **Exhibit BR-76.H**, RWE, Eemshaven II Annual Report, 2016, p. 4; for 2017 see **Exhibit BR-76.J**, RWE, Eemshaven II Annual Report, 2017, p. 6.
365 **Exhibit R-0115**, RWE, 2014 Annual Report, p. 37.
366 **Exhibit R-0117**, RWE, 2008 Annual Report, p. 53.
367 **Exhibit R-0117**, RWE, 2008 Annual Report, p. 20.
368 **Exhibit R-0049**, RWE, 2006 Annual Report, p. 38.
369 **Exhibit R-0109**, RWE, 2007 Annual Report, p. 24.
370 **Exhibit R-0117**, RWE, 2008 Annual Report, pp. 20 and 53.
371 **Exhibit R-0115**, RWE, 2014 Annual Report, p. 37.

second unit (known as "Block D") had not yet been completed due to additional delays.[372]

328. In December 2015, RWE decided not to complete construction of Block D, because it was no longer "*economically viable*"[373] to complete the unit.

329. At the time, media outlets such as Bloomberg confirmed that RWE's decision not to complete construction, despite the hefty costs already incurred, was attributable to adverse market conditions, which no longer justified RWE's investment:[374]

> "*Once the backbone that underpinned growth in Europe's biggest economy, coal and gas plants are being marginalized in a new world where solar and wind are all the rage. With electricity prices at their lowest level in more than a decade,* ***the outlook is now so bad that RWE AG will never start its 1 billion-euro ($1.1 billion) Westfalen-D plan*****t** […]"
>
> "*As wholesale power prices plunged almost 70 percent from a 2008 peak,* ***RWE*** *and EON* ***lost faith in the future of conventional power generation****. Both utilities plan to have a separate company next year focusing on renewables, grid and energy sales, which they expect will be more profitable.*"

330. While commissioning of Eemshaven's two units took place in April and October 2015 respectively, RWE's failure to complete Hamm's Block D (a copy of Eemshaven's units) by December 2015 was sufficient for the company to decide to put a final stop to Block D's construction. RWE thus terminated a EUR 1 billion investment given coal-fired generation's gloomy profitability prospects.

331. As Marc Oliver Bettzuege, managing director of the Institute of Energy Economics at the University of Cologne, explained to Bloomberg, "*The persistent price pressure changes the profitability calculations for the*

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372 **Exhibit R-0118**, RWE, 2015 Annual Report, 08 March 2016, p. 40.

373 RWE's declarations were reported in **Exhibit R-0119**, Bloomberg, 'This €1 Billion Power Plant May Never Be Switched on', 23 December 2015. RWE was also required to recognise an impairment of EUR 654 million, see **Exhibit R-0118**, RWE, 2015 Annual Report, 08 March 2016, p. 51.

374 **Exhibit R-0119**, Bloomberg, 'This €1 Billion Power Plant May Never Be Switched on', 23 December 2015.

new construction or completion of power plants."[375] In a similar vein, Professor Sauer from RWTH University in Aachen, Germany, stated that the drop in renewable energy prices made "*investments into large central power plants more risky*", because such investments required "*commit*[ment] *to a technology for 30 to 40 years*".[376]

332. Block E (the Hamm unit that RWE did build) was taken off the grid in 2021 in the context of the German coal phase out. The implications for this arbitration are discussed in Section 8.2 below.

4.4 Before construction completed, RWE cancelled its CCS project in 2011

4.4.1 RWE had committed to CCS

333. As mentioned above in Section 3.1, at the time it decided to make its alleged investment in Eemshaven, RWE was aware that generating power from coal was not compatible with climate protection goals (and the Dutch Government's climate policy) unless a solution would be found for the resulting CO2 emissions.[377] RWE often emphasised the importance of CCS[378] and considered it key to bringing the generation of electricity using coal in line with climate protection goals:[379]

> "*One of the main determinants of our competitiveness is whether we succeed in bringing the generation of electricity using fossil fuels—especially coal—in line with climate-protection goals.* ***Among the keys to achieving this is the capture and storage of carbon dioxide produced during the electricity generation process***."

334. In this context, RWE emphasised its intentions with regard to CCS and referred to itself as a frontrunner in clean coal technology.[380] It spoke

375 **Exhibit R-0119**, Bloomberg, 'This €1 Billion Power Plant May Never Be Switched on', 23 December 2015.
376 **Exhibit R-0119**, Bloomberg, 'This €1 Billion Power Plant May Never Be Switched on', 23 December 2015.
377 **Exhibit R-0108**, RWE, 2005 Annual Report, p. 79.
378 E.g., **Exhibit R-0049**, RWE, 2006 Annual Report, pp. 94 and 135-137; **Exhibit R-0109**, RWE, 2007 Annual Report, p. 71; **Exhibit R-0117**, RWE, 2008 Annual Report, p. 96; **Exhibit R-0120**, RWE, 2009 Annual Report, p. 92.
379 **Exhibit R-0109**, RWE, 2007 Annual Report, p. 71.
380 E.g., **Exhibit R-0049**, RWE, 2006 Annual Report, pp. 94 and 135-137; **Exhibit R-0109**, RWE, 2007 Annual Report, p. 71; **Exhibit R-0117**, RWE, 2008 Annual Report, p. 96; **Exhibit R-0120**, RWE, 2009 Annual Report, p. 92.

of its ambitions to develop a zero CO2 emissions power plant as a means to secure the role of coal as a source of energy:[381]

> "*To counter climate change, RWE plans to become the world's first power utility to construct a nearly CO2-free coal power plant on a large scale. Greenhouse gas will be captured before the electricity generation process and safely stored underground after it has been transported. If this technology achieves a worldwide breakthrough, it could provide lasting relief to our planet's atmosphere and secure the role of coal, our major domestic source of energy. This is what we are committed to.*"

335. RWE also highlighted its CCS ambitions in its communications with the Government in 2006 and 2007. In a letter to the Prime Minister RWE stated that "[t]*he Dutch government's ambition to build sustainable power plants ties in directly with RWE's concrete plans to develop a 'zero CO2 emissions' power plant*".[382] In that same letter, RWE notes that it is one of the few companies in Europe that wants to invest in a pilot project: a combination of a 450 MW coal gasifier with full CO2 capture. This experimental plant could be operational in 2014. The knowledge gained here could be applied in other countries such as the Netherlands. In subsequent communication, RWE also requested a meeting with the Ministry of Economic Affairs to discuss the prospects of CCS. In that request, it acknowledged that "*the responsibility for taking the lead* [in CCS] *lies predominantly with industry*".[383]

336. RWE's intention to realise a CCS project was also at the forefront of its correspondence to the Province of Groningen about Eemshaven:[384]

> "*This means that the RWE power station is the only remaining project in Groningen whereby CO2 capture can be realised within the foreseeable future. It is therefore very important that we, together with our partners in the north, get a real CCS project off the ground.*"

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381 **Exhibit R-0049**, RWE, 2006 Annual Report, p. 94.

382 **Exhibit R-0034-EN**, RWE's letter to the Prime Minister, 22 March 2007 (**Exhibit R-0034-NL**, RWE's letter to the Prime Minister, 22 March 2007).

383 **Exhibit R-0048-EN**, RWE's email to M. Frequin, 05 March 2008 (**Exhibit R-0048-NL**, RWE's email to M. Frequin, 05 March 2008).

384 **Exhibit R-0121-EN**, RWE's letter to Province of Groningen, 21 September 2007 (**Exhibit R-0121-NL**, RWE's letter to Province of Groningen, 21 September 2007).

337. RWE's commitment to CCS was reaffirmed in a letter to the Dutch Minister of Housing, Spatial Planning and the Environment on 4 February 2008:[385]

> "*However, we did not only focus on the construction preparation. We have also devoted a great deal of attention to the way in which we can make a significant contribution to the Dutch government's ambition to achieve a sustainable energy supply. For us, the objectives of the current cabinet, as formulated in the policy programme "Schoon en Zuinig" (Clean and Efficient), have been the guiding principle for realising our ambitions in the Netherlands.*"
>
> "*However, we also want to invest now in a path to transition to further CO2 reduction*."

338. In further correspondence of March 2008, RWE announced that it would commit EUR [redacted] (of which approximately EUR [redacted] would be allocated to CO2 capture) to a pilot CCS project in Eemshaven in collaboration with [redacted] and the Province of Groningen. RWE placed one precondition on this investment: being allowed to build Eemshaven. RWE stated that no caveats were made in relation to CO2 prices, meaning that RWE's commitment to invest in CCS would not be subject to financial conditions.[386]

> "*There is one reservation with this commitment and that is that RWE can actually build the Eemshaven power plant. After all, without a power plant, no CO2 can be separated or stored.* ***No reservation is made regarding CO2 prices to clearly indicate that this is an extremely serious matter for the three initiators***."[387]

339. RWE's commitment to invest in CCS was reiterated in a subsequent letter to the Prime Minister in November 2008. This letter again

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385 **Exhibit R-0122-EN**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 04 February 2008 (**Exhibit R-0122-NL**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 04 February 2008).

386 Similarly, RWE's commitment to CCS in the 2008 Sector Agreement was also not conditional upon financial considerations.

387 **Exhibit R-0123-EN**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 20 March 2008 (**Exhibit R-0123-NL**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 20 March 2008).

presented RWE's intention to invest in the development of CCS as one of the main selling points of the intended Eemshaven plant.[388]

> "*For the construction of our power plant in the Eemshaven, we intend to invest a total of more than EUR [redacted]. Our new plant in the Eemshaven will have a positive effect on the Netherlands since it will:*
> […]
> *- accelerate the development of carbon capture and storage technology*"
>
> "*We have not only put our focus on the preparations for the construction of our power plant in the Eemshaven. We have also paid a great deal of attention to the manner in which we can significantly contribute to the ambition of the Dutch Government to establish a renewable energy supply. For this, we have taken four initiatives which are currently being worked out. RWE is in the Netherlands:*
> […]
> - *investing approximately EUR [redacted] for the construction of a CO2 capture installation;*
> - *preparing an investment of EUR [redacted] in a second generation biomass plant;*
> - *working with our R&D partner the [redacted] to conduct research on large scale use of biomass and the realisation of carbon capture and storage."*

340. As noted above,[389] as part of the 2008 Sector Agreement energy producers, including RWE, promised to have two proposals for demonstration projects ready in 2011.[390] On top of this RWE expected to realise a demonstration project at the Eemshaven plant in 2015 with large-scale application by 2020.[391]

341. RWE's ambitions are also expressed once again in the sustainability contract RWE concluded with Essent in 2009 following the acquisition

388 **Exhibit R-0094**, RWE's letter to Prime Minister, 14 November 2008.
389 See paras. 269 to 272.
390 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 5(3) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).
391 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Annex 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

of part of Essent's assets. The press release in response to this on 12 May 2009 states:[392]

> "*Thanks to RWE's support, Essent is able to invest in sustainable energy in the Netherlands on a much larger scale than before. Essent's sustainable strategy can be implemented: increasing the share of green energy to 25% in 2020, increasing the energy efficiency from 42.5% to 50% before 2020, better than average performance per SO2 and NOx emissions and the developing of a low-carbon coal plan by capturing and storing CO2.*"

4.4.2 Despite its commitments, RWE abandoned its CCS project

342. While RWE indeed entered into a collaboration with a number of R&D partners, its CCS efforts were abandoned before any tangible progress was made.

343. RWE took part in the Core Team CCS North-Netherlands, a CCS partnership formed by various public and private partners and a subsection of CATO (which was a public-private R&D platform for CCS). The Core Team North-Netherlands was dedicated to realising CCS in the North of the Netherlands.

344. To this end, it published its 'Action Plan CCS North-Netherlands' (the "**Action Plan**") in February 2009. The Action Plan covered all aspects of the CCS chain: capture, transport, storage and/or re-use of CO2. Within this plan, RWE was responsible for developing post-combustion CO2 capture techniques. The Action Plan's aim was to inform the Government of the possibilities and challenges in the field of CCS and to serve as a basis to set up the necessary legislation and policy framework for CCS.[393]

345. The Action Plan was divided into three phases:

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392 **Exhibit R-0124-EN**, RWE, 'Essent and RWE sign sustainability contract', 12 May 2009, p. 1 (**Exhibit R-0124-NL**, RWE, 'Essent and RWE sign sustainability contract', 12 May 2009).

393 **Exhibit R-0050-EN**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 9 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

- RWE, NUON and SEQ undertook to perform pilot projects during the Initial Phase (2009 to 2015) in order to optimise CO2 capture technology;

- know-how gained during the Initial Phase would then be utilised for market introduction or large-scale demonstration projects during the Implementation Phase (2015 to 2020);

- progress made in the Implementation Phase projects was supposed to lay the groundwork for the large-scale roll out of CCS in the Market-driven Phase (from 2020 on), and its commercial exploitation.

346. The Core Team CCS North-Netherlands saw significant potential in the region. In respect of the Eemshaven area, RWE and NUON expressed their intention to realise full-scale CCS within the near future.[394] In particular, RWE expressed its intention to realise a CO2 capture installation with a capture capacity of 0.2 Mton CO2 per year by 2015, and full capture capacity in 2023 (7.2 Mton per year).[395]

> "*RWE is of the opinion, based on current insights, that this size is the right scale from a technical-economic point of view for the development of the post-combustion capture technology in the demonstration phase. RWE expects to achieve the necessary learning objectives (in particular efficiency improvements) within a period of two years.*"

347. The captured CO2 would be transported to and stored in a (yet to be determined) storage location. The Action Plan identified two potential storage sites that were expected to become available and to have sufficient storage capacity for the Implementation Phase and for a

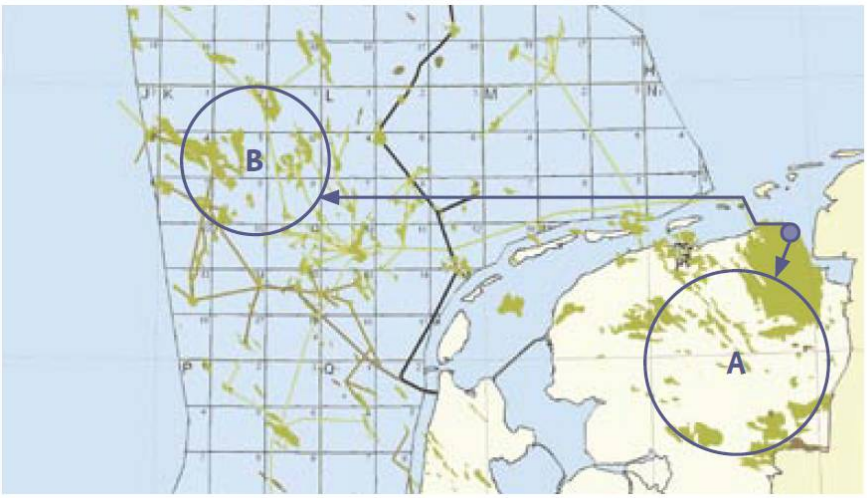
394 **Exhibit R-0050-EN**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, pp. 15-16 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

395 **Exhibit R-0050-EN**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 57 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

large part of the Market-driven Phase. These two scenarios ("**CCS chains**") for the Eemshaven area are as follows:[396]

(A) onshore: CO2 capture in Eemshaven – transport (by pipeline) – storage in gas fields in North-Netherlands; and

(B) offshore: CO2 capture in Eemshaven – transport (by pipeline or by ship) – storage in gas fields in the central part of the Dutch continental plate.



348. Both scenarios were considered in the business case. Because the costs of the offshore CCS chain were expected to be moderately higher than its onshore counterpart (EUR 50 to EUR 69 per ton for the offshore scenario, compared to EUR 40 to EUR 60 per ton for the onshore scenario),[397] further exploration of pilot projects during the Implementation Phase would first consider onshore storage locations.

349. The Action Plan did not dismiss an offshore CCS chain as unfeasible. Offshore CCS had already been proven technically feasible in a

396 **Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 59 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

397 **Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 69 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

previous pilot project.[398] Moreover, the Action Plan made clear that onshore storage would not be sufficient in the long term and that full scale projects would have to scale up to also include offshore storage locations in due time.[399]

350. Although the Government was initially inclined to facilitate the Action Plan's focus on onshore options, it also made it clear that its support of the use of onshore locations for CO2 storage was not set in stone. The Minister of Housing, Spatial Planning and the Environment noted that the Government's support meant that it deemed further research into the suitability and the safety of these locations useful at the time.[400] Moreover, the energy sector was in agreement that the suitability of potential storage locations would be decided by the Government,[401] and that public acceptance of storage locations was instrumental in this regard.[402] RWE was also aware that CCS projects were subject to support from the public.[403]

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398 **Exhibit R-0098**, R. de Vos (ed), Linking the Chain, CATO-2, 01 July 2022, p. 28. This pilot project has stored an annual 20,000 tonnes of CO2, captured from the locally produced natural gas, into a nearly depleted gas field in sector K12-B in the North Sea.

399 **Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 101 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

400 **Exhibit R-0125-EN**, Letter from the Minister of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 121, 24 June 2010: "*The fact that in this letter the government expresses a preference for a number of fields in the north of the Netherlands does not mean that it has now decided that CO2 will actually be stored in these fields and that the other potential storage locations will be definitively discarded. With this preference the government only indicates that it considers it useful, in preparation of a large-scale CCS project in the north, to have a detailed study conducted into the suitability and safety of (some of) the fields for which a preference has now been expressed*" (**Exhibit R-0125-NL**, Letter from the Minister of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 121, 24 June 2010).

401 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.4.12 of Annex 1: "*Together with the energy sector, the government is researching suitable storage locations and the necessary infrastructure for transporting CO2, responding to concrete initiatives from the market, starting with Rijnmond and Eemshaven.* ***The national government will ultimately decide whether a field is suitable for CO2 storage or not***." (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

402 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.3.6 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

403 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.3.6 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008); **Exhibit R-0050-EN**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 79 (**Exhibit R-0050-NL**, Core Team

351. In 2011, the Government shifted its focus to offshore storage.[404] This shift of focus was partially prompted by experiences gained from a small demonstration project that was to be carried out in depleted gas fields under the town of Barendrecht, but which was met with a lack of local public support and eventually abandoned. Following the experiences in Barendrecht, the Government investigated the level of support for carbon storage in the Northern Netherlands. It entered into conversations with various local stakeholders. During these conversations, it became clear that also in the Northern Netherlands the support base was lacking.[405]

352. The insights gained during that time led the Government to be guided by relevant social developments while deciding on future CO2 storage locations. The role of CCS within the Dutch climate policy remained unchanged, although the list of potential storage locations was streamlined to include only offshore storage locations for that time. Nevertheless, the Government remained open to revisiting onshore CO2 storage locations, though only if necessary due to offshore storage becoming insufficient in the future, which was not the case at the time.[406]

353. Moreover, offshore storage had been proven to be technically feasible in various studies since 2004, including the Action Plan which set out the possible offshore CCS chain for the Eemshaven area in particular.[407]

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of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

404 **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.

405 **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. It bears remembering that fostering public support was the responsibility of the Government and energy sector pursuant to **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.5.3 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

406 **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.

407 **Exhibit R-0050-EN**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009, p. 59 (**Exhibit R-0050-NL**, Core Team of CCS North-Netherlands, 'Carbon Capture and Storage: Plan of Action North Netherlands', 01 January 2009).

354. RWE abandoned its CCS plans in 2011, despite the offshore storage option and the commitments it had made in that regard at the beginning of the Initial Phase.

355. In a subsequent presentation by [redacted], [redacted] at Essent (RWE's subsidiary) at the time, it was noted that RWE had started looking into developing an offshore option and that it intended to prepare a bid for subsidies in 2013 based on the offshore option.[408] However, this plan (and the corresponding subsidy bid) never came to be, nor did RWE undertake any other action to explore (offshore) CCS options.

356. Ultimately, RWE considered CO2 prices too low to make a CCS demonstration project a worthwhile investment.[409] Although RWE was required to ensure very substantial CO2 emissions reductions (and had assured the Netherlands that its intentions to implement CCS were not conditional upon CO2 prices),[410] it ended up abandoning CCS because it felt it would not be sufficiently profitable.

357. Two other coal-fired operators continued their demonstration project, called ROAD, a CCS project in Rotterdam. Despite all the effort of the Government to make this pilot project a success, it was cancelled by the operators on 27 June 2017 because they "*could no longer justify further investment in this project*",[411] i.e., for financial reasons.

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408 **Exhibit** [redacted].

409 **Exhibit R-0127**, CATO-2 Briefing on identified best practices in relevant networks (2012), CATO2-WP4.2-D08, 17 January 2013, p. 9: "*Air Liquide and RWE consider the current EU ETS CO2 price as much too low to make a demonstration CCS project economically viable*."

410 **Exhibit R-0123-EN**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 20 March 2008 (**Exhibit R-0123-NL**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 20 March 2008). See also paragraph 244 above regarding the commitments made by RWE in the 2008 Sector Agreement, which were also made without conditions as regards CO2 prices.

4.5 Other investors decided against investing in coal following public pressure

358. The social resistance to coal plants was clear from Vattenfall's investment. At roughly the same time as RWE, Nuon (now Vattenfall) had plans to construct a power plant in Eemshaven. The Magnum plant, as the plant was called, was initially planned as a multi-fuel plant with coal firing capacity. Nuon received an environmental permit on 24 July 2007 which was ultimately rescinded by the judicial branch of the Council of State[412] on 3 December 2008 following complaints from environmental groups such as Greenpeace.[413] Nuon's subsequent environmental permit was not challenged as an agreement was reached between Nuon and environmental groups 2011. Nuon agreed to postpone its plans for coal firing capacity until 2020. Its decision was partially driven by the fact that CCS could not be used at the time.[414] Ultimately Nuon decided not to install any co-firing capacity in the Magnum plant.

412 The judicial branch of the Council of State is separate to the advisory branch and is the highest judicial body for administrative law questions.

413 **Exhibit RL-0045-EN**, Council of State, decision, ECLI:NL:RVS:2008:BG5909 (Nuon), 03 December 2008 (**Exhibit RL-0045-NL**, Council of State, decision, ECLI:NL:RVS:2008:BG5909 (Nuon), 03 December 2008).

414 **Exhibit R-0128-EN**, Trouw, 'Coal-fired power station in Eemshaven off the agenda', 07 April 2011 (**Exhibit R-0128-NL**, Trouw, 'Coal-fired power station in Eemshaven off the agenda').

PART D: THE NETHERLANDS' CLIMATE POLICY DURING EEMSHAVEN'S CONSTRUCTION AND FIRST YEARS OF OPERATION (2009-2019)

5 THE NEED FOR CO2 REDUCTION CONTINUED

359. As explained in this Chapter, after RWE's decision to construct Eemshaven in 2009, the Government continued its policy to reduce CO2 emissions.

360. The focus remained on reducing CO2 emissions, including by coal plants (**Section 5.1**). Against the backdrop of global and national developments and a lack of progress with respect to substantial CO2 reduction by coal plants, e.g., by the lack of application of CCS, discussions arose about a possible coal phase-out in the Netherlands to achieve the necessary reduction of CO2 emissions (**Section 5.2**).

5.1 The Government continued stressing the need for CO2 reduction and that CCS could be a means to achieve such reduction (2009-2013)

5.1.1 CO2 reduction in coal plants becomes a topic of Parliamentary discussion

361. In a letter to Parliament dated 23 June 2009, the Minister of Economic Affairs, Housing, Spatial Planning and the Environment again stressed the importance of emission reduction and the role CCS could play to achieve emission reduction. According to the letter, the Government envisaged that companies would invest in demonstration projects to develop and apply CCS in practice, which would decrease the costs for CCS.[415] It was expected that the implementation of CCS would be stimulated by increasing CO2 prices under the ETS or, if the ETS would not have the desired effect, by other measures.[416]

362. In a letter dated 28 October 2009, the Minister of Economic Affairs responded to a question from a Member of Parliament about what the

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415 **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.

416 **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.

Government would do to disincentivise the construction of coal plants. The Minister explained that while no type of energy generation was ruled out in advance, "[t]*he cabinet imposes strict framework conditions to guarantee that the realisation of the cabinet's goals in the field of climate policy is not jeopardised*".[417] These goals included the reduction of CO2 emissions and other greenhouse gases, a significant energy saving and the transition to a sustainable energy supply. The letter sets out a number of instruments to obtain these goals, such as the ETS, measures to stimulate sustainable energy and mandatory CCS application in coal plants after the demonstration phase would be completed.[418] Moreover, the Minister stated that coal plants would no longer play a role in the future.[419]

363. Shortly after, on 3 November 2009, Members of Parliament Mr Vendrik, Ms Ouwehand and Ms Gesthuizen submitted a motion (the "**Vendrik Motion**"). [420] The Vendrik Motion considered that the construction of four new coal plants, including Eemshaven, would severely threaten the realisation of climate goals. It therefore called on the Government to promote a CO2 cap for power plants of 350 grams per kWh of generated energy in a European context and to prepare the enactment of such a CO2 cap in the Netherlands.[421] A CO2 cap of 350 grams per kWh would effectively preclude the

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417 **Exhibit R-0129-EN**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2009/10, 28 240, no. 104, 28 October 2009, p. 2 (**Exhibit R-0129-NL**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2009/10, 28 240, no. 104, 28 October 2009).

418 **Exhibit R-0129-EN**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2009/10, 28 240, no. 104, 28 October 2009, p. 2 (**Exhibit R-0129-NL**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2009/10, 28 240, no. 104, 28 October 2009).

419 **Exhibit R-0129-EN**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2009/10, 28 240, no. 104, 28 October 2009, p. 2 (**Exhibit R-0129-NL**, Letter from the Minister of Economic Affairs to Parliament, Parliamentary papers II 2009/10, 28 240, no. 104, 28 October 2009).

420 **Exhibit R-0130-EN**, Amended Motion by Vendrik, Parliamentary papers II 2009/10, 31 123 XIII, no. 38, 03 November 2010 (**Exhibit R-0130-NL**, Amended Motion by Vendrik, Parliamentary papers II 2009/10, 31 123 XIII, no. 38, 03 November 2009).

421 **Exhibit R-0130-EN**, Amended Motion by Vendrik, Parliamentary papers II 2009/10, 31 123 XIII, no. 38, 03 November 2010 (**Exhibit R-0130-NL**, Amended Motion by Vendrik, Parliamentary papers II 2009/10, 31 123 XIII, no. 38, 03 November 2009).

operation of coal plants without firing significant portions of biomass and applying CCS.[422]

364. On 18 November 2009, the Minister of Economic Affairs and the Minister of Housing, Spatial Planning and the Environment informed the Parliament of their plans for CCS in the Netherlands. They explained that CCS could serve as an interim measure pending the transition to a fully sustainable economy[423] and that CCS was considered a necessary part of an effective climate policy, alongside energy saving and sustainable energy generation.[424] An accelerated application of all CO2 emission reduction methods, including CCS, would make a necessary contribution to climate goals.[425] The letter further set out that while it was already required that new coal plants be made "capture-ready", they intended to make the implementation of CCS mandatory in the future (in addition to the ETS).[426]

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422 A report based on Uniper's MPP3 plant, a coal plant built around the same time and with the same 46% efficiency as Eemshaven, explains that MPP3 would emit 728 grams of CO2 per kWh if it were to only fire coal. If it fired 50% biomass, it would still emit 372 grams of CO2 per kWh and if it only applied CCS (assuming capture more than half of emitted CO2), it would emit 360 grams of CO2 per kWh **Exhibit R-0131-EN**, CE Delft, 'CO2 reduction in a modern coal plant: Study regarding government costs and technical feasibility' dated September 2016 ,p. 4 (**Exhibit R-0131-NL**, CE Delft, 'CO2 reduction in a modern coal plant: Study regarding government costs and technical feasibility' dated September 2016).

423 **Exhibit R-0132-EN**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009, p. 1 (**Exhibit R-0132-NL**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009).

424 **Exhibit R-0132-EN**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009, p. 2 (**Exhibit R-0132-NL**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009).

425 **Exhibit R-0132-EN**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009, p. 2 (**Exhibit R-0132-NL**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009).

426 **Exhibit R-0132-EN**, Letter from the Ministers of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009, pp. 1 and 3 (**Exhibit R-0132-NL**, Letter from the Ministers

365. In a letter dated 30 November 2009, the Minister of Housing, Spatial Planning and the Environment updated the Parliament of the evaluation of the Clean and Efficient Work Programme. The letter explained that in addition to the measures mentioned in the Clean and Efficient Work Programme, the cabinet would consider other measures, such as a CO2 emission cap for power plants or a CCS obligation on a European and/or Dutch level.[427] Further, with reference to the Vendrik Motion, the letter announced that possible measures to significantly reduce CO2 measures would be considered.[428]

5.1.2 The Energy Report 2011 highlighted the need to reduce reliance on fossil fuels, including coal-fired power plants

366. In its Energy Report of 2011 (the "**Energy Report 2011**"), the Government continued to underscore the need to reduce CO2 emissions. It also again confirmed that energy producers would have to operate within the confines of the requirements set by the Government to protect the environment.[429]

> "*The government sets strict conditions in the areas of CO2 reduction, safety and environmental management and, within those conditions, gives companies and entrepreneurs room to invest and realise projects.*"

367. One of the core objectives of the energy policy as set out in the Energy Report 2011 was achieving a low-carbon economy by 2050, in line

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of Economic Affairs and of Housing, Spatial Planning and the Environment, Parliamentary papers II 2009/10, 31 209, no. 103, 18 November 2009).

427 **Exhibit R-0133-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment to Parliament, Parliamentary papers II 2009/10, 31 209, no. 105, 30 November 2009, p. 3 (**Exhibit R-0133-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment to Parliament, Parliamentary papers II 2009/10, 31 209, no. 105, 30 November 2009).

428 **Exhibit R-0133-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment to Parliament, Parliamentary papers II 2009/10, 31 209, no. 105, 30 November 2009, p. 4 (**Exhibit R-0133-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment to Parliament, Parliamentary papers II 2009/10, 31 209, no. 105, 30 November 2009).

429 **Exhibit R-0103-EN**, Energy Report 2011, p. 18 (**Exhibit R-0103-NL**, Energy Report 2011).

with the European climate ambitions to achieve reduction of CO2 emissions by 80% to 95% by 2050.[430]

368. The Netherlands aimed to transition to a more sustainable energy management and to reduce its reliance on fossil fuels, as referenced in the first sentence of the Energy Report 2011: "*The energy management must become more sustainable and less dependent on* […] *fossil fuels.*"[431]

369. While coal would remain part of the energy mix in the short term, it would eventually become the least important source in the sustainable energy system in the Netherlands. Energy provision would be governed by the merit order system, which prioritises sources with a lower marginal cost (renewables and biofuels) over those with a higher marginal costs (coal and gas). Under this system, fossil fuels would fade into the background – only in the absence of wind, solar or bio-based power would resort be had to coal or gas.[432]

> "*The marginal costs for renewable generation capacity such as wind and solar power are zero, as they do not involve costs for fuel and CO2 emissions. For bio-energy the marginal costs are higher, as the required biomass has to be paid for. Again, however, there are no costs incurred for CO2 emissions.*
>
> *Not all power plants are needed continuously: electricity demand is different every hour; low at night and high during the day. Depending on the demand, generation capacity will therefore be switched on or off. As long as weather conditions are favourable, renewable generation capacity will always be running.* ***Power plants with higher marginal costs (such as coal plants and especially gas plants) will be switched off when demand is low, if sufficient renewable energy is produced***."

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430 **Exhibit R-0103-EN**, Energy Report 2011, pp. 2 and 8 (**Exhibit R-0103-NL**, Energy Report 2011). See also **Exhibit R-0134**, Presidency Conclusions of the Brussels European Council 29/30 October 2009, 01 December 2009 and **Exhibit R-0135**, Conclusions of the European Council, 04 February 2011.

431 **Exhibit R-0103-EN**, Energy Report 2011, p. 2 (**Exhibit R-0103-NL**, Energy Report 2011).

432 **Exhibit R-0103-EN**, Energy Report 2011, p. 33 (**Exhibit R-0103-NL**, Energy Report 2011).

370. Consequently, the business case for coal-fired power plants would worsen, raising questions about future profitability.[433]

> "*In the long run, the **business case for coal-fired power plants is likely to deteriorate** due to the expected increase in the CO2 price and the additional need for flexibility due to a larger share of renewable energy. Signals from the market suggest that **under current and future market conditions, it does not seem attractive to invest in coal-fired power plants**.*"

371. The Energy Report 2011 emphasised that the continued use of fossil fuels (in the short term) "*by no means excludes the reduction of CO2.*"[434] Reduction of CO2 emissions was thus still front and centre of Dutch energy policy. This could be achieved through a combination of various measures.[435]

> "*Achieving CO2 reduction then takes place through a combination of an increasing share of renewable energy, energy saving, nuclear energy and CO2 capture and storage. The government is therefore offering room for all energy options, subject to strict preconditions, in order to achieve a low CO2 economy by 2050 and to guarantee safety and environment.*"

5.1.3 Under the 2013 Energy Agreement, the energy industry again agreed to restrictions on fossil fuels

372. The Energy Agreement for sustainable growth dated September 2013 (the "**2013 Energy Agreement**") further underscored the need to make energy supply more sustainable.[436] This agreement was entered into by the Government and various stakeholders, including Energie-Nederland, the trade association of energy companies (which included RWE as one of its members).

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433 **Exhibit R-0103-EN**, Energy Report 2011, p. 29 (**Exhibit R-0103-NL**, Energy Report 2011).

434 **Exhibit R-0103-EN**, Energy Report 2011, p. 4 (**Exhibit R-0103-NL**, Energy Report 2011).

435 **Exhibit R-0103-EN**, Energy Report 2011, p. 4 (**Exhibit R-0103-NL**, Energy Report 2011).

436 **Exhibit R-0106-EN**, 2013 Energy Agreement (**Exhibit R-0106-NL**, 2013 Energy Agreement).

373. Reducing reliance on fossil fuels and coal plants was one of the main topics during the discussions on the 2013 Energy Agreement.[437] The agreement aimed to make energy provision completely sustainable by 2050 in several ways, including by reducing reliance on coal-fuelled power and instead transitioning to renewables, which were envisaged to make up 14% of the energy mix by 2020, and 16% by 2023.[438]

374. The parties agreed to phase out five older coal plants – dating from the 1980s – by 1 July 2017.[439] This agreement was effected through the adoption of a decree that raised efficiency requirements above the levels that could be delivered by these older coal plants.[440] The newer coal plants were expected to also contribute to the goal of reducing CO2 emissions by 80% to 95% by 2050, as outlined in the 2013 Energy Agreement.[441] The Government was able to reach this agreement by reintroducing the coal tax exemption as of January 2016, giving operators, such as RWE, a significant financial advantage for achieving this necessary emission reduction.

375. In order to stimulate reduction at the newer plants, the Government would once more temporarily subsidise the co-firing of biomass through SDE+ subsidies,[442] as has been described above in Sub-section 3.2.2.

376. CCS was mentioned again as a stepping stone towards more sustainable energy supply:[443]

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437 **Exhibit R-0136-EN**, Letter from the Minister of Economic Affairs to the House of Representatives, Parliamentary papers II 2012/13, 30 196, no. 187, 28 November 2012 (**Exhibit R-0136-NL**, Letter from the Minister of Economic Affairs to the House of Representatives, Parliamentary papers II 2012/13, 30 196, no. 187, 28 November 2012).

438 **Exhibit R-0106-EN**, 2013 Energy Agreement, pp. 16-17 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

439 **Exhibit R-0106-EN**, 2013 Energy Agreement, p. 97 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

440 **Exhibit RL-0046-EN**, Decision amending the Environmental Management (Efficiency) Decree, Official Gazette 2015, 387, 13 October 2015 (**Exhibit RL-0046-NL**, Decision amending the Environmental Management (Efficiency) Decree, Official Gazette 2015, 387, 13 October 2015).

441 **Exhibit R-0106-EN**, 2013 Energy Agreement, pp. 20, 97 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

442 **Exhibit R-0106-EN**, 2013 Energy Agreement, pp. 20-21, 73 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

443 **Exhibit R-0106-EN**, 2013 Energy Agreement, p. 98 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

> "*To achieve a fully sustainable energy supply in the long term, the capture,* use and storage of CO2 (CCS) will be unavoidable."

377. Moreover, the parties to the 2013 Energy Agreement (including RWE) accepted that subsequent years would bring further changes and require more action:[444]

> "*Ultimately, the Accord forms the* ***starting signal*** *for a route for the coming years. The parties involved in this Accord therefore unambiguously express their commitment to take this route,* ***in full awareness that the coming years will bring additional challenges*** *on the road to achieving the objectives as now formulated. That is the essence of this Energy Agreement for Sustainable Growth and the approach to the climate problem: a package of agreements to start working as energetically as possible now, each with their own responsibilities, combined with* ***the agreement to make any additions and adjustments that are necessary to actually achieve the targets****."*

5.2 The need for further CO2 reduction raised discussions about a coal phase-out in the Netherlands (2015-2018)

378. In June 2015 the Hague District Court ordered the Government at the request of an environmental organisation to ensure that emissions in 2020 would be reduced by 25% compared to 1990 levels.[445] In light of this decision and the lack of progress of CCS, in November of 2015 the Dutch Parliament required the Dutch Government to examine a phase out of coal plants as a potential measure to reduce emissions (**Sub-section 5.2.1**).

379. In its Energy Report of 2016 (the "**Energy Report 2016**"), the Government confirmed that it was working towards some form of phasing out the use of coal by power plants (**Sub-section 5.2.2**). In early 2017, research identified several concrete measures to effect a coal phase-out (**Sub-section 5.2.3**). The Dutch Council of State advised that the coal phase-out should take place by prohibiting coal-

444 **Exhibit R-0106-EN**, 2013 Energy Agreement, pp. 11-12 (**Exhibit R-0106-NL**, 2013 Energy Agreement).

445 The Urgenda Foundation sued the Government of the Netherlands because it would act unlawfully by taking insufficient measures to prevent climate change and cause CO2 emissions. The court's decision was upheld on appeal and in cassation.

fired energy production and that this could be done without compensating operators of coal plants (**Sub-section 5.2.4**).

5.2.1 Parliament and the Government investigated phasing out coal plants to proactively address climate change

380. In the fall of 2015, Parliament ordered the Government to examine a phase-out of all coal plants as a potential CO2 reduction measure.

381. In particular, in a motion submitted by Members of Parliament Mr Vos, Ms Van Veldhoven, Ms Dik-Faber and Mr Smaling on 24 September 2015 (the "**Vos Motion**"), the Government was directed to the decision by the District Court of The Hague in *Urgenda Foundation v. State of the Netherlands*.[446] In that case, the Hague District Court had found that the CO2 emission reduction goals of the Annex I countries under the UNFCCC were insufficient to keep global warming well below 2°C. In light of this, the District Court ruled that the Netherlands should reduce CO2 emissions by at least 25% compared to 1990 levels by 2020and issued a corresponding injunction against the Government.[447] In the Vos Motion, the Government was ordered to examine which measures needed to be taken to comply with this CO2 reduction target. The Government was explicitly instructed to consider all options, including "*the closure of all Dutch coal-fired power stations* [which had been] *described as an option in the letter from PBL and ECN to the Lower House*".[448]

382. Shortly after, in a subsequent motion submitted by Members of Parliament Mr Van Weyenberg and Ms Van Veldhoven on 18 November 2015 (the "**Van Weyenberg Motion**"), it was pointed out that CO2 emissions were a cause of climate change and that the Netherlands must reduce its CO2 emissions. It was further observed

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446 **Exhibit C-0081**, Rb. Den Haag 24 June 2015, ECLINLRBDHA20157196, Verdict in English ECLINLRBDHA20157196 (Urgenda), para. 4.31. The decision was confirmed by the Dutch Supreme Court in 2019: **Exhibit RL-0047**, Dutch Supreme Court, decision ECLI:NL:HR:2019:2006 (Urgenda), 20 December 2019.

447 **Exhibit C-0081**, Rb. Den Haag 24 June 2015, ECLINLRBDHA20157196, Verdict in English ECLINLRBDHA20157196 (Urgenda), paras. 4.65 and 5.1.

448 **Exhibit R-0137-EN**, Motion by Vos, Parliamentary papers II 2015/16, 32 813, no. 115, 24 September 2015 (**Exhibit R-0137-NL**, Motion by Vos, Parliamentary papers II 2015/2016, 32 813, no. 115, 24 September 2015). The motion was passed on 29 September 2015: Acts II 2015/16, no. 7, item 22, dated 29 September 2015.

that coal plants were some of the largest CO2 emitters in the Netherlands. The Government was called on to phase out coal and prepare a plan to that effect, together with the energy sector.[449]

383. On 8 December 2015, the State Secretary of Finance announced that the Government would in short order send a letter to Parliament in response to the Van Weyenberg Motion. The State Secretary announced that the Government would develop concrete options for a future coal plant phase-out. The Government intended to make a decision before the next change of cabinet, which would take place in 2017. The State Secretary of Finance further stated that the "[p]*oint of departure is a coal-free electricity production in the long run*".[450]

384. On 18 December 2015, the Minister of Economic Affairs on behalf of the Government responded to the Van Weyenberg Motion. In this letter, the Minister confirmed that the Dutch and North-Western European electricity markets were moving towards a low CO2 energy supply in 2050. For that purpose, the most polluting electricity production would be phased out at an accelerated pace. For instance, pursuant to new efficiency requirements, five older coal plants would already close by 1 July 2017,[451] as agreed in the 2013 Energy Agreement (see para. 374).

385. Moreover, as coal plants were some of the largest CO2 emitters in the Netherlands, it was "*inevitable that phasing out the coal plants will also*

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449 **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. The motion was passed on 26 November 2015: Acts II, 2015/16, no. 30, item 7, dated 17 November 2015. The Van Weyenberg Motion also pointed to the fact that neighbouring countries, such as Germany and the United Kingdom, were making principal decisions to phase out coal. It further stated that no new permits should be granted for coal plants in the Netherlands.

450 **Exhibit R-0138-EN**, Letter from the State Secretary for Finance, Parliamentary papers II 2015/16, 34 302, no. 106, 08 December 2015, p. 3 (**Exhibit R-0138-NL**, Letter from the State Secretary for Finance, Parliamentary papers II 2015/16, 34 302, no. 106, 08 December 2015).

451 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, p. 1 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

be considered".[452] The Minister further explained how he would be investigating different scenarios for a coal plant phase-out, together with the sector.[453] Based on these investigations, a decision would be made regarding "*the phasing-out of all coal plants.*"[454] The phase-out that was being considered thus did not only concern the older coal plants which would close pursuant to tightened efficiency requirements in 2017,[455] but also the five newer coal plants (including Eemshaven) that would remain after that.[456] In light of the expected timing for the Government's decision, the Minister aimed to complete this investigation project by late 2016.[457] The results of the investigation were presented on 19 January 2017 (see further Sub-Section 5.2.3).

386. In April 2016, a report about the cost efficiency of possible CO2 emission reduction measures (the "**IPR Report**") was published by an interdepartmental working group of the Government.[458] According to the IPR Report, closing coal plants would lead to the most significant

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452 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, p. 2 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

453 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, pp. 2-3 and 5 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

454 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, p. 4 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

455 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, p. 1 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

456 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, p. 3 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

457 **Exhibit R-0139-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015, p. 6 (**Exhibit R-0139-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2015/16, 30 196, no. 380, 18 December 2015).

458 The working group consisted of representatives of the Ministry of Social Affairs and Employment, the Ministry of General Affairs, the Ministry of the Interior and Kingdom Relations, the Ministry of Economic Affairs, the Ministry of Finance, the Ministry of Infrastructure and the Environment and the Netherlands Environmental Assessment Agency: **Exhibit R-0140-EN**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016, p. 69 (**Exhibit R-0140-NL**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016).

reduction of CO2 emissions in the Netherlands.[459] In fact, of the measures considered, a closure of coal plants was identified as the only one with the potential to lead to sufficient CO2 emission reductions to meet the 2020 targets set by the *Urgenda* judgment.[460]

387. On 9 April 2016, the State Secretary of Infrastructure and Environment and the Minister of Economic Affairs sent a letter to Parliament in response to the IPR Report. This letter mentioned that the closing of two coal plants built in the 1990s was an option to comply with the 2020 *Urgenda* targets, meaning to reach the goal to reduce CO2 emissions by at least 25% compared to 1990 levels by 2020, depending on further research.[461] A closure of newer coal plants was not considered for reaching the 2020 reduction goals.

388. In a similar vein, an article published by news website *Nu.nl* in 2016, in which the Minister of Economic Affairs was reported to have seen no need to close newer coal plants,[462] reference was made to the 2020 *Urgenda* targets. For the purpose of reaching **those** targets, the Minister did not think that new coal plants needed to be closed.[463] The Coal Act is aimed at achieving the CO2 reductions goals for 2030 and beyond.[464]

389. After the Netherlands signed the Paris Agreement on 22 April 2016,[465] Parliament passed a bill to create a framework for additional measures

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459 **Exhibit R-0140-EN**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016, p. 11 (**Exhibit R-0140-NL**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016). The IPR Report did note that a full coal plant closure would exclude the possibility of firing biomass and could lead to destruction of capital.

460 **Exhibit R-0140-EN**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016, p. 63 (**Exhibit R-0140-NL**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016).

461 **Exhibit R-0141-EN**, Letter from the State Secretary for Infrastructure and the Environment, Parliamentary papers II 2015/16, 32 813, no. 122, 09 April 2016, p. 5 (**Exhibit R-0141-NL**, Letter from the State Secretary for Infrastructure and the Environment, Parliamentary papers II 2015/16, 32 813, no. 122, 09 April 2016).

462 Memorial, para. 268.

463 **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.

464 See Chapter 7.

465 Ratification was finalised on 28 July 2017.

to reduce CO2 emissions.[466] In 2020, this bill would become the Climate Law, which stipulates that the responsible Ministers must strive to reduce CO2 emissions by 49% in 2030, and 95% in 2050 (as compared to 1990 levels).[467] Parliament also passed a motion calling on the Government to set a timeline to phase out coal-fired power to meet the goal of the Paris Agreement.[468]

5.2.2 The Government described waning role of coal-fired power plants in Energy Report 2016

390. In the Energy Report 2016, the Government highlighted the need for further CO2 reductions and underscored that coal plants in their current form were not compatible with climate targets.

391. The report, titled "Transition to sustainability", focused on achieving a carbon neutral economy. The Netherlands had entered into global commitments to address global warming, and energy policy would continue to be guided by the goal of reducing CO2 emissions.[469]

> "***Steering toward CO2 reduction***
>
> *Internationally, the Netherlands is facing the challenge of drastically reducing global greenhouse gas emissions, whereby in the second half of the 21st century, as agreed in the* [Paris Agreement]*, there must be a global balance between greenhouse gas emissions and sequestration (or climate neutrality)."*

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466 **Exhibit R-0142-EN**, Climate Bill proposal, Parliamentary papers II 2015/16, 34 534, no. 2, 12 September 2016 (**Exhibit R-0142-NL**, Climate Bill proposal, Parliamentary papers II 2015/16, 34 534, no. 2, 12 September 2016).

467 **Exhibit R-0142-EN**, Climate Bill proposal, Parliamentary papers II 2015/16, 34 534, no. 2, 12 September 2016 (**Exhibit R-0142-NL**, Climate Bill proposal, Parliamentary papers II 2015/16, 34 534, no. 2, 12 September 2016); **Exhibit RL-0048-EN**, Climate Act, Official Gazette 2019, 253, 02 July 2019 (**Exhibit RL-0048-NL**, Climate Act, Official Gazette 2019, 253, 02 July 2019).

468 **Exhibit R-0143-EN**, Motion by Pechtold, Parliamentary papers II 2016/17, 34550, no. 14, 22 September 2016 (**Exhibit R-0143-NL**, Motion by Pechtold, Parliamentary papers II 201617, 34550, no. 14, 22 September 2016). The government provided a report on its progress, **Exhibit R-0144-EN**, Letter from Minister of Economic Affairs, Parliamentary papers II 2016/17, 31 793, no. 161, 14 October 2016 (**Exhibit R-0144-NL**, Letter from Minister of Economic Affairs, Parliamentary papers II 2016/17, 31 793, no. 161, 14 October 2016).

469 **Exhibit R-0145-NL**, Energy Report 2016, pp. 5-7 (**Exhibit R-0145-NL**, Energy Report 2016).

392. Given the EU climate targets, there would be almost no room for CO2 emissions from electricity production:[470]

> "*With a European climate target of 80-95% reduction by 2050, there is **virtually no CO2 emission potential for electricity generation in Europe**. The electricity market is currently undergoing a transition with a rapidly increasing use of renewable energy.*"

393. The Dutch energy industry would have to become less dependent on fossil fuels and move toward more sustainable solutions generated from renewable sources, such as wind.[471]

394. With regard to the newer coal-fired power plants, the Government confirmed that it was in active discussions on how to definitively phase them out. As explained in the Energy Report 2016, the Government would work out various options "[f]*or the eventual phase-out of coal-fired power stations*", together with the sector and other stakeholders.[472]

5.2.3 The Government identified measures to effectively reduce CO2 emissions by phasing out coal-fired power generation

395. Following his letter of 18 December 2015 in response to the Van Weyenberg Motion, the Minister of Economic Affairs commissioned a study that evaluated possible measures to phase out coal. In a letter to the House of Representatives dated 19 January 2017, the Minister described the study and its results. He explained that the starting point of the study was that the goal of the phasing out of coal plants was to reduce CO2. The study identified 29 measures for the realisation of CO2 reduction in coal plants and/or the realisation of phasing out and

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470 **Exhibit R-0145-EN**, Energy Report 2016, p. 126 (**Exhibit R-0145-NL**, Energy Report 2016).

471 **Exhibit R-0145-EN**, Energy Report 2016, pp. 6, 34-35 (**Exhibit R-0145-NL**, Energy Report 2016).

472 **Exhibit R-0145-EN**, Energy Report 2016, p. 127 (**Exhibit R-0145-NL**, Energy Report 2016).

assessed their feasibility and effectivity.[473] Moreover, he noted (among other things) the following conclusions of the study:[474]

396. First, phasing out coal plants will in all likelihood not create any issues for the security of supply in the Netherlands.[475]

397. Second, decreasing the electricity generated by Dutch coal plants leads to a significant reduction of CO2 emissions in the Netherlands. It also leads to a reduction of CO2 emissions on a European level.[476]

398. In this context, the study showed that any potential "leakage" or the "waterbed effect" do not render national measures to reduce CO2 emissions useless.

399. The concept of leakage assumes that a decrease in electricity production in one country will have to be compensated by electricity production elsewhere, which may cause equal or higher CO2 emissions. The letter explains that such leakage was projected to be substantially lower if coal plants were not closed in 2020, but rather in 2030.[477] Leakage would decrease further once Germany decided to phase out lignite and coal, which it indeed did.[478] Additionally, a central premise of leakage – that electricity lost by removing plants from the Netherlands would be "replaced" by electricity from equally or more polluting plants elsewhere – was not supported by facts: if Dutch coal

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473 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 6.

474 **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; **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures.

475 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 5.

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

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

478 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 8; **Exhibit R-0146**, German Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, 'Frequently asked questions on Germany's coal phase-out', (https://www.bmuv.de/en/topics/climate-adaptation/climate-protection/national-climate-policy/translate-to-english-fragen-und-antworten-zum-kohleausstieg-in-deutschland) accessed 10 May 2022, 18 August 2021.

plants closed, most of their energy production would be taken over by gas plants with lower CO2 emissions than coal plants.[479]

400. The waterbed effect means that emission reductions in one State that participates in the ETS free up emission rights which can be used by emitters in other participating States, thus allowing the same emissions elsewhere. This, too, did not need to render national CO2 reduction measures useless. The letter noted that the impact of the waterbed effect could be minimised by, for example, "*the buying up and then destroying of CO2 allowances*".[480]

401. Third, phasing out coal plants will lead to a cost increase for the electricity system and the end user. The later the phase out is effected, the lower the cost increase will be.[481]

402. Fourth, mandating CCS was one of the measures that was "*not feasible, at least not legally feasible*".[482]

403. Thereafter in June 2017, the feasibility of mandating CCS became moot. The initiators of Project ROAD, Uniper and Engie, had withdrawn from the project (like RWE had previously terminated its CCS project in 2011). The Government continued to consider "*CCS indispensable for the realisation of the climate objectives*" in the energy sector.[483]

404. Fifth, out of the 29 measures which were assessed, ten measures were found to be "*both feasible and potentially effective and efficient*

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479 **Exhibit R-0140-EN**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016 (**Exhibit R-0140-NL**, Netherlands Central Government, Report IBO Cost-effectiveness CO2 Reduction Measures dated April 2016); See also **Exhibit R-0147-EN**, Letter from Natuur & Milieu and Greenpeace, Parliamentary papers II 2016/17, 30 196, no. 505, Attachment no. 796950, 30 September 2016, p. 2 (**Exhibit R-0147-NL**, Letter from Natuur & Milieu and Greenpeace, Parliamentary papers II 2016/17, 30 196, no. 505, Attachment no. 796950, 30 September 2016).

480 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 7.

481 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 5.

482 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 6.

483 **Exhibit R-0148-NL**, Letter from Minister of Economic Affairs to Parliament, Parliamentary papers II 2016/17, 31 510, no. 67, 27 June 2017 (**Exhibit R-0148-NL**, Letter from Minister of Economic Affairs to Parliament, Parliamentary papers II 2016/17, 31 510, no. 67, 27 June 2017).

to reduce CO2 or to realise a phase out".[484] One of these ten measures was closing coal plants.[485] In light of the proportionality of the measure, the Government decided not to mandate the closure of the plants, but to impose a less far-reaching measure, namely a prohibition on the generation of electricity by firing coal as from a certain future date. This gives the plants the option, in addition to continued production until 2030, to convert and further produce electricity with a fuel other than coal.

405. The letter of 19 January 2017 and the list of assessed measures confirm that closing coal plants and other measures restricting coal-fired energy production were already on the table at that time for the period after 2020.[486]

5.2.4 Council of State advised on phasing out coal-fired power generation

406. In Dutch legislative procedure, legislative proposals can be initiated by the Government or by Members of Parliament. In February 2017, two bills proposing amendments to the Electricity Act and the Gas Act were submitted by a group of Members of Parliament (Mr Vos, Ms Dik-Faber, Mr Houwers, Mr Klein and Mr Monasch and, with respect to one of the two bills, Ms Van Tongeren and Ms Ouwehand) (the "**Vos Amendments**").

407. The purpose of the first amendment was to phase out the two coal plants built in the 1990s by introducing a minimum efficiency requirement of 45% as of 1 January 2021.[487] The second amendment served to phase out the remaining coal plants by further increasing the efficiency requirement to 48% as of 1 January 2031.[488] The Vos

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484 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures, p. 7.

485 **Exhibit C-0093**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures), measure 5.

486 **Exhibit C-0093**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Annex Assessment of possible measures (List of Measures).

487 **Exhibit R-0149-EN**, First Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 9, 16 February 2017, p. 1 (**Exhibit R-0149-NL**, First Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 9, 16 February 2017).

488 **Exhibit R-0150-EN**, Second Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 10, 16 February 2017 (**Exhibit R-0150-NL**, Second Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 10, 16 February 2017).

Amendments were intended to boost the energy transition and speed up the reduction of greenhouse gases in light of the Paris Agreement and the desire to transition to a society running on sustainable energy rather than fossil energy.[489] To ensure that the Vos Amendments were legally sound, the Minister of Economic Affairs submitted a request for advice to the Advisory Division of the Council of State in February 2017.[490]

408. If a bill is submitted to the Council of State for advice, the Council of State makes an assessment *inter alia* based on the appropriateness of the law to address the societal need in question, constitutionality, and compatibility with international and European law. It then issues non-binding advice, which can range from positive, sometimes with a recommendation that minor comments be considered, to negative unless amendments are made, or negative altogether. The Minister responsible for the bill then issues a report which sets out whether and how the advice will be followed and, if applicable, implemented in the bill.[491]

409. The Council of State advised against the Vos Amendments. Following an analysis of the Directive 2010/75 (the "**Industrial Emissions Directive**"),[492] the Council of State found that there was a serious risk that the Vos Amendments would violate that directive. The main reason for this finding was that the increased efficiency requirements

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489 **Exhibit R-0149-EN**, First Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 9, 16 February 2017, p. 2 (**Exhibit R-0149-NL**, First Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 9, 16 February 2017) and **Exhibit R-0150-EN**, Second Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 10, 16 February 2017, p. 2 (**Exhibit R-0150-NL**, Second Vos Amendment, Parliamentary papers II 2016-2017, 34 627, no. 10, 16 February 2017).

490 **Exhibit R-0151-EN**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2016/17, 34 627, no. 11, 28 February 2017, (**Exhibit R-0151-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2016/17, 34 627, no. 11, 28 February 2017).

491 For a more elaborate description of the full legislative process, see Section 7.2 below.

492 **Exhibit RL-0049**, Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), 24 November 2010.

were impossible to meet with the best available technology.[493] The Council of State further noted:[494]

> "*If closure of the coal-fired power stations is considered desirable, this should be done in a different, more direct way.* ***This can be done by means of a national law which regulates that on a certain date all electricity production with coal-fired power stations is prohibited****."*

410. The Council of State thus advised against the proposed method of effecting closure as set out in the Vos Amendments but did not draw the same conclusion in relation to a ban on coal-fuelled electricity production.

411. The Council of State also performed an analysis of the legality of a coal plant closure. In this context, the Council of State found that coal plant owners would not be expropriated (within the meaning of the ECHR). A coal phase-out would not result in a total loss of value for coal plant owners and would therefore not be a *de facto* expropriation:[495]

> "*the* [Advisory Division of the Council of State] *deems it plausible that these assets will in any case retain a more than negligible value after closure, so that the owners of the coal-fired power plants will still be able to sell them. This means that* ***the owners of the coal-fired power plants will retain some economic interest or meaningful use of the assets even after total closure****. It follows from this that* ***this is a regulation of property and not a de facto expropriation****.*"

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493 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, pp. 7-8 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

494 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 9 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017). The Council of State called the phase-out a "*closure law*" because this phrasing was used in earlier documents. However this is a misnomer: "*closure law*" refers to phasing out coal in power generation, not closing power plants.

495 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 11 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

412. The Ministry of Economic Affairs and Climate reviewed the advice of the Council of State and decided not to take the Vos Amendments further. However, the Minister recognised the alternative measure referenced by the Council of State as appropriate.[496]

> "*The* [Advisory Division of the Council of State] *advises against the amendments.* ***I accept this advice*** [...] ***I also agree with the Division's analysis that a closure law*** [a law whereby on a certain date electricity production with coal-fired power stations is prohibited] ***is an appropriate way to force the possible closure of coal-fired power plants***."

496 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, pp. 2-3 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

6 DUTCH POLICY HAS REPEATEDLY REITERATED THE IMPORTANCE OF CO2 REDUCTION AND THAT COAL PLANTS WOULD HAVE TO TAKE ACTION

413. In short, Dutch policy was geared towards achieving CO2 emission reduction, which was also recognised by RWE. The Netherlands briefly summarises the most important points:

- Implementation Note on Climate Policy (21 June 1999):[497] the Government stated that fossil fuels would need to stay within the conditions of climate policy. Coal plants specifically would need to reduce their CO2 emissions in order to meet the Kyoto Protocol targets. This document also included the first reference to CCS as an option to reduce CO2 emission, which would then receive more attention in the future. However, if CCS were not successful, CO2 emission reduction would have to be achieved through other means.

- Environmental Programme 2001-2004: [498] existing coal plants would need to reduce their CO2 emissions to be on par with gas-fired power stations. This would require an emission reduction of roughly 50%.

- Fourth National Environmental Plan (13 June 2001): [499] the Government set out how CO2 emission reduction could be progressed along three separate tracks: (i) through the use of renewables such as solar, wind and biomass; (ii) by improving energy efficiency; and (iii) through the development and application of clean fossil technology such as CCS.

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497 **Exhibit R-0042-EN**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

498 **Exhibit R-0083-EN**, Environmental Programme 2001-2004, Parliamentary papers II 2000/01, 27 404, no. 2, 19 September 2000 (**Exhibit R-0083-NL**, Environmental Programme 2001-2004, Parliamentary papers II 2000/01, 27 404, no. 2, 19 September 2000).

499 **Exhibit R-0086-EN**, Fourth National Environment Policy Plan, 13 June 2001 (**Exhibit R-0086-NL**, Fourth National Environment Policy Plan, 13 June 2001).

- Energy Report 2002:[500] the Government set out that energy production would have to remain within the constraints imposed by the climate policy. It noted that the need to reduce CO2 emissions was causing a sense of urgency.

- Clean Fossil Policy Memo (22 September 2003):[501] the Government noted that further restrictions on greenhouse gases were likely and that the measures needed to achieve future goals would be more expensive. It further stated that clean fossil would likely become a necessity in the future.

- Long-Term Vision for Security of Supply (September 2003):[502] even when discussing security of supply, the Government reiterated the importance of CO2 emission reduction. It was noted that coal plants would need to fit within hard national ceilings when it came to CO2 emissions.

- Energy Report 2005:[503] the use of coal would only be acceptable if it did not interfere with achieving the CO2 emissions targets. The Government gave no guarantee that emission requirements would not be tightened in the future. For CCS, coal plant owners might have to invest in the technology within 10 years.

- First plans for Eemshaven (2006): in April 2006 RWE issued a starting memorandum for the construction of a coal plant in Eemshaven in which it recognised that CO2 emission reduction was important and that future restrictions were likely. Thereafter, up until 22 March 2007, RWE sent letters detailing how its new Eemshaven plant would reduce CO2 emissions, including through the application of CCS, to various members of the Government.

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500 **Exhibit R-0029-EN**, Energy Report 2002 (**Exhibit R-0029-NL**, Energy Report 2002).

501 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6 (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

502 **Exhibit R-0043-EN**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II 2002/03, 29 023, no. 1, 03 September 2003, p. 11 (**Exhibit R-0043-NL**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II, 2002/03, 29 023, no. 1, 03 September 2003).

503 **Exhibit C-0039**, Energy Report 2005, Now for Later (**Exhibit R-0030-NL**, Energy Report 2005).

- Letter from Minister of Housing, Spatial Planning and the Environment (28 June 2007):[504] the Minister emphasised that coal power plants would have to fit within the climate policy. She further noted that she could not block the introduction of new coal plants; however, she could set parameters. It was further noted that coal plants would ultimately only be acceptable through a combination of high efficiency, co-firing biomass, using released heat and CCS.

- Energy Report 2008:[505] the Government once again reiterated the importance of CO2 emission reduction, stating that efforts to compensate the increased CO2 emissions were a condition for investment in new coal plants.

- 2008 Sector Agreement (28 October 2008):[506] as part of this agreement, the energy sector – including RWE – committed to promoting new coal plants to substantially reduce their CO2 emissions from 2015 onwards. In relation to CCS, RWE promised demonstration by 2015 and up scaling in 2020.

- Decision to construct Eemshaven (16 March 2009): RWE decided to commence construction of Eemshaven despite its bleak economic outlook.

- Energy Report 2011:[507] the Government continued to state that coal plants must operate within the confines of environmental policy, the focus of which was on sustainability which meant that in the long-run fossil fuels would be less important.

- RWE decides to halt participation in CCS project (2011): RWE decided not to proceed with its demonstration project as it did not believe it was economically viable.

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504 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

505 **Exhibit R-0032-EN**, Energy Report 2008 (**Exhibit R-0032-NL**, Energy Report 2008).

506 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

507 **Exhibit R-0103-EN**, Energy Report 2011 (**Exhibit R-0103-NL**, Energy Report 2011).

- 2013 Energy Agreement (September 2013):[508] the Government and energy sector reached an agreement to improve sustainability. Older coal plants would be closed down in return for a coal tax exemption. The Government further agreed to temporarily subsidise co-firing of biomass once more in newer coal plants.

- SDE+ Subsidy extends to include co-firing biomass (18 March 2015): [509] following the 2013 Energy Agreement up to 25 petajoules of co-firing will be subsidised.

- Von Weyenburg Motion (18 November 2015):[510] the prospect of phasing out coal plants was discussed in Parliament and the Government was asked to analyse the possibility.

- Energy Report 2016:[511] it was stated that coal plants did not fit within the parameters of the environmental policy in their form and further measures such as CCS would be needed.

- Analysis of CO2 measures (19 January 2017):[512] in response to the Von Weyenburg Motion, an analysis was made as to possible CO2 emission reduction measures in coal plants.

- End of Project ROAD (June 2017): the final project for CCS ended after two plant owners withdrew their support.

414. The above demonstrates that the common trend in Dutch policy was for energy production to stay within the boundaries of climate policy, which meant for new coal plants substantial CO2 emission reduction.

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508 **Exhibit R-0106-EN**, 2013 Energy Agreement (**Exhibit R-0106-NL**, 2013 Energy Agreement).

509 **Exhibit R-0104-EN**, Letter from the Minister of Economic Affairs, Parliamentary Papers II 2014/15, 31 239, no. 180, 11 November 2014, pp. 1 and 4-5 (**Exhibit R-0104-NL**, Letter from the Minister of Economic Affairs, Parliamentary papers II 2014/15, 31 239, no. 180, 11 November 2014). In 2020, the SDE+ Subsidy was updated and expanded to the so-called SDE++ subsidy regime.

510 **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.

511 **Exhibit R-0145-EN**, Energy Report 2016 (**Exhibit R-0145-NL**, Energy Report 2016).

512 **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures.

The Netherlands did not want or invite RWE to burn coal for electricity production as RWE states in its Memorial.[513]

415. Instead, the Netherlands wanted a cleaner energy production, which was the driving factor behind Dutch policy. Contrary to RWE's suggestion, [514] the desire to reduce CO2 emissions was not outweighed by other factors such as security of supply and price.

416. New coal plants would have to comply with the Clean Fossil policy, i.e., take action to substantially reduce CO2 emissions of fossil fuels. This was known as early as 1999 and was repeated throughout the period leading up to Eemshaven's construction. Similarly, during the construction of Eemshaven and thereafter, the Government continued to emphasise the importance of CO2 emission reduction within coal plants.

417. It was up to the energy producers to decide the manner in which they would comply with the Clean Fossil policy. In this regard, CCS and the co-firing of biomass were seen as possible ways for coal plants to comply with the Clean Fossil policy. The Netherlands facilitated the development of CCS and subsidised biomass to enable energy producers to reduce their emissions.

418. RWE recognised the need to reduce CO2 emissions. On numerous occasions it promised to achieve CO2 emission reduction whilst recognising that emission targets would likely be tightened in the future. RWE promised to employ CCS as part of its Eemshaven project. However, as detailed in Sub-section 4.4, RWE reneged on its promises. No alternative means of reducing CO2 emissions have been presented by RWE. The Government therefore took action to achieve CO2 reduction at coal plants by introducing the Coal Act.

7 THE INTRODUCTION OF THE COAL ACT

419. On 10 October 2017, the Coalition Agreement, titled Confidence in the Future, (the "**2017 Coalition Agreement**") was published. The 2017 Coalition Agreement contemplated the phasing out of coal-fired plants

513 Memorial, Section B.IV.
514 Memorial, Section B.IV.1. and B.IV.2.

by 2030, as an integral part of the Netherlands' ambition to reduce CO2 emissions by 49% by 2030. The Government eventually decided not to phase out coal plants but only for the use of coal fuelled electricity production (**Section 7.1**). A draft of the Coal Act was submitted for consultation with the public, and received positive consideration from the Council of State (**Section 7.2**). Following a comprehensive consultation process and parliamentary debate, on 20 December 2019, the Coal Act was adopted, accompanied by an Explanatory Memorandum outlining its rationale and purpose (**Section 7.3**).

7.1 The climate policy announcements in the 2017 Coalition Agreement

420. The 2017 Coalition Agreement noted that the EU had given "*firm commitments on behalf of all the Member States to reduce greenhouse gas emissions by at least 40% by 2030, compared to 1990*".[515] It also noted that this commitment would be insufficient to achieve the 2°C target set in the Paris Agreement.[516] The Netherlands therefore set a higher bar, calling for a 55% reduction target at EU level.[517] This would, in turn, result in a further increase in the Dutch CO2 emission reduction targets.[518]

421. It was in this context that the intention to pass legislation effecting a coal plant phaseout was introduced:[519]

> "*The coal-fired power stations will be phased out in 2030 at the latest. In a National Climate and Energy Agreement to be concluded, agreements will be made with the sector about the timing.*"

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515 **Exhibit R-0153-EN**, 2017 Coalition Agreement, 10 October 2017, p. 37 (**Exhibit R-0153-NL**, 2017 Coalition Agreement, 10 October 2017).

516 **Exhibit R-0153-EN**, 2017 Coalition Agreement, 10 October 2017, p. 37 (**Exhibit R-0153-NL**, 2017 Coalition Agreement, 10 October 2017).

517 **Exhibit RL-0030**, Paris Agreement 2015, 22 April 2016, Article 4.11 and **Exhibit R-0153-EN**, 2017 Coalition Agreement, 10 October 2017, p. 37 (**Exhibit R-0153-NL**, 2017 Coalition Agreement, 10 October 2017).

518 **Exhibit R-0153-EN**, 2017 Coalition Agreement, 10 October 2017, p. 37 (**Exhibit R-0153-NL**, 2017 Coalition Agreement, 10 October 2017).

519 **Exhibit R-0153-EN**, 2017 Coalition Agreement, 10 October 2017, p. 38 (**Exhibit R-0153-NL**, 2017 Coalition Agreement, 10 October 2017).

422. One of the aims of the policies envisaged by the Coalition Agreement was certainty on long-term climate policy targets for all stakeholders. This would be achieved by the conclusion of a subsequent national agreement on climate issues.[520]

423. The National Climate Agreement was concluded on 28 June 2019 (the "**National Climate Agreement**") and laid out policies and measures agreed with various sectors in order to achieve the 49% CO2 reduction target undertaken following the Paris Agreement.[521] The National Climate Agreement recorded that a proposed coal act – while being part of a separate process, and not subject to the assent of the energy sector – would count towards achieving the necessary CO2 reductions in the energy sector required by this target. Further agreements with the sector about the timing became superfluous as the proposed coal act included the longest possible transitional period until 2030.

7.2 The Coal Act was submitted for consultation with the public and received positive consideration from the Council of State

424. Under Dutch parliamentary procedure, once a pressing societal need is identified – such as the need to phase out coal announced in the Coalition Agreement – the responsible Minister will on behalf of the Government prepare a draft bill. This draft bill is accompanied by an Explanatory Memorandum, laying out the reasons and facts underlying it.

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520 **Exhibit R-0153-EN**, 2017 Coalition Agreement, 10 October 2017, p. 37 (**Exhibit R-0153-NL**, 2017 Coalition Agreement, 10 October 2017).

521 **Exhibit C-0095**, The government of the Netherlands, Climate Agreement, The Hague, 28 June 2019, for example pp. 5-7 and 165. The National Climate Agreement comprises several agreements between government, civil society organisations, and sector operators. These agreements were concluded at 'sector tables', including the electricity sector table, where RWE was represented. According to the National Climate Agreement, the 2030 challenge for the electricity sector is the removal of 20, Mt CO2 emissions, necessary in order to attain the goal of CO2 emission reduction of 49% CO2 reduction by 2030. The introduction of the Coal Act – well underway at the time of the Climate Agreement – is expected to count towards this target.

425. The draft bill is commonly submitted for consultation with the public, giving all stakeholders and society at large an opportunity to provide their perspective.[522]

426. It is then provided to the Council of State for advice. After the Council of State has given its advice and the responsible Minister has reported on whether and how the advice will be implemented in the bill, the draft bill is subjected to debate in the House of Representatives, which may adopt it, reject it, or propose amendments. Once adopted, the bill is submitted to the Senate, which may either adopt or reject it. If adopted, the bill is signed by the King and published in the Official Gazette.

427. A first draft of what would later become the Coal Act was submitted for public consultation on 19 May 2018.[523]

428. The consultation phase yielded ten written public responses from various stakeholders, including coal plant owners as well as environmental NGOs.[524] On 14 June 2018, RWE submitted its response to the Coal Act, referring in particular to the waterbed and leakage effects, issues of security of supply, and the potential effect of a ban on coal on Eemshaven's business case.[525]

429. These considerations – which RWE largely reiterates in the present proceedings – were heard, considered, and factored into the Explanatory Memorandum accompanying the Coal Act (the

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522 For example, in the case of the Coal Act, the considerations of all relevant stakeholders are given due consideration: **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, Section 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

523 **Exhibit R-0154-EN**, Overheid.nl, Consultation Act prohibition of coal for electricity production (https://www.internetconsultatie.nl/kolencentrales) accessed 3 September 2022 (**Exhibit R-0154-NL**, Overheid.nl, Consultation Act prohibition of coal for electricity production (https://www.internetconsultatie.nl/kolencentrales) accessed 3 September 2022).

524 Natuur & Milieu and Greenpeace submitted a reaction to the Coal Act, suggesting, *inter alia*, that the draft bill should enter into force earlier in view of the urgency of the need to reduce CO2 emissions. **Exhibit R-0155-EN**, Submission of Natuur & Milieu and Greenpeace for internet consultation regarding proposal for a law banning the production of electricity using coal, 15 June 2018 (**Exhibit R-0155-NL**, Submission of Natuur & Milieu and Greenpeace for internet consultation regarding proposal for a law banning the production of electricity using coal, 15 June 2018).

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

"**Explanatory Memorandum**") along with the considerations brought forward by the other responders.[526] Moreover, as further explained below, the input of stakeholders – e.g., with regard to the possibility of conversion to alternative sources of fuel – continued to be debated and addressed throughout the process that led to the adoption of the Coal Act.

430. After the public consultation, the legality of the draft law was subjected to an assessment by the Council of State. The Council of State delivered its advice on 16 January 2019. The advice was positive.[527]

431. The Council of State attributed weight to the aims underlying the draft law, i.e., the fight against climate change. In particular, the Council of State recognised that the draft Coal Act contributed to achieving climate goals:[528]

> "***Combating climate change requires action**. **The proposed coal act contributes to achieving the climate goals**, in the sense that it leads to a substantial reduction in greenhouse gas emissions, even if electricity is imported from abroad after the coal act. The proposed coal act is also a cost-effective measure, in the sense of costs in euros per tonne of emission reduction. Nor is there any particular starting point for the conclusion that the proposed coal act is not in accordance with international and European law* […]"

432. Assessing the Coal Act in relation to Article 1, Protocol 1 of the European Convention on Human Rights, the Council of State confirmed that the Coal Act would constitute regulation of property (excluding therefore that it constituted an indirect expropriation) and saw no reason to conclude that the Coal Act did not fulfil the fair

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526 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, Section 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

527 Advices from the Council of State include a dictum on a scale from A to E. The Coal Act received Dictum B which equates to a positive advice.

528 **Exhibit R-0156-EN**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019, p. 3 (**Exhibit R-0156-NL**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019).

balance test.[529] In particular, in view of the transitional period, the lack of financial compensation raised no questions to the contrary.

433. The Council of State advised the Government to ensure *inter alia* that the Explanatory Memorandum would elaborate further on the fair balance test and provide further detail regarding the possibilities for conversion to alternative fuels during the period up to 2030.[530] This is what happened. The Council of State's advice was addressed in a supplemented version of the Explanatory Memorandum.[531]

434. The Council of State did not recommend that the Government elaborate on its Explanatory Memorandum with reference to each operators' individual business case, and it did not advise the Government to reach out to RWE for individual data on the amounts recouped.[532]

435. The Council of State's recommendation to supplement the Explanatory Memorandum "*where possible*"[533] was made with a view to ensuring that the rationale behind the measures would be fully documented, in the interest of clarity, not because "*further review*"[534] was required before the Coal Act could be considered lawful. The Council of State's positive advice confirms this.

436. The Council of State's positive advice on the Coal Act stands in contrast with its earlier negative advice on the Vos Amendments. That earlier advice was based on the fundamentally different legislative

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529 **Exhibit R-0156-EN**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019, pp. 4-5 (**Exhibit R-0156-NL**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019).

530 **Exhibit R-0156-EN**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019, p. 5 (**Exhibit R-0156-NL**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019).

531 The Explanatory Memorandum (as supplemented) is discussed in Section 7.3 below.

532 Memorial, paras. 311-312.

533 **Exhibit R-0156-EN**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019, p. 5 (**Exhibit R-0156-NL**, Advice of Advisory Division of the Council of State regarding Act prohibition coal for electricity production, Parliamentary papers II 2018-2019, 35 167, no. 4, 16 January 2019).

534 Memorial, para. 297.

proposal of setting efficiency requirements that were contrary to the Industrial Emissions Directive.[535]

437. Insofar as the Council of State's analysis of the Vos Amendments can be deemed of relevance to the Coal Act, that relevance is in the Council's findings that (i) a closing of coal plants, let alone a prospective coal phase-out would not result in a total loss of value for the coal plant owners[536]*;* (ii) "*financial compensation is not as such necessary in order to achieve a fair balance*"[537] when regulating property; and (iii) the policy objective of closing coal plants was evident since 2015, however the Council recognised that a coal ban is not the same as the closure of coal plants. The Council recognised that already in 2007, the debate was dominated by potential CO2 emission reduction techniques (such as CCS).[538]

438. Following the Council of State's advice, the Coal Act was presented to the House of Representatives on 18 March 2019, which voted in favour of it on 4 July 2019. The Coal Act was subsequently adopted by the Senate on 10 December 2019.

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535 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, pp. 1-2 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017). The Vos Amendments required operators to raise their efficiency requirements to 45% by 1 January 2021 and to 48% by 1 January 2031, in the anticipation that these targets would eventually be untenable for all coal plants, and that subsequent failure by operators to meet it would ultimately lead to the attainment of the goals of the legislation, i.e., a coal phase out.

536 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 10: "*the* [Council of State] *deems it plausible that these assets will in any case retain a more than negligible value after closure* […] *This means that the owners of the coal-fired power plants will retain some economic interest or meaningful use of the assets even after total closure*" (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

537 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 12 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

538 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 12 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

7.3 The Coal Act was enacted on 20 December 2019, accompanied by an Explanatory Memorandum outlining its rationale and purpose

439. The Coal Act was published in the Official Gazette on 19 December 2019, and came into force on 20 December 2019.

440. The Coal Act envisages a prohibition on the use of coal in the production of electricity in its Article 2.

441. Article 3 governs the transitional period afforded by the Coal Act that allows operators to continue electricity production with the use of coal for a certain period (for Eemshaven this period is more than ten years) and to adjust to the prohibition. According to Article 3, the prohibition in Article 2 can enter into effect at one of three points:

- 1 January 2020 – in the case of coal plants with an efficiency rate below 44%, which co-fire no alternative fuels;
- 1 January 2025 – in the case of coal plants with an efficiency rate below 44%, who do co-fire alternative fuels;
- 1 January 2030 – in the case of coal plants with an efficiency rate exceeding 44%.

442. Article 4 provides that operators which are disproportionately affected by the prohibition on the use of coal may request financial compensation.

443. The Coal Act is accompanied by the Explanatory Memorandum.

444. As noted in the Explanatory Memorandum, the aim of the Coal Act is to achieve a "*significant reduction of CO2 emissions in the Netherlands*".[539]

445. Considering that "[p]*roduction of electricity with the use of coal is one of the most CO2-intensive methods of electricity production* […] *the*

539 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

importance of phasing out coal as a fuel in electricity production from a climate perspective is evident".[540]

446. Moreover, "[a]*lternative instruments* […] *have been researched earlier and judged to be less effective, cost-effective and/or legally untenable*".[541] For instance, making installation of CCS mandatory for coal plants was not considered to be legally possible, given that that technology had not yet been demonstrated.[542]

447. The Coal Act was drafted in consideration of international and EU law. As set out in the Explanatory Memorandum and outlined in the sections below, the tenets of the Coal Act are consistent with long-held objectives of the Dutch climate policy:

448. First, energy operators were fully aware that significant CO2 emission reductions would have to be achieved as set by evolving climate policy, if coal is to continue to be used as a fuel for electricity production[543] (**Section 7.3.1**). Second, operators are free to adjust

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540 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

541 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

542 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019): "***Alternative instruments****, such as tightening the efficiency requirements for these plants, the removal of ETS allowances from the market, or the obligatory introduction of carbon capture and storage (CCS)* ***have been researched earlier and judged to be less effective, cost-effective and/or legally untenable*** […] *reference is made to the earlier mentioned letter of 19 January 2017 and to the* [advice of the Council of State on the Vos Amendments]". See also p. 6: "*Contrary to what was foreseen at the time, it is therefore currently not yet possible to apply CCS by power stations. CCS is therefore currently not one of the options for achieving CO2 reduction in the generation of electricity by the power stations, so that also for this reason, the phasing out of coal is the most obvious*"; **Exhibit C-0092**, Parliamentary Papers II 2016/17, 30 196 and 32 813, no. 505, Letter to Parliament - Measures p. 6: "*Examples that are legally unfeasible are the establishment of a CO2 standard for coal-fired power stations, setting a CO2 budget for the coal-fired power stations and* ***mandatory CCS***".

543 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019,

their business model to operating without coal[544] (**Section 7.3.2**). Third, the transitional period allows operators to continue to burn coal for more than ten years[545] (**Section 7.3.3**). Fourth, in any case, the PPP provides that the costs of undertaking measures against global warming be borne by the emitters of CO2[546] (**Section 7.3.4**). Fifth, Article 4 Coal Act (i.e., the hardship clause) allows disproportionately affected energy operators to request compensation[547] (**Section 7.3.5**).

7.3.1 Energy producers were put on notice that CO2 emission reductions would be necessary

449. The Explanatory Memorandum recalled that, based on statements of prior cabinets and parliaments, measures further limiting CO2 emissions were foreseeable.[548] It noted that, as early as 2005, prospective investors were put on notice that investments in coal plants would need to go hand in hand with substantial emission reduction, and that CO2 emissions would need to reach zero during

p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

544 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

545 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 11 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

546 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

547 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 13 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

548 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 9-10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

the lifetime of coal plants.[549] This was likewise emphasised in 2007[550] and in 2008,[551] and further transpires from earlier legislative proposals specifically targeting coal plants.[552]

450. The Explanatory Memorandum further made clear that coal plants could be affected by measures aimed at reducing CO2 emissions drastically. Prohibiting the burning of coal for electricity production is such a measure. It was further noted that the use of other fuels, which coal plants are allowed to use on the basis of their permits, may continue to be used.[553]

451. The permits were issued on the expectation that CCS would become applied within ten years. After a demonstration phase, which would receive financial support from the Government, the costs of CCS

549 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 9 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

550 In **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007 the Minister indicated that the Netherlands' climate ambitions would not be without consequences for fossil fuels and that energy operators would need to take into account changes in market conditions, see p. 2 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007); **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007, p. 27 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

551 **Exhibit R-0157-EN**, Answers from Minister of Economic Affairs, Parliamentary papers II 2008/09, 31 510, no. 2, 29 September 2008, p. 13 (**Exhibit R-0157-NL**, Answers from Minister of Economic Affairs, Parliamentary papers II 2008/09, 31 510, no. 2, 29 September 2008); **Exhibit R-0158-EN**, Letter from the Minister of Housing, Spatial Planning and Environment to Parliament, Parliamentary papers II 2008/09, 31 209, no. 42, 27 October 2008, p. 22 (**Exhibit R-0158-NL**, Letter from the Minister of Housing, Spatial Planning and Environment to Parliament, Parliamentary papers II 2008/09, 31 209, no. 42, 27 October 2008).

552 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 5-6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

553 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

would be borne by the owners of coal plants.[554] In other words, the expectation was that the plants would soon operate with significantly reduced CO2 emissions, which the coal plant operators would need to "***fully*** [i.e., down to zero] *reduce*" during the lifetime of the plants.[555] As the Explanatory Memorandum put it, given that this expectation did not materialise, "*the phasing out of coal is the most obvious*" in order to achieve the reduction in CO2 emissions which remained necessary.[556]

7.3.2 Operators are free to adjust their business model to operating without coal

452. The Coal Act only prohibits the use of coal. It does not affect the use of other means of electricity generation listed in the operators' permits, such as biomass, hydrogen, gas or ammonia.[557]

453. The Explanatory Memorandum notes that developments in the field of energy transition are happening in rapid succession. It lists examples of energy plants in Denmark, Belgium and Canada which have achieved a transition to alternative fuels as in the period 2013 to 2017.[558] Under the Coal Act, the coal plants' transition will take place

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554 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

555 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

556 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

557 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). See also pp. 10 and 17.

558 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). It also describes that three of the six units of a coal plant in the United Kingdom have been converted to fire only biomass.

nearly two decades after these developments, allowing for further technological developments to take place. The Explanatory Memorandum notes the existence of emerging technologies, including hydrogen, which are expected to "*take off*".[559]

454. In this context, it is "*up to the operators themselves to make a choice as to how they wish to continue operating their power plant, based on their own business assessment*."[560] Operators are therefore free to convert or find another use for their plant. This is in line with the fact that energy producers have long been developing alternatives to coal. In the process of doing so, they will have received EUR 3.6 billion in subsidies from the Government for the co-firing of biomass,[561] of which EUR 2.5 billion was received by RWE.[562]

455. The Explanatory Memorandum notes that one of the operators, i.e., RWE, "*has already indicated in the media that it wants to run its two power plants entirely on biomass with the aim of making them CO2-neutral*".[563] As explained in Chapter 8, biomass has long been a part

559 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 10-11 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

560 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). This is in line with the specification made at p. 15: "[The Coal Act] *introduces a ban on the use of coal for electricity generation* ***and as such does not interfere with the control that the owners of the power stations can exercise over their business***".

561 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

562 **Exhibit R-0159-EN**, RWE, 'Biomass and the energy transition' (https://benelux.rwe.com/innovatie-en-toekomst/biomassa) accessed 2 September 2022 (**Exhibit R-0159-NL**, RWE, 'Biomass and the energy transition' (https://benelux.rwe.com/innovatie-en-toekomst/biomassa) accessed 2 September 2022).

563 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). See also p. 12 of the Explanatory Memorandum and Section 9.1.

of RWE's vision with respect to the conversion of Eemshaven,[564] which RWE acknowledges is possible with the technology of today.[565]

456. RWE likewise acknowledged around the time that the Coal Act was discussed in Parliament that predicting the future of transition was a difficult exercise, but that innovative technologies offered a clear path towards its goal of carbon neutrality by 2040:[566]

> "*who could have predicted today's reality 20 years ago?* ***Likewise, no one knows what 2040 will look like****. Digitalization and innovative technologies opened the door to wonderful opportunities for development above all in power supply, the people working at RWE want to draw on their expertise and engineering and know how to seize these very opportunity and spur progress* […] ***However be it with green gas, high performance batteries or something entirely new****, only one thing counts at the end of the day:* ***RWE will be a carbon neutral company*** *by 2040.*"

457. As was explained by the Minister of Economic Affairs and Climate Policy in the context of discussions in Parliament surrounding the draft Coal Act,[567] it is also for this reason that the 2019 Frontier Economics report commissioned by Uniper on conversion of its plant to biomass and hydrogen,[568] is not a reliable indicator of the possibilities for conversion to alternative fuels as of 2030. It relies *inter alia* on

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564 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021. As will be further explained in Chapter 8 below, RWE noted in order to achieve these climate targets, "*the phase out of electricity generation from coal will play a central role*".

565 See e.g., Memorial, para. 13, where RWE clearly indicates that the only debate is whether such conversion would be economical. See also Memorial, paras. 321-330. **Exhibit C-0002**, RWE Annual Report 2019, p. 44: "*we can continue operating our Amer 9 and Eemshaven hard coal-fired power plants in the Netherlands after the established end dates for coal if we fully convert them to biomass.* […] *Conversion to 100 % biomass-firing would involve significant additional expenses.* "

566 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 2.

567 **Exhibit R-0161-EN**, Memorandum of Reply regarding Act prohibition coal for electricity production, Parliamentary papers I 2019-2020, 35 167, 17 October 2019, pp. 12-13 (**Exhibit R-0161-NL**, Memorandum of Reply regarding Act prohibition coal for electricity production (Parliamentary papers I 2019-2020, 35 167, no. B), 17 October 2019).

568 RWE refers to this report in Memorial, para. 326.

inevitably outdated assumptions regarding the possibilities for conversion.[569]

7.3.3 Energy producers are afforded a suitable transitional period

458. For plants such as Eemshaven, the prohibition to use coal to generate electricity only enters into force as of **1 January 2030**. This is ten years after the enactment of the Coal Act, 13 years since measures for coal plants were announced in the Coalition Agreement 2017, and decades after energy producers were put on notice that the continued use of coal would be conditional on CO2 emission reductions.

459. The Explanatory Memorandum sets out that the transitional period until 2030 is the result of a balancing exercise between different considerations. These include the following:

(i) Addressing climate change requires swift action, including a phase-out of coal for electricity production in the Netherlands by 2030 at the latest. The Explanatory Memorandum takes note of a scientific report on the need to phase out coal-fuelled electricity published by the policy institute Climate Analytics in February 2017.[570] According to the report, based on the available scientific evidence, all remaining coal-fired power plants in the EU should be phased out by 2030 to keep global warming below 2ºC and in line with commitments under the

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569 **Exhibit R-0161-EN**, Memorandum of Reply regarding Act prohibition coal for electricity production, Parliamentary papers I 2019-2020, 35 167, 17 October 2019, pp. 12-13 (**Exhibit R-0161-NL**, Memorandum of Reply regarding Act prohibition coal for electricity production (Parliamentary papers I 2019-2020, 35 167, no. B), 17 October 2019). As noted by the Minister, the assumptions underlying the Frontier Economics Report likewise neglect, *inter alia*, the existence of SDE+ subsidies granted by government to support biomass conversion, fluctuating ETS prices, and the full breath of alternative fuels already available – in addition to the possibility that coal plants will likely altogether cease to be profitable after 2030.

570 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 1 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

Paris Agreement. The Coal Act therefore included the longest possible transitional period:[571]

> "*The long-term temperature goal adopted under the Paris Agreement of holding temperature increase to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" requires a rapid decarbonisation of the global power sector and the phase-out of the last unabated coal-fired power plant in the EU by around 2030.*"

The Climate Analytics report also observed that phasing out coal-fired power plants by regulation would have the benefit of providing certainty to energy sector investors, as opposed to a sudden closure due to changed market conditions.[572]

(ii) Conversion to alternative fuels is already technically feasible and further renewable alternatives are on the rapid rise. As explained above, the Coal Act allows operators to adjust to the inability to use coal in a manner of their choosing. The Explanatory Memorandum sets out that the transitional period gives ample opportunity to do so. Until 2030, the owners of more efficient coal plants can continue operating by using coal. At the same time, operators can gradually switch their operations to other, less CO2-intensive fuels. Taking current biomass capacities as an example – with reference to the ambitions of one of the coal plant owners, i.e., RWE,[573] to make its plant CO2-neutral with biomass – the Explanatory Memorandum noted that the transitional period is twice as long as required for a full conversion, which is technically possible

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571 **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, Executive Summary, p. VI. **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 11 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

572 **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, p. 31.

573 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

today.[574] In addition, government subsidies have helped kick off the conversion process. Accordingly, the energy operators already have the knowledge, skills and organisational foundations to make use of the transitional period to fully transition to alternative fuels.[575]

(iii) The transitional period is in line with the expected development of CO2 'leakage' due to relocation of electricity production abroad. As noted in the Explanatory Memorandum, research indicates that after 2030, the percentage of CO2 'leaked' will be significantly less than in 2020.[576] The coal plants are covered by ETS.[577] The introduction of the MSR as of 2019, coupled with the concomitant efforts in other countries to switch to renewables, means that emissions avoided in the Netherlands as a result of the Coal Act will not automatically be replaced by emissions elsewhere,[578] especially if alternative

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574 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 11-12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).The Government accounted for the following: "*For the subsidising of co-firing of biomass in coalfired power plants, a period of three years is used to implement co-firing. A full conversion to 100% biomass requires similar technical modifications, and in principle a period of three years is therefore also reasonable for this. In addition to technical modifications, other operational changes may also be needed, such as applying for permits, additional purchase of (sustainable) biomass and adjusting and optimising the power plant*".

575 This is all the more applicable to Claimants, which have already almost fully converted their other Dutch power plant – the Amer plant – to biomass on the basis of subsidies from the Government in the amount of EUR [redacted].

576 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

577 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 7 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

578 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 7 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

fuels are also applied.[579] In any event, the aim of the Coal Act is to achieve a significant reduction in CO2 emissions at national level.[580]

460. Moreover, as also noted by the Minister in the course of the parliamentary debate regarding the Coal Act, the profitability of using coal is likely to drastically decrease.[581] Since the inception of RWE's investment, there have been indications that the profitability of coal is on a downwards trajectory (see also Section 4.3). It is likely that irrespective of whether energy producers choose to participate in the energy transition, the transitional period is the last interval during which coal plants could profitably operate.

461. Finally, the Explanatory Memorandum addresses the question of compensation in the context of the assessment of *fair balance* under the European Convention on Human Rights. As indicated by the Council of State in its advice on the Vos Amendments, three elements may ensure fair balance: compensation, transitional periods, and hardship clauses – compensation not being a prerequisite.[582] In this case, as noted in the Explanatory Memorandum, the legislator opted for the longest possible transitional period and for a hardship clause.

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579 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

580 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

581 **Exhibit R-0161-EN**, Memorandum of Reply regarding Act prohibition coal for electricity production, Parliamentary papers I 2019-2020, 35 167, 17 October 2019, p. 13 (**Exhibit R-0161-NL**, Memorandum of Reply regarding Act prohibition coal for electricity production (Parliamentary papers I 2019-2020, 35 167, no. B), 17 October 2019).

582 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 8 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

Accordingly, no compensation was considered justified or required in addition to these elements.[583]

7.3.4 The Polluter Pays Principle provides that costs for climate change mitigation and prevention be borne by the polluter

462. The PPP is found in numerous treaties[584] and is one of the tenets of the Coal Act.[585] As noted in the Explanatory Memorandum, which refers to the Council of State's advice on the Vos Amendments to recall its endorsement of the PPP, the costs of reducing environmental damages should lie with the polluter.[586] The Explanatory Memorandum stated: "[t]*he power plants are causing damage to the environment, so it is in principle justified that they bear the loss they may incur as a result of the measures to limit the damage*".[587]

463. The Explanatory Memorandum also noted that, in any event, the cost of environmental damage mitigation has not been, in fact, placed solely with the polluter.[588] As explained above, as of 2027, the Netherlands will have provided energy operators with more than EUR

583 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 9-13 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

584 This principle is laid down in for example Principle 16 of the Rio Declaration (see Section 2.1) and in Article 19 ECT (see Sub-section 14.3.3).

585 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

586 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

587 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

588 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

3.6 billion in biomass subsidies, a part of which will have been used for the conversion of coal plants to alternative energy sources.[589]

7.3.5 The Coal Act provides for a hardship clause

464. Considering *inter alia* the longstanding knowledge of coal plant operators that curbing CO2 emissions would be required and the ample transitional period for adjustment of coal plants to alternative fuels (as well as the declining outlook on coal),[590] granting energy operators financial support through the transition was not deemed justified by the legislator in order to achieve fair balance.[591]

465. However, Article 4 of the Coal Act provides that if, years after its enactment, and contrary to what is expected, the Coal Act imposes an "*individual, excessive burden for one of the owners of the coal-fired power plants, as a result of which there would be no longer a "fair balance"*"[592] the Minister of Economic Affairs and Climate has the power to award compensation to the affected party. This additional safeguard accounts *inter alia* for the individual circumstances of the plants.

589 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

590 **Exhibit R-0161-EN**, Memorandum of Reply regarding Act prohibition coal for electricity production, Parliamentary papers I 2019-2020, 35 167, 17 October 2019, p. 13 (**Exhibit R-0161-NL**, Memorandum of Reply regarding Act prohibition coal for electricity production (Parliamentary papers I 2019-2020, 35 167, no. B), 17 October 2019).

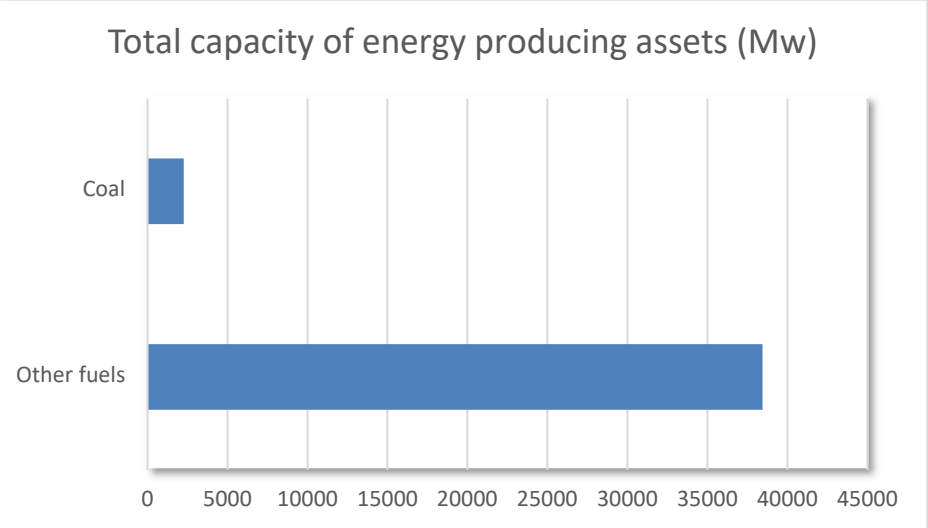
591 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 13 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

592 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 22 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

PART E: RWE'S EVOLUTION INTO A COAL-FREE ENERGY PRODUCER (2017-2030)

8 PRIOR TO THE COAL ACT, RWE HAD DECIDED TO PHASE OUT COAL

466. RWE AG is a company with a market capitalisation of approximately EUR 23.4 billion (year-end 2020). RWE AG generates energy with various fuels, in addition to coal and biomass such as wind (on land and sea) sun, gas, water, oil and nuclear energy. The total generation capacity of RWE AG at the end of 2020 was 40,702 MW with assets in Germany, France, Spain, Portugal, Luxembourg, the United States, the United Kingdom, Turkey and the Netherlands. Of the total generation capacity, 2,257 MW was generated by means of coal (visualised in the graph below).[593]



467. Prior to the adoption of the Coal Act, in autumn 2019, RWE had announced that as part of its global strategy it would become a carbon neutral company and phase out coal for electricity generation. RWE stated that it did this to further global climate goals, including the Paris Agreement (**Section 8.1**).

468. One of the first actions RWE took was participating in an auction launched by the German government to phase out coal plants. RWE

593 **Exhibit R-0162**, RWE generation asset list, 31 December 2020, pp. 16 and 18.

successfully submitted a bid to remove from the grid – as of 2021 – Eemshaven's twin plant Hamm, as well as the Ibbenbüren coal plant, and receive in exchange for what RWE considered to be "*fair compensation for loss of future value*"[594] in the amount of EUR 216 million (**Section 8.2**).

8.1 Before the Coal Act was enacted, RWE set in motion its transformation into a carbon-neutral and coal-free energy producer

469. RWE's plans to phase out coal pre-date the Coal Act and appear driven by a need to operate in a market where energy companies are required to take responsibility for their own emissions.

470. On 30 September 2019, at a dedicated press conference in Essen, Germany, RWE announced the beginning of a "*new era*"[595] for the conglomerate. Following a reorganisation process for which plans had started to be made in early 2018,[596] the "*new RWE*"[597] was ready to become a driver of the energy transition, responding to the needs of a changing society:[598]

> "***society is changing and of course companies have to change as well****. This is a path and we have embarked at this path.* ***We want to be drivers in the energy transitions*** *and that's why we are reorganizing ourselves.*"

471. In particular, [redacted] RWE AG, announced an "*ambitious CO2 reduction plan*" as well as a company-wide

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594 **Exhibit R-0163**, RWE Press Release: 'Compensation allocated at hard coal phase-out auction, RWE closes power stations in Hamm and Ibbenbüren', 01 December 2020.

595 See **Exhibit R-0164**, Video Recording RWE Press Conference (excerpts), 30 September 2019; **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 1.

596 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 5.

597 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 1. See also **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019.

598 See **Exhibit R-0164**, Video Recording RWE Press Conference (excerpts), 30 September 2019, at 1'55". Cf. also **Exhibit** [redacted]: "*Tomorrow's energy world needs* ***driving forces. This is a role we gladly accept****. We want to* ***advance the energy transition***."

"*responsible **phasing out of fossil fuels***".[599] RWE's [redacted] emphasised that RWE would become a "*carbon neutral company by 2040*" and launched a new company purpose:[600]

> "***we will become a carbon neutral company by 2040**. We will be one of the world largest providers of renewable energy and we will supply clean, reliable electricity. We will generate the electricity digital society needs, enabling sustainable life although power consumption is high. **This ambition is clearly stated in our new purpose**, the purpose of the company. We've defined for the new RWE as being as follows: **our energy for a sustainable life**."*

472. As [redacted] put it, driven by today's societal demands the age of renewables had begun:

> "***we have been building this new RWE for 1,5 years now*** […] *we want to advance the energy transition.* […] *Lignite and nuclear energy have laid our foundations* […]*. But **every form of energy has its time, now is the beginning of the renewables era**. We will implement the phase out of conventional energy sources responsibly.* […]
>
> *Ladies and Gentlemen, **carbon neutral power production as quickly as possible: this is the society great wish**. We, at the new RWE, are rolling up our sleeves and getting to work to make this happen.*" [601]

473. [redacted] explained that innovation in technology made it difficult to predict what the future of electricity supply would look like, but that RWE would be carbon neutral by 2040:[602]

> "*who could have predicted today's reality 20 years ago. Likewise, **no one knows what 2040 will look like**. Digitalization and innovative technologies opened the door to wonderful opportunities for development above all in power supply […] However **be it with green gas, high performance batteries or something entirely new**, only one thing counts at the end of the day: **RWE will be a carbon neutral company***

599 **Exhibit** [redacted]

600 **Exhibit** [redacted]

601 **Exhibit** [redacted]

602 **Exhibit** [redacted]

> *by 2040. This mission goes far beyond what is required by both national and international climate goals.*"

474. As part of the process towards this goal, RWE intended to lower its CO2 emissions by 70% in 2030 as compared to 2012.[603] With specific reference to the Netherlands, RWE recalled the Dutch Government's intention to phase out coal-based electricity generation by 2030 and confirmed that RWE's Dutch plants were being converted to biomass:[604]

> "***RWE is in the process of converting the plants in Eemshaven*** *and Amer* ***to fire biomass****.* ***The objective is to*** *transform electricity generation from fossil fuel in order to* ***achieve carbon neutral production****.*"

475. In subsequent public statements and communications to investors, RWE further expanded on its plans and repurposing.

476. In November 2019, RWE reiterated its earlier declarations in an ESG presentation to its investors,[605] and highlighted that it would contribute to the achievement of global climate goals and European and national greenhouse reduction targets.[606]

477. In the presentation, RWE stated that it "***fully support*****[ed]** ***global climate goals***"[607] and emphasised its "*strong commit*[ment] *to the UN Sustainable Development Goals*", as expressed in the United Nations' 2030 Agenda for Sustainable Development, including Goal 13 on fighting climate change.[608] Goal 13 ("*Take urgent action to combat*

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603 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 3.

604 **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019. See also **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 3. See also Chapter 9.

605 Including the goal to reach by 2030 a CO2 emission reduction 70% as compared to its 2012 levels and to reach "*net zero*" by 2040: see **Exhibit R-0165**, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, slides 5 and 14.

606 **Exhibit R-0165**, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, slide 13.

607 **Exhibit R-0165**, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, slide 8.

608 **Exhibit R-0165**, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, slide 12.
Exhibit R-0165, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, slide 12. See also **Exhibit R-0166**, UN General Assembly, Resolution

climate change and its impacts")[609] seeks among other things to implement the UNFCCC commitments, including the Paris Agreement.[610]

478. In a Capital Markets presentation dated March 2020, RWE informed investors that it was "*fully supportive of the Paris Climate Agreement*"[611] and raised its 2030 emission reduction target from 70% to 75%.[612] In late 2020, RWE also announced that its targets had been independently certified by two third parties, the Transition Pathway Initiative (an initiative led by asset owners aimed at assessing companies' preparedness to transition to a low carbon economy)[613] and the Science Based Targets initiative (a collaboration between international agencies and non-profit organisations established to help companies to set emission reduction targets in line with climate science).[614] In RWE's view, these third parties provided "*scientific confirmation that RWE's strategy is in line with the goals of the Paris Climate Agreement*."[615]

479. As RWE explained, in order to achieve these climate targets, "*the phase out of electricity generation from coal will play a central role*".[616] The March 2020 Capital Markets presentation describes RWE's "*responsible phase out of coal*", where RWE's coal generation fleet in

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A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015.

609 See e.g., **Exhibit R-0166**, UN General Assembly, Resolution A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, Goal 13.

610 See, in particular, **Exhibit R-0166**, UN General Assembly, Resolution A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, Target 13.4; **Exhibit R-0167**, SDG 13 - Climate action - Statistics Explained, 'Take urgent Action to Combat Climate Change and Its Impacts' dated April 2022.

611 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020, p. 14.

612 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020, p. 14.

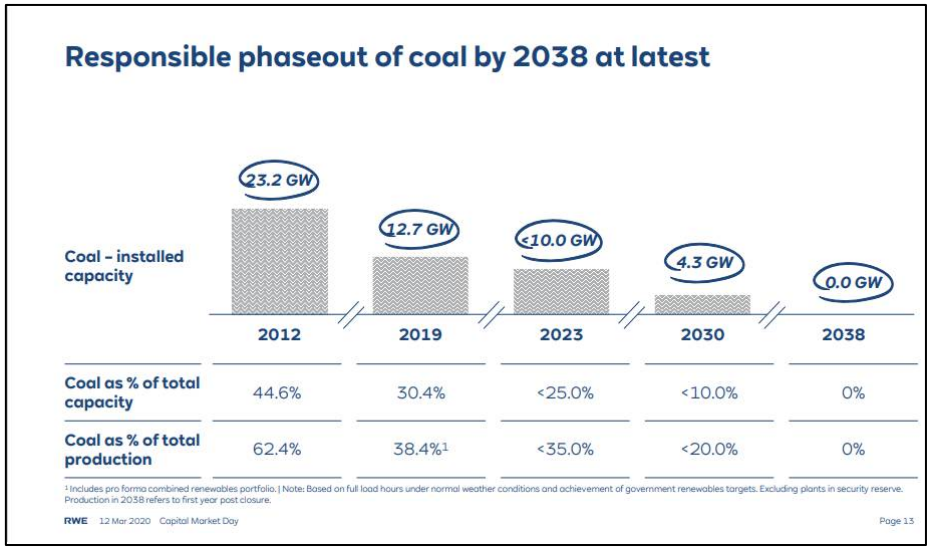
613 See **Exhibit R-0168**, Transition Pathway Initiative (https://www.transitionpathwayinitiative.org) accessed 2 September 2022.

614 See **Exhibit R-0169**, Science Based Targets, 'Ambitious corporate climate action' (https://sciencebasedtargets.org/) accessed 1 September 2022.

615 See **Exhibit R-0170**, RWE, 'Responsibility and sustainability (https://www.rwe.com/en/responsibility-and-sustainability) accessed 29 August 2022; see also **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021.

616 This was the response given to a questionnaire on RWE's climate impact over the year 2020 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021. A further element of its strategy is the "*the use of carbon-neutral fuel to produce electricity*", such as biomass. In doing so, RWE submits it is "*acting in line with the Paris climate goals*".

Europe had started to be removed from the grid as from 2012 and would be entirely decommissioned by 2030 (except for 4.3 GW of German lignine, which would be phased out in 2038):[617]



480. RWE also publicly clarified that it intended to abandon coal irrespective of whether coal phase-out legislation had been passed in countries where it operated. RWE's [redacted], made this explicit during an interview, where he also confirmed that RWE acknowledged that phasing out coal was part of RWE's broader assumption of responsibility for tackling climate change:[618]

> "[o]*f course,* ***we are responsible for*** *climate and* ***fighting global climate change****, and* ***this is why we contribute to energy transition*** [...] ***we are stepping out of coal-based power generation*** [...] *The future belongs to renewable energies* […] *we will be a big operator of wind farms, photovoltaics, biomass, of storage facilities…* […]"
>
> *Q:* "***Will you*** *still* ***operate coal-fired power plants*** *in other parts of Europe* ***where they have not been phased out****?*"
>
> *RWE:* "***Definitely not.***"

617 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020, p. 13.

618 See **Exhibit** [redacted]

481. Together with the changed societal needs that RWE already acknowledged in its September 2019 press conference,[619] among other places, and its responsibility to fight climate change,[620] financial concerns appeared to be the driving factors of RWE's decision to abandon coal-based electricity generation. RWE's 2018 Annual Report indicated that the Supervisory Board had received from the Executive Board a report "*on the increasingly critical views that banks and insurance companies have of coal*".[621] As made clear in its March 2020 Capital Markets presentation, the "*coal exit*" allowed for the "*de-risking*" of the company as well as an "*improved credit profile*".[622]

482. Similarly, when asked to describe "*where and how climate-related risks and opportunities have influenced* [its] *financial planning*",[623] RWE explained that its investment in renewables as well as its coal phase-out were driven by climate change and the related need to steeply decarbonise the power sector within a decade:[624]

> "***Climate change required steep decarbonization of the power sector over the next decade. RWE is committed to the Paris Agreement's Climate targets*** *and has reduced its direct power plant emissions by over 60% from 2012. RWE aims to become carbon neutral by 2040.* ***To this end, we will invest billions in wind energy, photovoltaics and storage technologies, enter the green hydrogen production business, and phase out electricity generation from coal.***"

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619 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019.

620 See **Exhibit R-0041**, Transcript RWE declarations at ABC 'Climate in the Courtroom Part 2: A fossil fuel company is sued. Now it speaks', 12 July 2020.

621 **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 10.

622 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020 , p. 7, 39.

623 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021, p. 14. See also in similar terms the answer to "*Describe where and how climate-related risks and opportunities have influenced your strategy*." p. 14.

624 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021, p. 14. More recently, in September 2021, RWE was put under pressure by investors to accelerate its announced coal phase-out plans for financial reasons. As reported by Bloomberg, investors believed that RWE could double in value by phasing out coal earlier and selling the sold emissions rights that it amassed in the past at lower costs. See **Exhibit R-0172**, Bloomberg, 'Activist Investor Urges Germany's RWE To Exit Coal Quicker' (Energy Connects, 2021) (https://www.energyconnects.com/news/utilities/2021/september-1/activist-investor-urges-germany-s-rwe-to-exit-coal-quicker/) accessed 29 August 2022, 09 September 2021.

8.2 In Germany, RWE received EUR 216 million to remove Block E at Hamm and Ibbenbüren from the grid in as early as 2021

483. After its formal repositioning as spearheading energy transition, RWE started to make good on its promises and began phasing out its coal generation fleet.

484. In the course of 2020, RWE participated in the first auction launched by the German government to decommission hard coal-fired power plants.[625]

485. In particular, RWE successfully submitted a bid to remove Block E at Hamm power plant (also known as Westfalen) from the grid; that is, Eemshaven's twin plant.[626]

486. As discussed in Sub-section 4.3.3 above, Hamm's design was virtually identical to Eemshaven's. Like Eemshaven, Hamm was initially intended to consist of two identical units. However, due to delays and adverse market conditions, RWE had decided to abandon construction of one of the two units (Block D), leaving Block E as the only operating unit. Hamm's Block E (an 800-megawatt unit) went online in July 2014 and had been feeding electricity into the German grid ever since.

487. Together with Hamm's Block E, RWE agreed to decommission its 800-megawatt Ibbenbüren power plant, a coal plant which had been producing electricity since 1985.[627]

488. On 1 December 2020, RWE announced that it would receive a total of EUR 216 million for both plants to stop electricity production as of 1 January 2021 (meaning the plants could not continue to operate until 2030 as in the Netherlands).[628]

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625 **Exhibit R-0163**, RWE Press Release: 'Compensation allocated at hard coal phase-out auction, RWE closes power stations in Hamm and Ibbenbüren', 01 December 2020.

626 See Sub-section 4.3.3.

627 See **Exhibit R-0173**, Global Energy Monitor, 'Ibbenbüren-B power station', 14 January 2022.

628 **Exhibit R-0163**, RWE Press Release: 'Compensation allocated at hard coal phase-out auction, RWE closes power stations in Hamm and Ibbenbüren', 01 December 2020.

489. In a press release on the same day, [redacted] RWE Generation, recalled that the closure of the two plants fit within RWE's carbon neutrality plans:[629]

> *"This underlines our CO_2 reduction strategy. RWE will be carbon-neutral by 2040. The closure of the plants in Ibbenbüren and Hamm is a further step in this direction.*"

490. [redacted] also made clear that in RWE's view, the EUR 216 million received in compensation represented "*adequate compensation for loss of the future value of our power plants*":[630]

> "*We submitted bids for both Westfalen and Ibbenbüren which represent an **adequate compensation for the loss of the future value of our power plants**.*"

491. In summary, whilst progressing on its carbon neutrality journey, RWE considered that receiving EUR 216 million to close down two power plants totalling 1600 megawatts as of 2021 (without any transitional period) amounted to adequate compensation for future value loss.

9 RWE CONTINUED TO PURSUE ITS PLANS TO CONVERT EEMSHAVEN TO FULL ALTERNATIVE USE AFTER THE 2017 COALITION AGREEMENT

492. Before the introduction of the Coal Act, RWE had already stressed that it planned to fully convert Eemshaven to a biomass plant. It continued

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629 **Exhibit** [redacted]

630 **Exhibit** [redacted] RWE made this point again clear when it started these arbitral proceedings. On 11 February 2021, RWE announced that it had filed a request for arbitration against the Netherlands. After recognizing that "*RWE is consistently phasing out coal*" and that the Coal Act would only preclude coal-fired electricity generation from 2030, [redacted] explained that "*no compensation is provided for the resulting disruption*" (see **Exhibit** [redacted]). At the same time, RWE's announcement approvingly refers to the compensation offered in Germany: "[redacted]*: "During the legislative process, we have offered a number of times to work together to find a solution which is suitable for both the Dutch government and our company. Should the Dutch government make appropriate proposals, we will continue to be willing to do so." **In other countries, such as Germany, parliament has granted compensation to the affected companies**, based on the recommendations of an independent commission*." (**Exhibit** [redacted]

to do so after the adoption of the Coal Act and has taken steps to that effect (**Section 9.1**). Other alternative uses for former coal plants have also been considered by operators in the western market (**Section 9.2**).

9.1 RWE intends to fully convert Eemshaven to a 100% biomass plant and continues taking steps to that end

493. RWE always intended to fire biomass at Eemshaven. In its initial permit application of 20 December 2006, where it asked the Province of Groningen for permission to build and operate Eemshaven, RWE made clear that the plant would initially be prepared to co-fire biomass.[631] It also presented this as one of the main advantages of the project.[632] The Province of Groningen granted an environmental permit for Eemshaven on 11 December 2007.[633] This permit allowed for the co-firing of 15% biomass (on an output basis) at Eemshaven.[634]

494. When Eemshaven started operations in 2015, it fired only coal.[635] In the same year, the SDE+ Subsidy for biomass co-firing became available.[636] Shortly after, in 2016, RWE applied for a subsidy under this subsidy scheme to convert part of the plant to co-fire biomass. According to the subsidy request, the conversion would entail retrofitting two out of eight coal mills and would result in a co-firing capacity of 256 MW (of a total net capacity of Eemshaven of 1,560 MW).[637]

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631 **Exhibit R-0047-EN**, Request for environmental permit, 20 December 2006, p. 9 (**Exhibit R-0047-NL**, Request for environmental permit, 20 December 2006).

632 **Exhibit R-0047-EN**, Request for environmental permit, 20 December 2006, p. 12 (**Exhibit R-0047-NL**, Request for environmental permit, 20 December 2006).

633 **Exhibit R-0036-EN**, Environmental permit, 11 December 2007 (**Exhibit R-0036-NL**, Environmental permit, 11 December 2007).

634 In an exchange between RWE and the Province of Groningen in 2016, it was confirmed that the permit allowed RWE to co-fire 15% biomass: **Exhibit R-0174-EN**, RWE's letter to Province of Groningen, 11 June 2016 (**Exhibit R-0174-NL**, RWE's letter to Province of Groningen, 11 June 2016); **Exhibit R-0175-EN**, Email from Province of Groningen to RWE, 09 September 2016 (**Exhibit R-0175-NL**, Email from Province of Groningen to RWE, 09 September 2016).

635 **Exhibit R-0176-EN**, Evaluation of Environmental Impact Assessment 2006, 05 June 2018, pp. 1, 5 and 7 (**Exhibit R-0176-NL**, Evaluation of Environmental Impact Assessment 2006, 05 June 2018).

636 See Sub-section 3.2.2.

637 In para. 62 of its Memorial, RWE implies that only one coal mill was retrofitted, but the subsidy request documentation indicates that two coal mills were retrofitted:

495. The subsidy was granted on this basis on 30 November 2016. RWE has been granted up to EUR 930,222,223, to be paid out over the course of eight years from the moment that Eemshaven started co-firing biomass.[638] Eemshaven eventually started co-firing biomass in the fall of 2019, once the subsidised conversion had been completed.[639]

496. In July 2017, RWE announced that it was planning to convert Eemshaven to fire 100% biomass and started the process to obtain a permit to expand Eemshaven's biomass co-firing capacity to 30%.[640] Since the 2017 Coalition Agreement, RWE has continued to seek to convert Eemshaven to a 100% biomass plant and has repeatedly and publicly declared that it intends to do so, as described in this Section 9.1. It continues to do so to date.

497. In an article dated [redacted] 2017 titled "[redacted]", [redacted], then [redacted], declared that it was "*our ambition to eventually make the Eemshaven plant 100% CO2 neutral*". For that purpose, RWE was planning to extract more value from biomass.[641]

498. On 5 July 2017, before completion of the initial conversion, RWE submitted a notice to the Province of Groningen, announcing its aim

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Exhibit R-0177-EN, Project description as attached to subsidy request, 03 October 2016": *The project provides for the conversion of two coal mills: the conversion of one of the four coal mills in block A of Eemshaven (as was the case for the SDE application in the spring of 2016) and, in addition, a second coal mill in block A or a first coal mill in block B. The conversion of two coal mills results in a co-firing capacity of approximately [redacted] tonnes/hour or approximately 256 MWe at Eemshaven*" (**Exhibit R-0177-NL**, Project description as attached to subsidy request, 03 October 2016). This document refers to a total capacity of 1600 MW, but the actual capacity of Eemshaven is 1,560 MW, according to RWE: Memorial, para. 7.

638 **Exhibit BR-12**, National Enterprise Agency of The Netherlands, Eemshaven: Decision to Grant a Subsidy, dated 30 November 2016.

639 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. S.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019); **Exhibit R-0178-EN**, Het Financieele Dagblad, 'RWE starts co-firing biomass in Eemshaven power plant', 19 September 2019 (**Exhibit R-0178-NL**, Het Financieele Dagblad, 'RWE starts co-firing biomass in Eemshaven power plant', 19 September 2019).

640 **Exhibit R-0179-NL**, RWE, Starting Memorandum, 05 July 2017, p. 5 (**Exhibit R-0179-NL**, RWE, Starting Memorandum, 05 July 2017).

641 **Exhibit** [redacted].

to start co-firing 30% biomass at Eemshaven (twice as much as initially permitted) and to start using other types of biomass.[642] It formally requested the permit on 8 November 2018.[643]

499. In January 2018, shortly after the 2017 Coalition Agreement, [redacted] – who by then had been promoted to [redacted] – declared to the press that RWE intended to convert its Dutch coal plants to biomass plants:[644]

> "***Before 2030 we want to burn them on biomass for 100 per cent***. *By capturing the CO2 and reusing it for materials and in industry, we can save four times as many greenhouse gases in the long run as by closing the power plants."*

500. In the same article, [redacted] explained that if a coal phase-out were enacted, it would not cause the end of operations in Eemshaven. According to [redacted], "[t]*he coal has to go, not the power plants. They are there now, so it's better to recycle them*".[645]

501. Shortly after, still in January 2018, the specialised outlet [redacted] published another article announcing RWE's intentions to convert its coal-fired Amer 9 plant entirely to biomass by 2030. The article also included declarations by RWE's [redacted], conveying RWE's intention to also convert Eemshaven to biomass, making the operations of Eemshaven fully CO2-neutral by 2025.[646]

502. In March 2018, RWE made statements in Energeia, a media outlet dedicated to the energy sector, that a possible ban on coal did not have to lead to the closure of its coal-fired plants by 2030, including

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642 **Exhibit R-0179-NL**, RWE, Starting Memorandum, 05 July 2017, p. 5 (**Exhibit R-0179-NL**, RWE, Starting Memorandum, 05 July 2017); **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, pp. 1.3 and A.24 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

643 See Chapter 9 below.

644 **Exhibit** [redacted]

645 **Exhibit** [redacted]

646 **Exhibit** [redacted]

Eemshaven, because by 2030 these would no longer be relying on coal.[647] The article also included additional statements by [redacted], who emphasised the role biomass would play in the energy mix after 2030, once coal was phased out. With respect to RWE's other coal plant, he declared that "[t]*here is sufficient biomass available*" and that RWE was "*working on making the prices competitive if the SDE+ subsidy for biomass expires*".[648]

503. In October 2018, online magazine Agro & Chemie published an interview with [redacted], [redacted]. According to the article, RWE's "*goal is to run on 100% biomass by 2030. New storage silos have now been built for this purpose. The coal mills have also already been modified, which grind the fuel for the combustion chamber.*" The article quotes [redacted] saying that "[i]*t is proven technology, so just a matter of doing. Then we will be CO2 neutral in 2030.*"[649]

504. In apparent execution of these plans and as mentioned before, on 8 November 2018, RWE applied for a revision of the Environmental Permit to increase the share of biomass in the energy mix fired at Eemshaven. It intended to expand its biomass co-firing allowance from 15% to 30%.[650] At that time, it was publicly known that the subsidy cap of 25 petajoules had been reached and no further subsidies would be granted. It was therefore clear that RWE would not receive additional subsidies in connection with an increase of biomass co-firing. Regardless, RWE pursued the increase of its biomass co-firing allowance.

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647 **Exhibit** [redacted].

648 **Exhibit** [redacted] "*"If 70% or 80% of electricity comes from wind and sun, electricity becomes almost free." There are no additional costs for producing more electricity. To provide security, however, the energy system will have to make room for, for example, biomass plants*" [redacted]).

649 **Exhibit** [redacted].

650 **Exhibit R-0083-EN**, Environmental permit, 15 September 2021, p. 3 (**Exhibit R-0182-NL**, Revised environmental permit, 15 September 2021).

505. The environmental impact assessment of April 2019 (the "**Environmental Impact Assessment 2019**"), prepared at the request of RWE for this permit application, again confirmed that RWE intended to co-fire biomass at Eemshaven from the outset,[651] but also confirms the aim of full transition to biomass later on. The Environmental Impact Assessment 2019 stated that the "*ultimate goal of RWE for the Plant is to be able to produce fully CO_2 neutrally (= 100% biomass) in 2030*"[652] and that this permit was the next step in that direction:[653]

> "*It has been RWE's ambition for a long time to increase the share of biomass co-firing at the power plant. RWE has expressed this ambition officially on several occasions, for example when applying for the permit to construct the power plant. Currently, the power plant is being prepared for co-firing 15% output-based biomass (approximately 800 kton) in the course of 2019.* ***The*** **[environmental impact assessment]** ***describes the next step to further increase biomass (to 30% on an output basis biomass; approximately 1600 kton) towards the ultimate goal of 100% production on biomass***."

506. "*In anticipation of the situation that the Plant can possibly run on 100% biomass*", RWE was applying for a permit to double the amount of biomass used at Eemshaven, according to the Environmental Impact Assessment 2019.[654] RWE's motivation to do so was based on national and international climate goals, including the Paris Agreement.[655]

507. In a similar vein, in September 2019, [redacted] declared to the press that while existing permits only allowed co-firing of biomass up to 15%, RWE's goal was to reach "*100% biomass*" conversion.[656]

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651 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. 1.2 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

652 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. 1.2 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

653 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. S.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

654 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. S.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

655 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, pp. S.3-S.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

656 **Exhibit** [redacted]

508. In a November 2019 presentation, RWE informed its investors that it was planning to reduce its CO2 emissions by, among other ways, completing the "[b]*iomass conversion and coal exit in the Netherlands* […] *by 2030*".[657]

509. After the enactment of the Coal Act on 11 December 2019, RWE persisted in its plans to convert Eemshaven to a 100% biomass-firing plant, and its external communication regarding those plans continued. RWE's 2019 Annual Report, for example, reiterated this same message. In the words of [redacted], RWE "*can continue operating our Amer 9 and Eemshaven hard coal-fired power plants in the Netherlands after the established end dates for coal if we fully convert them to biomass.*"[658]

510. In response to the question why RWE's newly defined core business excludes coal and nuclear energy he stated:[659]

> "*We simply asked ourselves what parts of our business will have a role to play in the energy world of tomorrow and should therefore become a fixture in our portfolio. Renewables definitely fit the bill. Gas-fired power stations will also be needed in the foreseeable future to meet demand during periods of insufficient electricity generation from wind and solar farms. Of course, the same applies to pumped storage. In addition, we can continue operating our Amer 9 and Eemshaven hard coal-fired power plants in the Netherlands after the established end dates for coal if we fully convert them to biomass. And, our trading subsidiary RWE Supply & Trading, which is the Group's commercial hub, is indispensable in terms of optimising our generation portfolio. All of these activities form our core business. Our German hard coal, lignite and nuclear power stations are not part of our core business, because clear exit paths have been defined for them. And we will not build any new coal-fired power plants, not even in countries where they would be widely accepted by the public.*"

511. In March 2020, [redacted] again declared that RWE's intention was to convert Eemshaven into a biomass plant and that "*we need to rely on*" RWE's biomass projects at Eemshaven and its other Dutch coal-fired

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657 **Exhibit R-0165**, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, p. 14.

658 **Exhibit** [redacted]

659 **Exhibit** [redacted]

plant, as these projects make major contributions to CO2 emission reductions in the Netherlands. He added that with regard to biomass, this is waste that can hardly be used for anything else. And that there are now plans to capture CO2 from the power station.[660]

512. Later, in its response to a questionnaire on climate impact over the year 2020, RWE again declared that "[i]*n the Netherlands in particular*" its subsidiary RWE Generation *"is focusing on biomass by converting two hard-coal power plant* [i.e., Amer and Eemshaven] *to this carbon-neutral energy source*".[661]

513. In July 2021, RWE confirmed again in a press release that "*RWE is consistently phasing out coal: In the UK and Germany, there are no longer any hard coal-fired power plants in operation, and in the Netherlands the conversion of two plants to biomass is progressing*".[662]

514. In [redacted] 2021, Dutch newspaper [redacted] published an interview with Mr [redacted] of RWE Generation. The article states that "*according to* [redacted] *of energy giant RWE, we will have to use biomass*" and confirmed once again that "*RWE wants to keep open its two Dutch coal-fired plants that are scheduled for closure, and run them entirely on biomass by 2030*".[663]

515. Shortly after, on 15 September 2021, the permit to increase co-firing of biomass to 30% was granted. While RWE benefitted from subsidies for the initial conversion that allowed for the co-firing of up to 15% biomass,[664] it did not receive additional subsidies in connection with the increase of the allowance for biomass co-firing up to 30%.

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660 **Exhibit** [redacted].

661 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021, p. 1.

662 **Exhibit R-0184**, RWE Press Release: 'The end of an era: RWE hard-coal power stations in Hamm and Ibbenbüren to be completely decommissioned', 08 July 2021.

663 **Exhibit** [redacted]. For the sake of completeness, it is noted that the article also suggests a combination of biomass and CCS, although [redacted] appears to suggest that RWE is only willing to realise such combination with financial support from the Dutch government. See also, in a similar vein, [redacted]

664 See e.g., **Exhibit C-0002**, RWE Annual Report 2019, p. 44.

Currently RWE already co-fires 20% biomass in its Eemshaven plant.[665]

516. On 8 August 2022, [redacted] again told the media that RWE "*still wants to make the coal- and biomass-fired Eemshaven plant sustainable by replacing coal with biomass and to capture the CO2*"[666] emitted from burning biomass.

517. RWE's website confirms that RWE is phasing out the use of hard coal and that the Eemshaven plant and the Amer plant are being converted to fire only biomass.[667]

518. In short, RWE's plans are clear: RWE intends to further adapt Eemshaven to full biomass use by 2030, as it was already planning to do before the enactment of the Coal Act.

9.2 Coal plants across the world are also being converted to uses other than biomass-fuelled energy generation

519. As made clear in the Explanatory Memorandum to the Coal Act (see Sub-section 7.3.2), operators can choose how they want to continue operating their power plant as long as they do not use coal after 2030.[668] As discussed in Section 9.1, RWE appears to have decided to convert Eemshaven to full biomass use. Other, foreign coal plant

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665 **Exhibit R-0185-EN**, Province of Groningen, 'German RWE invests billions in Eemshaven location, 'the energy and hydrogen hub of Northwestern Europe', 09 August 2022 (**Exhibit R-0185-NL**, Province of Groningen, 'German RWE invests billions in Eemshaven location, 'the energy and hydrogen hub of Northwestern Europe', 09 August 2022).

666 **Exhibit** [redacted]

667 **Exhibit R-0187**, RWE, 'The era of hard coal at RWE is drawing to a close' (https://www.rwe.com/en/our-energy/discover-conventional-energy-sources/hard-coal) accessed 5 September 2022: "*The era of hard coal at RWE is drawing to a close.* […] *The last two plants in the Netherlands are being converted to biomass. RWE no longer operates hard coal fired power plants in the UK and Germany. The remaining two plants in the Netherlands are being converted to biomass.*"

668 See Chapter 7. **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 11 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

operators have considered converting their coal plants to other alternative uses, or have already done so.

520. Technological developments in the energy sector, including renewable energy, have been moving at rapid pace, making reliance on alternative sources increasingly viable.

521. First, as noted by Brattle, the successful conversion of coal-to-gas has already taken place and has proven to be "*economic*".[669]

522. Second, several coal plant operators are considering or in the process of converting such plants to hydrogen or to a combination of gas and hydrogen. Utah-based Intermountain Power Agency, for example, is currently converting a 1,800 MW coal-fired power plant to a 840 MW hybrid-natural gas and 30% green hydrogen plant. The converted plant will start operations in 2025. Eventually, the plant will operate on 100% green hydrogen.[670] The storage of natural gas and hydrogen will take place in underground salt caverns.[671]

523. Similarly, the German energy group Uniper SE will reportedly convert its 762 MW coal-fired Gelsenkirchen-Scholven power plant into a plant running temporarily on natural gas and eventually fully on hydrogen.[672] Similar conversions of coal-fired plants to hydrogen-fired plants are

669 **Exhibit CER-0002**, Brattle Expert Report, para. 250.

670 **Exhibit R-0188**, GH Coalition, 'Conversion of Intermountain Power Project to Green Hydrogen', 21 July 2022; **Exhibit R-0189**, Jon Reed, 'A Green Transformation at Delta's Power Plant Looks Promising for the Climate, But Uncertain for the Community', KUER, 10 November 2021; **Exhibit R-0190**, Lincoln Bleveans, 'You Say Old Coal Plant, I Say New Green Hydrogen Facility', Greenbiz, 24 November 2020; **Exhibit R-0191**, Utility Dive, LADWP, 'Natural gas plant replacing Los Angeles coal power to be 100% hydrogen by 2045', 12 December 2019.

671 **Exhibit R-0189**, Jon Reed, 'A Green Transformation at Delta's Power Plant Looks Promising for the Climate, But Uncertain for the Community', KUER, 10 November 2021

672 **Exhibit R-0192**, Anna Ivanova, 'Uniper Coal Power Plant to Become Hydrogen Centre', Renewables Now, 23 February 2022.

being carried out at various locations across the world, including Portugal,[673] Bulgaria[674] and Australia.[675]

524. Third, besides converting to alternative fuels, coal plant operators are also looking at other uses for coal-fired power plants in the Western-European market. For example, several operators in Germany are investigating the possibility of converting their coal plants to electrolysers. Plans are being made to convert Vattenfall's originally coal-firing Moorburg plant, closed in 2021, to an electrolyser that could produce green hydrogen at a capacity of up to 500 MW and could start operations in 2026.[676] Uniper was reported to be contemplating a conversion of its Wilhelmshaven coal plant into a 410 MW electrolysis plant.[677]

525. In summary, coal plant operators in various parts of the world are converting or considering to convert coal plants to uses other than biomass-fuelled energy generation, such as producing energy from gas or hydrogen (or a combination of gas and hydrogen) and the production of green hydrogen.

9.3 RWE continues investing in the Netherlands

526. RWE continues to invest in the Netherlands on large scale. It does so despite the fact RWE claims that the Netherlands has breached the ECT by (in)directly expropriating Eemshaven and not treating RWE's investment fairly and equitably.

527. After 10 October 2017, the reference date used by RWE, several major investments were made by RWE in the Netherlands in projects

673 **Exhibit R-0193**, Reuters, 'EDP to Transform Sines Coal Plant into Hydrogen Hub by 2025', 14 October 2021.

674 **Exhibit R-0194**, Vladimir Spasić, 'Two Bulgaria's Coal Power Plants to be Converted to Natural Gas, Hydrogen', Balkan Green Energy News, 04 June 2021.

675 **Exhibit R-0195**, Fortescue Metals Group, 'Fortescue Future Industries and AGL Energy Aim to Repurpose Coal-fired Power Plant Sites to Generate Green Hydrogen', 08 December 2021. See also: **Exhibit R-0196**, H2 Fuel, 'Conversion of Coal and Gas Power Plants into Hydrogen Power Plants' (https://h2-fuel.nl/portfolio-item/conversion-of-coal-and-gas-power-plants-into-hydrogen-power-plants/?lang=en) accessed 21 July 2022.

676 **Exhibit R-0197**, Kerstine Appunn, 'Former Coal Plant Site in Hamburg Could Produce Green Hydrogen by 2026', Clean Energy Wire, 23 March 2022.

677 **Exhibit R-0198**, Energy Live News, 'Uniper Unveils Plans to Convert Coal-fired Plant into Hydrogen Hub', 16 April 2021.

for solar parks, wind parks and hydrogen. Also currently RWE is considering other major investments in renewable energy in the Netherlands.

528. As far as solar parks are concerned, RWE started using Solar Park Kerkrade, 14.8 MWp, in 2021[678] and Solar Park Amer, 8.9 MWp, was commissioned in 2018 and expanded in 2021.[679] Solar Park Kattenberg is still in development with an intended 6 MWp.[680]

529. In 2020 and 2021 RWE commissioned three wind parks; Wind Park Westereems (171 MW/54 turbines),[681] Wind Park Oostpolder (36 MW/8 turbines),[682] Wind Park Oostpolderdijk (7.5 MW/3 turbines).[683] Furthermore, four other wind parks are still in development: Karolinapolder (2 MW; replacement of old turbines),[684] Halsteren (6.8 MW; replacement and extension of turbines),[685] Eekerpolder (63 MW/15 turbines planned)[686] and Gelderse Waard (four turbines planned).[687]

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678 **Exhibit R-0199**, RWE, 'Solar Farm Kerkrade' (https://benelux.rwe.com/en/locations/solar-farm-kerkrade) accessed 29 August 2022.

679 **Exhibit R-0200**, RWE, 'Project Expansion Solar Farm Amer' (https://benelux.rwe.com/projecten/project-uitbreiding-zonnepark-amer) accessed 29 August 2022.

680 **Exhibit R-0201-EN**, RWE, 'Solar Park Kattenberg' (https://zonneparkkattenberg.nl/) accessed 29 August 2022 (**Exhibit R-0201-NL**, RWE, 'Solar Park Kattenberg' (https://zonneparkkattenberg.nl/) accessed 29 August 2022).

681 **Exhibit R-0202**, RWE, 'Westereems Wind Farm' (https://benelux.rwe.com/en/locations/westereems-onshore-wind-farm) accessed 29 August 2022.

682 **Exhibit R-0203**, RWE, 'Oostpolder' (https://benelux.rwe.com/en/projects/oostpolder) accessed 29 August 2022.

683 **Exhibit R-0204**, RWE, 'Oostpolderdijk' (https://benelux.rwe.com/en/projects/oostpolderdijk) accessed 29 August 2022.

684 **Exhibit R-0205-EN**, RWE, 'Wind Park Karolinapolder' (https://windparkkarolinapolder.nl/) accessed 29 August 2022 (**Exhibit R-0205-NL**, RWE, 'Wind Park Karolinapolder' (https://windparkkarolinapolder.nl/) accessed 29 August 2022).

685 **Exhibit R-0206**, RWE, 'Onshore Wind farm Halsteren' (https://benelux.rwe.com/en/locations/halsteren-onshore-wind-farm) accessed 29 August 2022.

686 **Exhibit R-0207**, RWE, 'Onshore Wind Farm Eekerpolder' (https://benelux.rwe.com/en/projects/eekerpolder) accessed 29 August 2022.

687 **Exhibit R-0208-EN**, RWE, 'Wind Park De Gelderse Waard' (https://windparkdegeldersewaard.nl/) accessed 29 August 2022 (**Exhibit R-0208-NL**, RWE, 'Windpark De Gelderse Waard' (https://windparkdegeldersewaard.nl/) accessed 29 August 2022).

530. RWE is also interested in investing in hydrogen-fuelled energy production in the Netherlands.[688] It has joined the Dutch hydrogen consortium NortH2, which aims to build wind energy generation plants for 10 GW green hydrogen production capacity by 2040.[689] For this purpose, as part of its Eemshydrogen project, RWE is developing an electrolyser at the premises of Eemshaven, which will produce green hydrogen from renewable power generated by an onshore wind farm.[690] RWE is also contemplating the construction of a plant elsewhere in the Netherlands, which would convert waste to hydrogen.[691]

531. In June 2022, to further develop the Eemshydrogen project, RWE agreed to purchase the Eemshaven-based Magnum plant, a 1.4 GW gas-firing plant which can be made fit to co-fire 30% hydrogen and which may be converted to solely fire hydrogen by 2030, from Vattenfall for an estimated EUR 500 million.[692] The Magnum plant has roughly the same age as the Eemshaven plant.

532. RWE has also made a bid to purchase a 600 MW offshore wind generation project to increase its electrolysis capacity.[693] It recently announced an investment in a Dutch company specialised in floating

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688 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021 : RWE declared that it is "*convinced that green hydrogen will be an important factor for the success of the energy transition*".

689 **Exhibit R-0209-EN**, Energeia, 'International energy giants join hydrogen consortium NortH2', 07 December 2020 (**Exhibit R-0209-NL**, Energeia, 'International energy giants join hydrogen consortium NortH2', 07 December 2020); **Exhibit R-0210**, NortH2, 'Kickstarting the green hydrogen economy' (https://www.north2.eu/en/) accessed 31 August 2022.

690 **Exhibit R-0211**, RWE, 'Eemshydrogen' (https://benelux.rwe.com/en/innovation-and-future/waterstof/eemshydrogen) accessed 29 August 2022.

691 **Exhibit R-0212**, RWE, 'FUREC Project to Use Waste Stream for Hydrogen Production' (<https://www.rwe.com/en/press/rwe-generation/2020-11-19-furec-project-to-use-waste-stream-for-hydrogen-production>) accessed 21 July 2022; **Exhibit R-0213-EN**, Het Financieele Dagblad, 'RWE wants to produce hydrogen from residual waste', 19 November 2020 (**Exhibit R-0213-NL**, Het Financieele Dagblad, 'RWE wants to produce hydrogen from residual waste', 19 November 2020).

692 **Exhibit R-0214**, Hydrogen Central, 'RWE Acquires 1,4-gigawatt Power Plant From Vattenfall And Develops Eemshaven Site Into A Leading Energy And Hydrogen Hub In Northwest Europe', 02 June 2022; **Exhibit R-0215-EN**, Energeia, 'RWE purchases Vattenfall's Magnum plant for €500 mln', 02 June 2022 (**Exhibit R-0215-NL**, Energeia, 'RWE purchases Vattenfall's Magnum plant for €500 mln', 02 June 2022).

693 **Exhibit R-0214**, Hydrogen Central, 'RWE Acquires 1,4-gigawatt Power Plant From Vattenfall And Develops Eemshaven Site Into A Leading Energy And Hydrogen Hub In Northwest Europe', 02 June 2022.

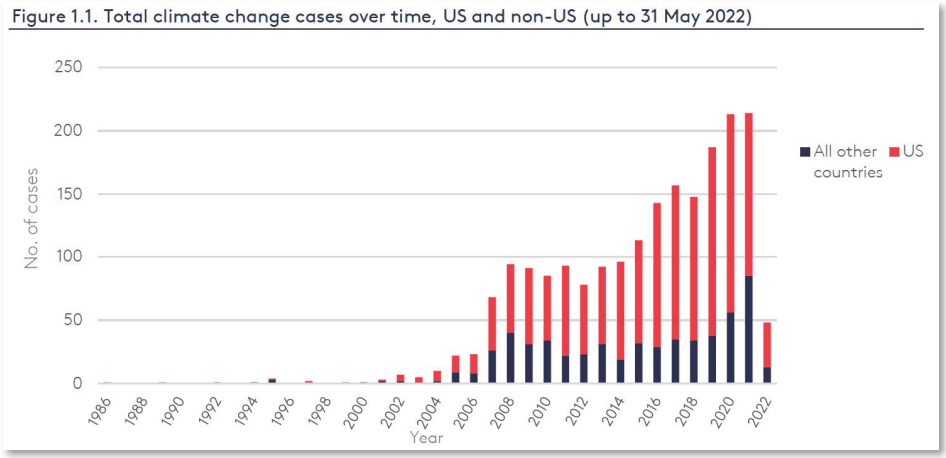
solar parks. The idea presented by RWE is to have floating solar parks in between the offshore wind turbines to generate more electricity.[694]

694 **Exhibit R-0216-EN**, Energeia, 'RWE invests in solar park in the North Sea', 19 July 2022 (**Exhibit R-0216-NL**, Energeia, 'RWE invests in solar park in the North Sea', 19 July 2022).

PART F: OTHER RECENT DEVELOPMENTS (2015-2022)

10 THE GROWING CLIMATE CRISIS HAS LED TO A SURGE IN CLIMATE CHANGE LITIGATION AGAINST CORPORATIONS

533. Social pressure is mounting on corporate entities to take the initiative in reducing greenhouse gas emissions. This is reflected in the fact that, over the past decades, climate change-related litigation has surged. A recent report published by the Grantham Research Institute on Climate Change and the Environment found that as of May 2022, over 2,000 climate change cases have been filed in 44 countries over the world.[695] They have been growing exponentially since the early 2000s, with the cumulative number of climate change cases having more than doubled since 2015.



(**Exhibit R-0217**, p. 9)

534. Climate change litigation consists of a broad range of legal proceedings and types of legal claims that relate in some way to climate change and its effects. While this type of litigation has

695 See for example, **Exhibit R-0217**, Joana Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2022 Snapshot, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 01 June 2022. On September 2, 2020, six Portuguese citizens filed a complaint with the European Court of Human Rights against 33 countries, including the Netherlands and other EU Member States. The complaint alleges that the respondents have violated human rights by failing to take sufficient action on climate change, and seeks an order requiring them to take more action.

traditionally been brought against governments,[696] the recent years have shown a steep rise in climate change related litigation within the private sector.[697] This involves cases that are brought directly against corporations that undertake activities which negatively contribute to the climate crisis.

535. This type of climate change litigation has been dominated by claims against companies with heavy CO2 emissions.[698]

536. RWE has also been on the receiving side of a climate change civil suit.[699] In 2015, Saúl Luciano Lluiya, a Peruvian farmer, brought a claim against RWE in Germany, seeking to hold RWE liable for its part in climate damage to glaciers in the city of Huaraz, Peru. The melting of glaciers in that region has led to accumulation of water in a nearby

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696 See for example the *Urgenda* case described in Sub-section 5.2.1 above.

697 Setzer and Higham explain that governments are most often the defendants in climate litigation, but cases against private parties are expanding: **Exhibit R-0217**, Joana Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2022 Snapshot, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 01 June 2022, p. 2: "*Most cases have been brought against governments (national and subnational), typically by companies, non-governmental organisations (NGOs) and individuals. In this year's study period, more than 70% of all cases were brought against governments* […] *Cases against the Carbon Majors and other companies involved in the extraction of fossil fuels or the provision of fossil energy have continued to proliferate, now more significantly outside of the US. Cases are also being filed against a more diverse range of corporate actors.*"

698 See for example **Exhibit RL-0050**, District Court The Hague, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie v. Shell*, official English translation), 26 May 2021; **Exhibit RL-0051**, Summons in the case of Notre Affaire à Tous et al v. Total, 01 January 2002; **Exhibit RL-0052-EN**, Petition in the case of Kaiser, et al. v. Volkswagen AG, 08 November 2021 (**Exhibit RL-0052-DE**, Petition in the case of Kaiser, et al. v. Volkswagen AG, 08 November 2021); **Exhibit RL-0053-EN**, Petition in the case of Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW), 21 September 2021 (**Exhibit RL-0053-DE**, Petition in the case of Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW), 21 September 2021); **Exhibit RL-0054-EN**, Court order in the case of Saúl Luciano Lluiya v. RWE, 30 November 2017 (**Exhibit RL-0054-DE**, Court order in the case of Saúl Luciano Lluiya v. RWE, 30 November 2017).

699 In addition, RWE has also been named one of the respondents in re Greenpeace Southeast Asia (Philippines). In the Commission on Human Rights of the Philippines' final report, published on 6 May 2022, concluded that climate change is a human rights issue and that states have a duty to protect human rights, including regulating the conduct of non-state actors. In relation to the 50 major carbon emitting companies involved in these proceedings, the Commission found that these companies contributed to 21.4% of global emissions, engaged in wilful obfuscation of climate science which may form grounds for liability, and have a corporate responsibility to undertake human rights due diligence and provide remediation. See **Exhibit RL-0055**, Commission on Human Rights of the Philippines, National Inquiry on Climate Change Report, 03 May 2022.

lake, which subsequently flooded a large part of the city of Huaraz. Lluiya argued that RWE should contribute to the cost of protective measures necessary to safeguard his property against flooding, proportionate to RWE's share of global greenhouse gas emissions (0.47%).

537. While the Essen Court had dismissed the Lluiya's claims in the first instance, in 2018 the Higher Regional Court of Hamm determined that Lluiya has a prima facie case against RWE, ordering that the claim progress to the evidentiary stage.[700] While the case is still pending, the German court recognised that a private company could be liable for climate change-related damages of its CO2 emissions under German law.

538. In addition to litigious pressure from third parties and reputational risks accompanying such litigation, companies are also facing increasing pressure from shareholders. For example, in the matter *ClientEarth v. Enea,* an NGO and shareholder of the Polish utility company Enea SA successfully brought a claim against the latter, seeking the annulment of a resolution consenting to the construction of a new coal-fired power plant.[701]

539. This trend of growing litigation risk and pressure from both third parties and investors reflects the increasing urgency of the climate crisis. Companies in emission-heavy sectors in particular are facing growing pressure from various actors to transition to a more sustainable business model.

11 OTHER EVENTS AFTER THE COAL ACT

11.1 The phase out of biomass subsidy does not affect the possibility of its use

540. The fact that the subsidies for co-firing biomass in coal plants will expire as planned, does not preclude coal plant owners from using

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700 **Exhibit RL-0054-EN**, Court order in the case of Saúl Luciano Lluiya v. RWE, 30 November 2017 (**Exhibit RL-0054-DE**, Court order in the case of Saúl Luciano Lluiya v. RWE, 30 November 2017).

701 **Exhibit R-0218**, Press release of ENEA regarding the case of ClientEarth v. Enea, 01 August 2019.

biomass.[702] As the State Secretary of Economic Affairs and Climate stated, power plants could continue running on biomass:[703]

> "*So coal-fired power stations are free to use biomass for* [the production of electricity] *We do not give new subsidies but they can use them.*"

541. The Government also made clear that biomass would continue to play an important role in sustainability plans.

542. During a debate on 27 July 2021, the State Secretary of Economic Affairs and Climate explained that biomass has a "*fundamental place in our plans for the Climate Agreement and in the development of our climate plans*".[704]

543. Similarly, in a letter to Parliament dated 22 April 2022, the Minister for Climate and Energy and the State Secretary of Infrastructure and Water Management clarified that biomass was "*indispensable*" and that subsidies for biomass (not the use of biomass itself) would eventually be reduced.[705]

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702 RWE relies on several documents to explain that "*the Government does not only want to stop the subsidization off biomass co-firing, but the co-firing itself*". However, these documents, too, made clear that subsidies (not the use of biomass) would actually be phased out. For example, in the document cited in para. 348 of the Memorial, the Minister of Economic Affairs and Climate refers to "*abolishing **subsidies** for woody biomass*"; **Exhibit C-0107**, Parliamentary Papers II 2020/21, 32 813, no. 682, Report of a Written Consultation, 22 April 2021, p. 55. Similarly, in the document cited in para. 349 of the Memorial, the Minister of Economic Affairs and Climate mentioned "*steps to phase out the issuing of **subsidies***": **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. In the document cited in para. 351 of the Memorial, the State Secretary of Economic Affairs and Climate explained that she "*will not include this low-grade application of woody biomass in the new SDE++ subsidy round*": **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 , p. 32.

703 **Exhibit R-0219-EN**, Parliamentary discussion about Amendment of the Coal Act (Acts I 2020/21, no. 43, item 9), 29 June 2021, pp. 33 and 38 (**Exhibit R-0219-NL**, Parliamentary discussion about Amendment of the Coal Act (Acts I 2020/21, no. 43, item 9), 29 June 2022).

704 **Exhibit C-0109**, Parliamentary Papers II 2020/21, 32 813, no. 809, Report of a Committee Debate, 27 July 2021, p. 46.

705 **Exhibit R-0220-EN**, Letter from the Minister for Climate and Energy and the State Secretary of Infrastructure and Water Management, Parliamentary papers II 2021/22, 32 813, no. 1039, 22 April 2022, p. 1 (**Exhibit R-0220-NL**, Letter from the Minister for Climate and Energy and the State Secretary of Infrastructure and Water Management, Parliamentary papers II 2021/22, 32 813, no. 1039, 22 April 2022).

> "*In order to achieve a climate-neutral and circular society in 2050, the government sees an* ***important role for the use of sustainable biobased raw materials. Biobased raw materials are indispensable*** *for ending the dependence on (imported) primary fossil raw materials and mineral resources, for instance in the chemical industry, the construction industry and the production of fuels for aviation and shipping. At the same time, the government is aware of the concerns that society has about woody biofuels. Concerns about air quality, deforestation, loss of biodiversity and thus the sustainability of biofuels.*"
>
> "*Where sustainable alternatives become available in the short term, this will eventually lead to* ***a reduction in the subsidy*** *on the use of bio-based raw materials for those applications.*"

544. To the extent that there were concerns about the use of biomass, such concerns only related to *woody* biomass, as mentioned in the letter cited above.[706] Woody biomass is not the only type of biomass that could be used, as explained by the Minister of Economic Affairs and Climate in a letter dated 22 April 2021:[707]

> "*biomass plants are not dependent on just that prunings. Other forms of biomass (such as manure, food industry residues and waste wood) as well as pruning and thinning wood from existing forests in Europe can also be used. There are therefore many more biofuels available.*"

545. Similarly, the State Secretary of Economic Affairs and Climate noted during a meeting with Parliament on 29 June 2021 that other types of biomass were also available for energy producers, explaining that

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706 **Exhibit R-0220-NL**, Letter from the Minister for Climate and Energy and the State Secretary of Infrastructure and Water Management, Parliamentary papers II 2021/22, 32 813, no. 1039, 22 April 2022, p. 1 (**Exhibit R-0220-NL**, Letter from the Minister for Climate and Energy and the State Secretary of Infrastructure and Water Management, Parliamentary papers II 2021/22, 32 813, no. 1039, 22 April 2022). See also for example **Exhibit C-0107**, Parliamentary Papers II 2020/21, 32 813, no. 682, Report of a Written Consultation, 22 April 2021, p. 55, where the Minister of Economic Affairs and Climate referred to "*abolishing subsidies for* ***woody biomass***", and **Exhibit R-0219-EN**, Parliamentary discussion about Amendment of the Coal Act (Acts I 2020/21, no. 43, item 9), 29 June 2021, p. 32, where the State Secretary of Economic Affairs and Climate explained that she "*will not include this low-grade application of* ***woody biomass*** *in the new SDE++ subsidy round*" (**Exhibit R-0219-NL**, Parliamentary discussion about Amendment of the Coal Act (Acts I 2020/21, no. 43, item 9), 29 June 2022).

707 **Exhibit C-0107**, Parliamentary Papers II 2020/21, 32 813, no. 682, Report of a Written Consultation, 22 April 2021, p. 55.

"*some of the companies are looking at alternative forms of biomass besides wood*."[708]

546. The Environmental Impact Assessment 2019, submitted by RWE in connection with its application for an increase in the allowance for biomass co-firing to 30% (see para. 504 above), also recognises this. Biomass is "*a very broad term under which a large number of biofuels fall*":[709] it includes not only wood, but also sugarcane pulp, lignite, bentonite, manure, excess products from the food industry and waste. The Environmental Impact Assessment 2019 also expressly contemplated the use of sugarcane pulp, lignin and bentonite.[710]

547. The Dutch policy on the use of biomass as described above is in line with European policy: the European Union has designated biomass as a sustainable fuel in the EU Directive on Renewable Energy.[711] It would therefore even not be possible to ban the use of biomass in power plants.

548. In summary, no new subsidies will be granted for the use of biomass to generate electricity.[712] However, the use of biomass (including woody biomass) for the generation of electricity remains permitted.[713]

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708 **Exhibit R-0219-EN**, Parliamentary discussion about Amendment of the Coal Act (Acts I 2020/21, no. 43, item 9), 29 June 2021, p. 45 (**Exhibit R-0219-NL**, Parliamentary discussion about Amendment of the Coal Act (Acts I 2020/21, no. 43, item 9), 29 June 2022).

709 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. 2.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

710 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. 2.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

711 **Exhibit RL-0056**, Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), 21 December 2018, Article 2.

712 **Exhibit R-0221-EN**, Netherlands Enterprise Agency, 'Renewable Heat' (https://www.rvo.nl/subsidies-financiering/sde/aanvragen/hernieuwbare-warmte) accessed 2 August 2022 (**Exhibit R-0221-NL**, Netherlands Enterprise Agency, 'Renewable Heat' (https://www.rvo.nl/subsidies-financiering/sde/aanvragen/hernieuwbare-warmte) accessed 2 August 2022).

713 RWE's broad allegation that the Netherlands "*wants to stop the use of biomass in power plants*" (Memorial, paras. 347-354) is thus unfounded.

11.2 The Netherlands set limits on coal-fuelled energy production which were subsequently lifted following Russia's invasion of Ukraine

549. In order to reduce CO2 emissions in the short term, in 2021, the Netherlands legislated a temporary production limit on power generated by coal. Starting on 1 January 2022, coal-fired power plants were required to limit the volume of electricity produced by firing coal to 35% of their total production capacity. The production limit would last until 1 January 2025.[714]

550. The temporary production limit came into effect shortly after its enactment and during the transition period under the Coal Act. Because the production limit affected the right to produce electricity by coal-firing during the Coal Act's transition period and because the limit had not been foreseeable for plant operators, the Netherlands provided payment to plant owners.[715] The methodology for calculating the payment to a plant owner was set out before the production limit came into effect, after review by Parliament and by the Council of State.[716]

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714 **Exhibit RL-0057-EN**, Act amending the Coal Act in connection with production limits (Gazette 2021, no. 382), 07 July 2021 (**Exhibit RL-0057-NL**, Act amending the Coal Act in connection with production limits (Gazette 2021, no. 382), 07 July 2022).

715 **Exhibit R-0222-EN**, Explanatory memorandum regarding Amendment of the Act prohibition of coal for electricity production in connection with reduction of the CO2 emission, Parliamentary papers II 2020-2021, 35 668, no. 3, 09 December 2020, p. 11 (**Exhibit R-0222-NL**, Explanatory memorandum regarding Amendment of the Act prohibition of coal for electricity production in connection with reduction of the CO2 emission, Parliamentary papers II 2020-2021, 35 668, no. 3). RWE tries to buttress its claim for compensation under the Coal Act by referring to the willingness of the Netherlands to offer payment for the temporary production limit: Memorial, paras. 342-346. However, this is an inappropriate comparison. As explained in Chapter 7 above, the Coal Act provides a generous transition period allowing coal plant owners to adapt. The production limit, on the other hand, did not separately provide for such a transition period. Moreover, the production limit had not been foreseeable for the plant operators, contrary to the Coal Act itself.

716 **Exhibit R-0223-EN**, Draft decree laying down rules for compensation of losses of operators of coal plants in connection with the reduction of CO2 emissions, 27 July 2021 (**Exhibit R-0223-NL**, Draft decree laying down rules for compensation of losses of operators of coal plants in connection with the reduction of CO2 emissions, 27 July 2021); **Exhibit R-0224-EN**, Letter from the State Secretary for Economic Affairs, Parliamentary papers I 2021-22, 35 668, no. M (**Exhibit R-0224-NL**, Letter from the State Secretary for Economic Affairs, Parliamentary papers I 2021-22, 35 668, no. M , 22 December 2021).

551. However in February 2022, Russia invaded Ukraine. Russian gas supplies became highly unreliable. The Netherlands took measures to ensure it was not dependent on Russian gas and to ensure it met its obligations to the European gas system pursuant to the EU Regulation. In this context the Government lifted the production limits on electricity produced by coal in order to relieve pressure on the use of gas in the power sector. As a result the production limits are no longer in force.[717] Russia's invasion of Ukraine has also resulted in higher prices for coal which are expected to remain high.[718]

717 **Exhibit R-0225-EN**, Letter from the Ministry of Economic Affairs and Climate to the Second Chamber, 20 June 2022, pp. 2-3 (**Exhibit R-0225-NL**, Letter from the Minister of Climate and Energy and the State Secretary of Economic Affairs and Climate to Parliament, 20 June 2022).

718 **Exhibit R-0226-EN**, Het Financieele Dagblad 'Credit rating agency: "Coal price will remain sky-high for years to come"', 11 August 2022 (**Exhibit R-0226-NL**, Het Financieele Dagblad 'Credit rating agency: "Coal price will remain sky-high for years to come"', 11 August 2022).

PART G: ICSID DOES NOT HAVE JURISDICTION OVER THE DISPUTE AND CLAIMANTS' CLAIMS ARE INADMISSIBLE

12 THE DISPUTE IS NOT WITHIN THE JURISDICTION OF ICSID OR THE COMPETENCE OF THE TRIBUNAL

12.1 Introduction

552. Where consent is absent, no jurisdiction may be found. The Netherlands respectfully submits that this Tribunal has no jurisdiction to hear this dispute because the Kingdom of the Netherlands did not extend a binding offer to arbitrate to investors of the Federal Republic of Germany.

553. The principle of the autonomy of EU law is one of constitutional importance in the EU legal order. The autonomy of EU law as explained by the CJEU in consistent case law, prevents application of incompatible treaties within the EU's legal order. This also applies to investor-State arbitration agreements in an intra-EU setting. This became particularly clear since the CJEU issued its *Achmea* judgment, followed by multiple expressions issued after that date instructing future tribunals and investors on the consequences of that ruling. Nevertheless, this is also apparent from the drafting history of the ECT, the declarations issued by the European Commission and the EU Member States and recently clarified in the agreement in principle on modernisation of the ECT by all 53 ECT Contracting Parties.

554. As such, Claimants knew or should have known when the Coal Act entered into force, and later when they triggered this dispute, no valid offer to arbitrate pursuant to Article 26 ECT was extended as this Article is not applicable in an intra-EU context. This does not conflict with a peremptory norm of general international law, nor any rights of the other Contracting Parties as all Contracting Parties to the ECT in the context of the modernisation process acknowledge and agree with the clarification.

555. The law of treaties does not preclude EU Member States from following and abiding by that practice as a means of harmonizing their

obligations under the EU Treaties and the ECT. This was recently confirmed in the *Green Power v. Spain* ruling and follows from the freedom of States to modify a treaty *inter se*.

556. In other words, Article 26(2)(c) ECT is not applicable in an intra-EU context and therefore no offer to arbitrate had been extended for the settlement of investment disputes between an investor of an EU Member State and an EU Member State. For this reason, the Tribunal is to decline jurisdiction in this particular case.

12.2 Consent is the cornerstone of arbitration

557. Consent to arbitrate is an essential prerequisite for any arbitration. This is no different in the case of an investment arbitration initiated under the ICSID Convention. Article 41 ICSID Convention expressly requires the Tribunal to consider if a dispute falls within the scope of its competence. The text of Article 41 states that "[a]*ny 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* […]."[719]

558. Lack of consent is the archetypal basis for a tribunal to decline jurisdiction - or later, for an arbitration award to be annulled.[720] Article 25 ICSID Convention requires the Parties to have given their consent in writing. Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties' overall relationship.[721] The ICSID Convention itself does not contain an offer to arbitrate.

559. Claimants rely on Article 26 ECT ("Settlement of Disputes between an Investor and a Contracting Party") as the basis for the Tribunal's jurisdiction in this case. Article 26 ECT provides rules for the administration of disputes arising between a Contracting Party to the

719 **Exhibit CL-0001**, ICSID Convention, Regulation and Rules, Article 41(1).
720 **Exhibit CL-0001**, ICSID Convention, Regulation and Rules, Article 52.
721 **Exhibit RL-0058**, Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, The ICSID Convention A Commentary (2nd edn), Article 25 ICSID, Cambridge University Press (2009), para. 561.

Treaty and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former.

560. Pursuant to Article 26(2)(c) ECT, if an amicable settlement of the dispute cannot be reached, the dispute may be submitted to international arbitration. A claimant investor gives its consent by invoking the Treaty and filing a claim, whereas pursuant to Article 26(3) ECT, each Contracting Party has already given its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of the ECT. Article 26(4) ECT requires that the dispute be submitted to ICSID if (i) the respondent Contracting Party; and (ii) the Contracting Party of the Investor are parties to the ICSID Convention. Article 26(5) ECT confirms that the consent of the State and the Investor are considered to satisfy the requirements for consent of the parties to a dispute under the ICSID Convention. Article 26(6) ECT requires the Tribunal to "*decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*".[722]

12.3 EU Treaties preclude application of Article 26 ECT to intra-EU disputes

561. The Netherlands' offer to arbitrate in Article 26 ECT is not applicable with respect to investors of other EU Member States because it is incompatible with the EU Treaties. Extending the application of Article 26(2)(c) ECT to intra-EU disputes is a manifest violation of EU law and concerns a rule of its internal law of fundamental importance.

12.3.1 Autonomy of EU law is of constitutional importance in the EU legal order

12.3.1.1 The concept of autonomy

562. The EU is a treaty-based international organization of 27 Member States, founded by the Netherlands, the Federal Republic of Germany and four other sovereign states on 1 January 1958. The Treaties aim

722 **Exhibit CL-0002**, Energy Charter Treaty, Article 26(6).

to create "*an ever-closer union*" [723] through "*a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living* [throughout the Community] *and closer relations between the States belonging to it.*"[724] To that end, a single economic area was created providing rules covering all cross-border economic activities in the EU, providing for free movement of goods, services, capital and people.

563. When investors from Member States exercise one of these fundamental freedoms, such as the freedom of establishment or the free movement of capital, they act within the scope of application of EU law and therefore enjoy the protection granted by those freedoms and, as the case may be, by the relevant secondary legislation, by the EU Charter of Fundamental Rights of the European Union, and by the general principles of EU law, which include in particular the principles of non-discrimination, proportionality and legal certainty.[725] Moreover, a violation of these freedoms and protections *is fully actionable under EU law*, and an injured investor may sue for compensation against the offending State in the courts of any EU Member State. As a German investor, RWE AG was a full beneficiary of these freedoms and protections when it invested in Eemshaven in the Netherlands – and remains such a beneficiary to this day. At the same time, EU investors are also *bound* to comply with obligations under EU law and refrain from actions that lead to circumvention of these obligations.

564. The constitutional framework of the EU[726] is also known as the 'autonomy of EU law'[727] or 'primary law'.[728] That autonomy exists with respect to both the law of the Member States as to international law.[729] The constitutional framework of the EU is unique. That framework

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723 **Exhibit RL-0059**, The Treaty of Rome, 25 March 1957, preamble which states "*DETERMINED to lay the foundations of an ever-closer union among the peoples of Europe*".

724 **Exhibit RL-0059**, The Treaty of Rome, 25 March 1957, Article 2.

725 **Exhibit RL-0060**, Robert Pfleger and Others, CJEU, Case C-390-12, ECLI:EU:C:2014:281, Judgment, 30 April 2014 paras. 30-37.

726 See **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019.

727 See **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019.

728 **Exhibit RL-0009**, Van Gend en Loos v. Nederlandse Tariefcommissie, CJEU, Case 26/62, ECLI:EU:C:1963:1, Judgment, 05 February 1963, para. 65.

729 **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019, para. 109.

encompasses the founding values set out in Article 2 Treaty on European Union (the "**TEU**"), the provisions of the EU Charter of Fundamental Rights, and the provisions of the TEU and the Treaty on the Functioning of the European Union (the "**TFEU**"), which include, *inter alia*, rules on the conferral and division of powers between the EU and its Member States, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.[730]

565. To ensure the specific characteristics and a proper functioning of the EU legal order, the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In accordance with Article 19 TEU, it is for the national courts and tribunals and the CJEU to ensure the full application of that law in all the Member States and to ensure effective judicial protection. The CJEU has exclusive jurisdiction to give the definitive interpretation of EU law. To that end, the EU system includes, in particular, the preliminary ruling procedure provided for in Article 267 TFEU.[731] Pursuant to Article 344 TFEU, EU Member States are not allowed to submit a dispute concerning the interpretation or application of the EU Treaties to any method of settlement other than those provided for in the Treaties. In addition to the national courts, tribunals and the CJEU, the Member States themselves are obliged to give full effect to EU law and cooperate within the principle of mutual trust.[732] The consequence of these principles is that Member States are to refrain from submitting disputes that may relate to interpretation or application of EU law to judicial bodies outside of the EU.[733]

730 **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019, para. 109.

731 **Exhibit RL-0012**, Opinion 2/13, CJEU, ECLI:EU:C:2014:2454, 18 December 2014, paras. 174-176 and 246.

732 **Exhibit RL-0061**, Treaty on the Functioning of the European Union, 26 October 2012, Article 4(3).

733 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment, 06 March 2018, para. 58.

566. Nevertheless, the EU and its Member States may enter into international agreements and be bound by them.[734] This includes agreements that provide for the creation of a court or tribunal responsible for the interpretation of their provisions and whose decisions are binding on the EU and/or its Member States.[735] The jurisdiction of EU courts and tribunals specified in Article 19 TEU to interpret and apply those agreements is limited to disputes covered by EU law.[736] It does not take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements.[737] Therefore, Investor-State Dispute Settlement (the "**ISDS**") mechanisms standing outside the EU judicial system do, in principle not adversely affect the autonomy of the EU legal order.[738] This is also the reason why EU Member States are still empowered, in principal, to maintain and conclude bilateral investment treaties with third countries, provided such treaty is not replaced by a treaty on the EU level.[739] However, the EU Member States must always ensure that any such agreement respects the EU's constitutional framework.[740] Both Member States and the EU institutions themselves must take this obligation into account. Consistent case-law of the CJEU issued well before the decision in *Achmea* confirm that the EU and its Member States may

734 **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019, para. 106.

735 **Exhibit RL-0012**, Opinion 2/13, CJEU, ECLI:EU:C:2014:2454, 18 December 2014, para. 182. See also **Exhibit RL-0006**, Opinion 1/91, CJEU, ECLI:EU:C:1991:490, 14 December 1991, paras. 40 and 70; **Exhibit RL-0007**, Opinion 1/09, CJEU, Case C-1/09, ECLI:EU:C:2011:123, 08 March 2011, para. 74.

736 See **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 28.

737 **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019, para. 116.

738 **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019, para. 115.

739 See **Exhibit RL-0062**, Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 12 December 2012**.**

740 See, *inter alia*, **Exhibit RL-0063**, Opinion 1/00, CJEU, ECLI:EU:C:2002:231, 18 April 2002, paras. 20-21 and **Exhibit RL-0012**, Opinion 2/13, CJEU, ECLI:EU:C:2014:2454, 18 December 2014, para. 183.

only enter international agreements if they respect the EU's constitutional framework.[741]

567. To illustrate:

- In **Opinion 1/75**, the CJEU held that it must be assessed when concluding an international agreement respect for the autonomy of EU law must be ensured.[742]
- This was also confirmed in ***Haegeman***[743] and in the ***Sevince***-case.[744]
- In **Opinion 1/91**,[745] the CJEU ruled that a court system set up by an international agreement that posed a threat to the autonomy of the EU legal order was incompatible with EU law.[746]
- That ruling was confirmed in several other decisions, among them **Opinions 1/00**,[747] **1/94**,[748] **1/09**,[749] **2/13**,[750] **2/15**[751] and **1/17**.[752]
- Also relevant in this context is the decision of the CJEU in the ***MOX Plant*** case,[753] rendered on 30 May 2006 concerning an

741 See, *inter alia*, **Exhibit RL-0063**, Opinion 1/00, CJEU, ECLI:EU:C:2002:231, 18 April 2002, paras. 20-21 and **Exhibit RL-0011**, Opinion 2/15, CJEU, ECLI:EU:C:2017:376, 16 May 2017, para. 183.
742 **Exhibit RL-0064**, Opinion 1/75, CJEU, ECLI:EU:C:1975:145, 11 November 1975.
743 **Exhibit RL-0065**, R. & V. Haegeman v Belgian State, CJEU, Case 181/79, ECLI:EU:C:1974:41, Judgment, 30 April 1974.
744 **Exhibit RL-0066**, Sevince v. Staatessecretaris van Justitie, CJEU, Case C-192/89, ECLI:EU:C:1990:322, Judgment, 20 September 1990.
745 CJEU cases – unlike cases in common law countries – are not referred to by the names of the parties involved. Instead, they are referenced principally by case numbers. The first number refers to the numerical value of a particular case in a particular year, while the second number refers to the year in which the case was filed. So, e.g., "Opinion 1/91" refers to the first opinion filed in the year 1991.
746 See **Exhibit RL-0006**, Opinion 1/91, CJEU, ECLI:EU:C:1991:490, 14 December 1991, paras. 35-36.
747 **Exhibit RL-0063**, Opinion 1/00, CJEU, ECLI:EU:C:2002:231, 18 April 2002.
748 **Exhibit RL-0067**, Opinion 1/94, CJEU, ECLI:EU:C:1994:384, 15 November 1994.
749 **Exhibit RL-0007**, Opinion 1/09, CJEU, Case C-1/09, ECLI:EU:C:2011:123, 08 March 2011.
750 **Exhibit RL-0012**, Opinion 2/13, CJEU, ECLI:EU:C:2014:2454, 18 December 2014.
751 **Exhibit RL-0011**, Opinion 2/15, CJEU, ECLI:EU:C:2017:376, 16 May 2017.
752 **Exhibit RL-0010**, Opinion 1/17, CJEU, ECLI:EU:C:2019:341, 30 April 2019.
753 **Exhibit RL-0068**, Commission v. Ireland Melloni, CJEU, Case C-459/03, ECLI:EU:C:2006:345, Judgment, 30 May 2006.

arbitration between the United Kingdom and Ireland under the United Nations Convention on the Law of the Sea (the "**UNCLOS**"). In this case, the CJEU confirmed that international agreements cannot affect the exclusive jurisdiction of the CJEU in accordance with Article 344 of the TFEU.

- Similarly, the CJEU held in ***Budějovický Budvar*** that provisions laid down in an international agreement concluded between two Member States cannot apply in the relations between those two States if they are found to be contrary to the EU Treaties.[754]

568. So, as is clearly set out above, it is well known that the principle of autonomy of EU law results in the fact that Member States are to refrain from submitting disputes that may relate to interpretation or application of EU law to judicial bodies outside of the EU.

12.3.1.2 Interpretation of EU law by the CJEU is binding on the Netherlands and Germany

Place of CJEU in the EU constitutional framework

569. As stated before, the CJEU is exclusively empowered under the EU Treaties to issue rulings concerning the interpretation and application of EU law.[755] That includes interpretation and application of international law **within** the EU's legal order.[756] After all, the CJEU consistently ruled that the constitutional framework *filters* the effect of international obligations in the EU legal order.[757] Or, phrased differently, the EU Treaties are seen as the "bridge" between

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754 **Exhibit RL-0069**, Budějovický Budvar National Corporation v. Rudolf Ammersin GmbH, CJEU, Case C-478/07, ECLI:EU:C:2009:521, Judgement, 08 September 2009.

755 That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.

756 **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, paras. 49 and 87.

757 See **Exhibit RL-0070**, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, Judgment of the Court (Grand Chamber) , 03 September 2008, para. 195 and further.

obligations of international law and their effect in the EU and its Member States with regard to issues covered by EU law. In other words, the EU is "*un ordre juridique interne de dimension transnationale.*"[758]

570. In case of incompatibility with that constitutional framework, incompatible international provisions must be interpreted as not being applicable according to the CJEU.[759] Such interpretation ensures respect for the hierarchy of norms within the EU legal order, in which international agreements to which the EU and the Member States are a party are filtered through the EU's constitutional framework.

571. Due to principles of primacy of EU law and direct effect, rulings of the CJEU are final and binding interpretations of law applicable within the EU. The principle of the primacy of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of national law of a Member State, EU law will prevail.[760] Direct effect means that EU law, including the final and binding interpretation of the CJEU not only entails obligations for EU Member States, but also rights and obligations for individuals. Individuals may therefore take advantage of these rights and obligations and directly invoke EU law before national and European courts, even when there is no judicial remedy under national law.[761]

572. Rulings of the CJEU are not only *de iure* binding on the referring court of a Member State that asked a preliminary question. In addition, these rulings also apply *erga omnes partes*, given that the CJEU has interpreted the EU Treaties. In principle, these rulings have *ex tunc*

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758 **Exhibit RL-0071**, Yassin Abdullah Kadi v. Council of the European Union, CJEU, Case C-402/05 P, ECLI:EU:C:2008:11, Opinion of the Advocate General Poiares Maduro, 16 January 2008, para. 21.

759 **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 66.

760 See amongst all, **Exhibit R-0227**, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007, Declaration 17 and consistent case law. **Exhibit R-0228**, Primacy of EU law (https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law.html) accessed 3 September 2022.

761 **Exhibit R-0229**, The direct effect of European Union law (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14547) accessed 3 September 2022, 21 October 2021; **Exhibit R-0230**, Christina Eckes, 'The autonomy of the EU legal order', Europe and the World: A law review, 05 February 2020, p. 6.

effect.[762] That means that they clarify and define where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force.[763] The rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation. In other words, rulings of the CJEU do not only affect the parties to the litigation, but they also have a generally binding effect, i.e., for all EU institutions, national administrations and judiciaries, all legal and natural persons.[764]

573. Only in exceptional circumstances, rulings of the CJEU may apply *ex nunc.* Two essential criteria must be fulfilled before such a limitation can be imposed: those concerned must have acted in good faith and there must be a risk of serious difficulties.[765] If the application of rulings of the CJEU *ex nunc* would not be an exception, it would limit the effects of the interpretation of EU law provided by the CJEU and amount to circumventing that Member State's obligations under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU.[766]

Analogy with international constitutional courts

574. The CJEU is not unique in its jurisdiction over multiple sovereign territories as the authority to exclusively decide cases on the interpretation and application of international law within their legal order. The CJEU is also not unique by granting *ex tunc* effect to its rulings on the interpretation and application of fundamental elements of its constitutional framework.

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762 See **Exhibit RL-0061**, Treaty on the Functioning of the European Union, 26 October 2012, Article 264.

763 According to the first paragraph of Article 264 TFEU, if the action for annulment is found to be well founded, the Court must declare the contested act to be void (declaration of nullity). Therefore, the effect of annulment is *ex tunc* (i.e., from the time of adoption of the act, not from the date of judgment, *ex nunc*). See **Exhibit RL-0072**, ECJ, Case 22/70, Commission v. Council, Judgment, 31 March 1971.

764 **Exhibit RL-0073**, Koen Lenaerts, Ignace Maselis, Kathleen Gutman, and Janek Nowak, EU Procedural Law, OUP (2015) 414-415.

765 **Exhibit RL-0074**, ECJ, C-585/19, Academia de Studii Economice din Bucuresti, Judgment, 17 March 2021, para. 79 and the case law cited.

766 **Exhibit CL-0150**, ECJ, C-109/20, Judgment (*Republiken Polen v. PL Holdings Sàrl*), para. 65.

575. In that sense, analogies can be drawn between other constitutional courts. For example, the Judicial Committee of the Privy Council is the highest court of appeal for a number of Commonwealth countries, crown dependencies and United Kingdom overseas territories. The Commonwealth of Nations is an international association consisting of independent nations that were previously part of the British Empire. The Privy Council has jurisdiction in appeals from 32 jurisdictions. It has the power to reverse the decision of the lower court in the country from which the case was referred.[767] Judgments are binding on all courts within any other Commonwealth country from which an appeal is heard.[768]

576. Similarly, the United States Supreme Court's (the "**US Supreme Court**") appellate jurisdiction extends jurisdiction to hear appeals from federal courts, but also of appeals brought by the Supreme Court of Puerto Rico and the Virgin Islands.[769] The US Supreme Court is the final arbiter of the proper interpretation of federal law in the United States, and its pronouncements on federal law are binding not only on the lower federal courts, but also on the courts of the individual States.[770] Analogous to the preliminary ruling procedure of the CJEU, federal appellate courts in the United States can engage in "certification", which is "[a] *procedure by which a* […] *court asks the U.S. Supreme Court or the highest state court to review a question of law* […] *on which it needs guidance*."[771] Decisions of the US Supreme Court apply *erga omnes* and *ex tunc* (e.g., when dealing with the interpretation of the United States Constitution), and not just with respect to the parties to the dispute.

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767 **Exhibit R-0231**, Judicial Committee of the Privy Council, 'Role of the JCPC' (https://www.jcpc.uk/about/role-of-the-jcpc.html#:~:text=The%20Judicial%20Committee%20of%20the,and%20military%20sovereign%20base%20areas) accessed 3 September 2022.

768 **Exhibit R-0232**, Judicial Committee of the Privy Council, 'Beginners Guide to the Judicial Committee of the Privy Council'.

769 **Exhibit RL-0075**, United States Code, Title 28 - Judiciary and Judicial Procedure, section 1254; **Exhibit RL-0076**, United States v. Vaello Madero, 21 April 2022.

770 *See* **Exhibit R-0233**, United States Courts, 'Comparing Federal and State Courts' (https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts) accessed 3 September 2022: "*State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court*".

771 Definition of Certification, **Exhibit RL-0077**, Bryan Garner, Black's Law Dictionary, Ninth Edition.

577. Closer to home, the Kingdom of the Netherlands consists of four constituent countries, i.e., the Netherlands, Aruba, Curacao and Sint Maarten. The *Hoge Raad der Nederlanden* is the supreme court of the Kingdom by virtue of the Cassation regulation for the Netherlands Antilles and Aruba.[772]

578. These examples serve to illustrate the fact that the CJEU is not the only constitutional court with jurisdiction over multiple sovereign territories that engage independently in international relations. In addition, the CJEU is not the only constitutional court competent to exclusively decide cases on the interpretation and application of international law **within** their legal order by applying an *ex tunc* interpretation in relation to matters of fundamental importance that must have been understood and applied from the time of its coming into force.

12.3.2 Claimants knew Article 26 ECT was not applicable when they triggered this proceeding

579. As stated in the previous paragraphs, the autonomy of EU law as explained by the CJEU in consistent case law prevents the application of incompatible treaties within the EU's legal order. This also applies to investor-State arbitration agreements in an intra-EU setting. This became particularly clear since the CJEU issued its *Achmea* judgment, followed by multiple expressions instructing future tribunals and investors on the consequences of that ruling issued after that date. Nevertheless, this was already apparent from the drafting history of the ECT, the declarations issued by the European Commission and the Member States and recently clarified in the agreement in principle on modernisation of the ECT by all 53 ECT Contracting Parties. As such, Claimants knew or should have known when the Coal Act entered into force, and later when they triggered this dispute on 2 February 2021, that Article 26 ECT is not a valid arbitration agreement.

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772 **Exhibit RL-0078-EN**, Act on Jurisdiction of the Hoge Raad, 20 July 1961, Article 1 (**Exhibit RL-0078-EN**, Act on Jurisdiction of the Hoge Raad, 20 July 1961).

12.3.2.1 Jurisprudence CJEU

Achmea

580. The *Achmea* case was the first holding in which the CJEU specifically addressed the compatibility of ISDS-mechanisms within an intra-EU context. While this may appear to be surprising at first, it should not be: since the founding of the EU until the late 2000s, the issue of intra-EU arbitration had never arisen before, so the CJEU had no reason to weigh in on the question, see below. The CJEU addressed, in particular, the validity of an arbitration agreement in a bilateral investment treaty (the "**BIT**") between the Netherlands and Slovakia.

581. After engaging in a three-step analysis, the Grand Chamber of the CJEU[773] *unanimously* ruled that clauses submitting investor-State disputes to international tribunals are incompatible with EU law in an intra-EU setting. The CJEU's decision extends to *all* arbitration agreements contained in intra-EU bilateral investment treaties, not just the BIT between the Netherlands and Slovakia which was under consideration in the case at hand. With respect to its analysis:

- First, the CJEU ascertained whether the dispute which the arbitral tribunal is called on to resolve is liable to relate to the interpretation or application of EU law. If this is the case, Article 344 TFEU is breached as only the CJEU has the jurisdiction to provide the definitive interpretation and application of that law;

- Second, the CJEU assessed whether an arbitral tribunal is situated within the judicial system of the EU, and whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. When this is not the case, Article 267 TFEU is breached which also results in the incompatibility of the arbitration proceedings with the EU constitutional framework; and

- Third, the CJEU examined whether an arbitral award made by such a tribunal is – in accordance with Article 19 TEU in

773 The Grand Chamber of the CJEU indicates a sitting in which all judges of the Court participate and is usually reserved for particularly important cases.

particular – subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the CJEU by means of a reference for a preliminary ruling.

582. Applying these criteria, the CJEU first found that an arbitral tribunal established to determine an intra-EU investment dispute may be called upon to interpret, or to apply EU law. In addition, an arbitral tribunal established under an international agreement has, in principle, no link with the judicial systems of the Member States.[774] Lastly, as arbitral awards are also not always subject to review by a court of a Member State,[775] there is no feedback loop to correct interpretations of EU law issued by such tribunals as is required by Article 19 TEU. Based on these specific characteristics, the CJEU concluded that Articles 267 and 344 TFEU preclude an arbitration provision in an international agreement concluded between Member States, and that such a provision should be disapplied or disregarded.[776]

Komstroy

583. In the *Komstroy* case, the CJEU applied the same analysis in the context of intra-EU disputes pursuant to Article 26(2)(c) ECT. The CJEU effectively extended *Achmea*'s central holding to the ECT, and confirmed that the offer to arbitrate contained in Article 26 ECT does not apply between Member States.

584. The CJEU observed that an arbitral tribunal established pursuant to Article 26 ECT may be called on to interpret or apply EU law. Thus if Article 26 ECT were to apply intra-EU this would exclude the possibility that a dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of EU law.[777] As a result, the

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774 See **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment, 06 March 2018, para. 48 and see, to that effect, **Exhibit RL-0079**, Paul Miles and Others v. Écoles européennes, CJEU, Case C-196/09, ECLI:EU:C:2011:388, Judgment, 14 June 2011, para. 41.

775 Such as, for instance, an arbitration proceeding under the auspices of ICSID.

776 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment, 06 March 2018, para. 60.

777 See **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 60.

CJEU concluded that "*Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State*."[778] The ruling of the CJEU in *Komstroy* is a final and binding interpretation of the ECT as it applies between EU Member States.

PL Holdings

585. *PL Holdings* confirms the findings of the CJEU in both *Achmea* and *Komstroy*. The CJEU added that should intra-EU investors continue to bring such disputes before arbitration tribunals, Member States are required to challenge – before that arbitration tribunal or before the court with jurisdiction – the validity of the arbitration clause on the basis of which the dispute was brought before that arbitration tribunal.[779] In compliance with this obligation, the Netherlands sought confirmation of the Court in Cologne that Article 26 ECT is not a valid offer to arbitrate this dispute between Claimants and the Netherlands.

Relevance to this dispute

586. There is no doubt that rulings of the CJEU in *Achmea* and *Komstroy* apply *ex tunc*.[780] To avoid any doubt, the CJEU confirmed in *PL Holdings* that the invalidity of arbitration clauses in intra-EU settings have *ex tunc* effect, even when the arbitration proceeding was initiated before the *Achmea* ruling.[781] This is relevant, because the dispute before this Tribunal concerns an investment made by Claimants in the territory of the Netherlands. Claimants RWE AG and RWE Eemshaven Holding II BV are legal entities established in the Federal Republic of Germany and the Kingdom of the Netherlands, respectively. Both parties are EU Member States and Claimants are subject to the laws of the EU.

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778 See **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 66.

779 **Exhibit CL-0150**, ECJ, C-109/20, Judgment (*Republiken Polen v. PL Holdings Sàrl*), para. 52.

780 Confirmed amongst all in **Exhibit CL-0150**, ECJ, C-109/20, Judgment (*Republiken Polen v. PL Holdings Sàrl*), para. 64.

781 **Exhibit CL-0150**, ECJ, C-109/20, Judgment (*Republiken Polen v. PL Holdings Sàrl*), para. 66.

587. The dispute before this Tribunal runs the risk of interpreting and applying provisions of EU law. The dispute relates to the construction, conduct, maintenance and operation of Eemshaven. This is covered by material provisions of EU law, in particular provisions relating to the free movement of services (i.e., establishment),[782] free movement of capital between EU Member States and internal energy market regulations.[783] In addition, Claimants complain about the (lack of continuation of) subsidy schemes to support co-firing biomass. All subsidy schemes of the Netherlands, including SDE-subsidies, qualify as state aid and must be notified to the European Commission, implicating EU-level competition laws.[784]

588. This dispute is also governed by procedural rules of EU law that preclude this Tribunal from exercising jurisdiction as Claimants have initiated parallel proceedings in Dutch domestic courts, which fall under the supervision of the CJEU. This Tribunal has been constituted pursuant to relevant provisions of the ICSID Convention and has no link with the judicial system of any of the Member States. In fact, ICSID is a self-contained dispute resolution system, meaning that proceedings are delocalised from domestic procedures and local courts do not intervene in the ICSID process.[785] Moreover, ICSID arbitral awards are not subject to review by a court of a Member State. Instead, a party can only resort to the remedies under the Convention and cannot bring a challenge before local courts based on domestic law or other treaties.[786] In other words, for the question whether there is a valid arbitration agreement it is irrelevant whether a Tribunal has been established under the ICSID Convention or any other *ad hoc* arbitration rules.[787]

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782 Services are provided in four so-called "modes of supply", see **Exhibit RL-0080**, General Agreement on Trade in Services, 01 January 1995, Article I:2(c), which defines “establishment” as the supply of a service by a service supplier of one Member, through commercial presence, in the territory of any other Member.

783 **Exhibit R-0234**, Internal Energy Market, European Parliament, 01 October 2021.

784 **Exhibit RL-0061**, Treaty on the Functioning of the European Union, 26 October 2012, Articles 107-108.

785 **Exhibit R-0235**, ICSID, 'Special Features and Benefits of ICSID Membership'.

786 **Exhibit R-0236**, ICSID, 'Post-Award Remedies'.

787 **Exhibit RL-0081**, European Commission v. European Food SA and Others, CJEU, Case C-638/19 P, ECLI:EU:C:2022:50, Judgment, 25 January 2022, para. 142.

589. From this, it follows that EU law precludes the applicability of Article 26(2)(c) ECT in the dispute before this Tribunal between the Kingdom of the Netherlands and Claimants, investors of the Federal Republic of Germany.

12.3.3 Drafting history of the ECT shows consent has not been extended to intra-EU application

590. At the time the ECT was negotiated, the CJEU already had issued a series of consistent case law explaining that the EU and its Member States may only enter into international agreements if the constitutional framework of the EU is respected. This is also reflected in the purpose, drafting history and declarations made in context of the negotiations of the ECT and the fact that no EU Member States at the time of the ECT negotiations had any BIT between them in place.

12.3.3.1 Purpose of the ECT

591. When the ECT was negotiated between 1992 and 1994 and signed in December 1994, the goal was to improve the framework for investments in the energy field, in particular regarding countries that were not EU Member States, and regarding their relationship to the EU and the EU Member States. Both the EU and the EU Member States ratified the ECT, as the ECT is a 'mixed' agreement.

592. The ECT covers all aspects of commercial energy activities including trade, transit, investments and energy efficiency. The ECT partly overlaps with the substantive and procedural provisions of the internal market of the EU, particularly in the field of trade and investment, transit and specific provisions in the field of energy that fall under the scope of the free movement of goods, services, capital and persons. Therefore, the ECT was explicitly not meant to regulate the EU's own energy or investment policies, nor affect the EU's division of competence.

12.3.3.2 The drafting history of the ECT confirms that the offer to arbitrate contained in Article 26 for investments between EU Member States was disputed

593. During the negotiations of the ECT, the European Commission requested the ECT Secretariat on 29 June 1992 to include a Community exception in order to ensure compliance with EU law. After all, the CJEU had just issued its Opinion 1/91.[788] To that end, the Secretariat included as a footnote into the new version of the ECT (BA-15 of 12.8.1992, page 84, n.27.18): "*EC – a statement in the minutes of the concluding document could substitute, if necessary, the ex-paragraph (4) concerning a Community exception: (4) In their mutual relations, Contracting Parties which are Members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Agreement [ECT] except insofar as there is no Community rule governing the particular subject concerned*."

594. The proposal remained as footnote in BA 22 (21.10.1992) and BA 26 (25.11.1992) without making it into the draft text. In March 1993 in the first version of the Draft Ministerial Declaration, appears a suggestion for a declaration in relation to Article 27: "*In their mutual relations, Contracting Parties which are Members of the European Communities shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned*."

595. It remains in the draft ministerial Declaration versions 2 (1.05.1993), 3 (1.06.1993), 4 (7.07.1993), 5 (11.10.1993) and 6 (20.12.1993) but disappears in version 7 (17.3.1994). Finally, the Ministerial Declaration was substituted by the Declarations contained in the Final Act of the Conference adopting the ECT, which does not contain any reference to such disconnection clause as cited above.

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788 See **Exhibit RL-0006**, Opinion 1/91, CJEU, ECLI:EU:C:1991:490, 14 December 1991.

12.3.3.3 Declarations in context of the ECT negotiations

596. However, the European Commission submitted a Statement to the ECT Secretariat on 19 May 2015 on behalf of the European Communities pursuant to Article 26(3)(b)(ii) ECT, noting that the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.[789] This statement was replaced after the Financial Liability Regulation was adopted[790] and applies to investor-State disputes initiated by a claimant from a third country under the ECT. It contains conclusive rules to allocate the financial responsibility within the EU for ISDS-cases *only* with investors of third countries.[791]

597. Moreover, the European Commission issued a Declaration on 19 May 2015 at the occasion of the drafting of the International Energy Charter, the political basis for the ECT. The Declaration reads that "*due to the nature of the EU internal order, the text in Title II, Heading 4, of the International Energy Charter on dispute settlement mechanisms cannot be construed as to mean that any such mechanism would become applicable in relations between the European Union and its Member States, or between the said Member States, on the basis of that text*."[792]

598. So, it was clear from the perspective of the EU and its actions during the negotiations that the ECT was never meant to extent the consent to arbitrate provided in Article 26(2)(c) ECT to investor-State disputes between an EU investor and an EU Member State. Just like the State-to-State dispute resolution provision was not meant to be applicable between EU Member States.

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789 **Exhibit R-0237**, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, 02 May 2019.

790 **Exhibit RL-0082**, Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

791 **Exhibit R-0237**, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, 02 May 2019.

792 **Exhibit RL-0083**, EU's International Energy Charter Declaration, 20 May 2015.

12.3.3.4 No BIT between the Netherlands and Germany

599. The Tribunal must keep in mind that intra-EU investment arbitration is an accidental, and completely unintended consequence of one simple historical development: the accession of Central and Eastern European countries to the EU in 2004, 2007 and 2014. Before then, there was no such thing as an "intra-EU Bilateral Investment Treaty". None of the original Members of the EU ever had bilateral or multilateral investment treaties between themselves. They had no reason to: the fundamental freedoms and protections of the EU Treaties gave these States the investment protections they needed. So, for example, there is no such thing as a Netherlands-Germany BIT. Similarly, there is no France-Italy BIT, or a Spain-Belgium BIT. Historical reality confirms what *Achmea* clarified: EU Member States cannot – and have not – made offers to arbitrate investment disputes between themselves.

600. The case at hand is different from other intra-EU cases under the ECT. Unlike most other intra-EU arbitration proceedings, this case concerns the application of the ECT between the Netherlands and Germany. With respect to the Netherlands and Germany in particular, these countries were among the first Member States of the EU. Their membership, which began on 1 January 1958 predates the signing of the ECT (17 December 1994) by over thirty years.

601. This means that with respect to their mutual relations, the Netherlands and Germany are (since 1 January 1958) subject to the same EU rules in the single market, including those on cross-border investments, the freedom of establishment and the free movement of capital. In addition, based on the principle of mutual trust and sincere cooperation, all EU investors also benefit from the same procedural protections, including the ability to submit claims for injuries to national courts. Together with the obligation of national courts to apply and respect EU law, the combined consequence of these principles is that EU Member States must refrain from submitting disputes that may

relate to interpretation or application of EU law to judicial bodies outside of the EU.[793]

602. Before accession, many of the Central and Eastern European States had BITs with existing Member States in Western Europe. Importantly, *none of these BITs were intra-EU BITs at the time they came into force*. Instead, they were agreements between Western EU Member States and Central and Eastern European non-EU Members.

603. Once these States joined the EU, those BITs were converted overnight into intra-EU BITs, thus setting up for the first time in history a "live" problem and conflict. The European Commission and respondent Member States did not sit idly by when the first, unintended intra-EU investment cases began to be filed: on the contrary, respondent Member States immediately lodged objections to the jurisdiction of the tribunals hearing the cases.

604. Although the BITs were not immediately terminated, the preamble of the Termination Treaty of intra-EU Bilateral Investment Treaties signed by the Netherlands, Germany and 21 other Member States on 5 May 2020 summarises that these Member States consider "*investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union*."[794]

12.3.3.5 EU Member States immediately objected to jurisdiction in the first intra-EU investment arbitration cases

605. EU Member States have, from the time of the first intra-EU arbitration cases, rejected the application of investment arbitration under BITs and the ECT in an intra-EU context. The first cases concerned application of the ECT between investors of the first Members of the

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793 **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment, 06 March 2018, para. 58.

794 **Exhibit RL-0084**, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020, preamble.

EU as of 1958 and "EU 13" Member States that had acceded to the EU in 2004, 2007 and 2015, ten years or more after the ratification of the ECT. *AES v. Hungary* and *Electrabel v. Hungary,* both frequently quoted in this Counter-Memorial, are the first of many intra-EU cases in which EU Member States consistently objected to the jurisdiction of the tribunal on the basis of the non-applicability of the arbitration provision in an intra-EU context.

606. In addition, the European Commission consistently called on EU Member States, including the Netherlands to terminate their what became intra-EU BITs. To that end, the Netherlands was subject to a pilot proceeding in 2009 and received a formal notice of the European Commission in 2015 to terminate their intra-EU BITs, specifically with respect to the BIT between Slovakia and the Netherlands.

607. The *Achmea* judgment *clarified* that the Commission's view on the incompatibility of intra-EU arbitration with the EU Treaties was correct. The CJEU's judgment in *Achmea* is a final and binding interpretation as it applies between EU Member States. Ever since that ruling was issued on 6 March 2018, it was unequivocally clear that ISDS-mechanisms applied in an intra-EU context are incompatible with EU law. That holding was confirmed in other cases, such as *Komstroy* and *PL Holdings.* Ever since that date, the consequences of these rulings were consistently communicated to arbitral tribunals, the investor-community and to other Contracting Parties to the ECT.

12.3.3.6 EU Member States' declarations after the *Achmea* judgment were clear

608. After the *Achmea* judgment, EU Member States undertook a series of actions to clarify the legal consequences of that judgment and on investment protection within the EU more generally. On 15 January 2019, EU Member States issued a declaration to inform investment arbitration tribunals and investors. In the declaration, Member States confirm that they are "*bound to draw all necessary consequences from that judgment pursuant to their obligations under Union law*."

609. Due to the lack of a valid offer to arbitrate by the Member State party to the underlying BIT, the declaration stressed that these treaties could

no longer produce effects (i.e., have *ex tunc* effect, see above). As a consequence, all investor-State arbitration clauses contained in BITs between EU Member States are contrary to EU law and thus inapplicable.[795] That also applies to the application of Article 26 ECT in intra-EU settings.[796] As a result, EU Member States conclude that the offer for arbitration included in the ECT between Member States is incompatible with the EU Treaties and thus would have to be disapplied as between Member States – a holding later confirmed by the CJEU in *Komstroy*. [797]

610. The EU Member States made a number of additional pronouncements in the Declaration that are relevant for this Tribunal:

(1) Member States inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment, as set out in this declaration, in all pending intra-EU investment arbitration proceedings brought either under bilateral investment treaties concluded between Member States or under the Energy Charter Treaty.

(2) EU Member States will take the necessary measures to inform the investment arbitration tribunals concerned of those consequences. In this context, the Netherlands specifically calls upon the Tribunal to invite the Federal Republic of Germany as a non-disputing third party to submit views on the question of application or interpretation of the ECT between its own nationals and the Netherlands pursuant to Arbitration Rule 37(2) ICSID Convention.

(3) Member States inform the investor community that no new intra-EU investment arbitration proceedings could be initiated.[798] The Netherlands and Germany have consistently

795 **Exhibit R-0238**, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, p. 1.

796 **Exhibit R-0238**, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, p. 2.

797 See **Exhibit R-0238**, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection.

798 **Exhibit R-0238**, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, para. 3.

done so.[799] The present case was registered well *after* that date, i.e., on 2 February 2021 when the investors knew that no new intra-EU ISDS-cases could be triggered.

611. As indicated above, in the Declaration of 2019, EU Member States stress that the *Achmea, Komstroy* and *PL Holding* rulings apply *ex tunc,* meaning that from a systemic point of view under EU law, there was never a valid offer to arbitrate. Nevertheless, the Declaration provides for a grandfathering regime in relation to settlements and arbitral awards in intra-EU investment arbitration cases that can no longer be annulled or set aside.[800] This was meant to provide legal certainty to investors in situations where their disputes with a Member State had already been settled or to which final awards were rendered.

612. Similarly, EU Member States concluded the Termination Treaty on 5 May 2020. That Treaty applied to intra-EU BITs and not to the ECT. Also in the Termination Treaty, EU Member States made practical arrangements in relation to the grandfathering of arbitral awards and settlements rendered before 6 March 2018, so as to provide legal certainty to investors in situations where their disputes with a Member State had already been settled.

613. So, after the CJEU's ruling in *Achmea,* the Member States' express pronouncements made clear to investors that the consent to arbitration included in Article 26 ECT did not apply to intra-EU

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799 See **Exhibit R-0239-EN**, Letter from the Minister of Foreign Trade and Development Cooperation, Parliamentary papers II 2017/18, 21 501-02, no. 1863, 26 April 2018 (**Exhibit R-0239-NL**, Letter from the Minister of Foreign Trade and Development Cooperation, Parliamentary papers II 2017/18, 21 501-02, no. 1863, 26 April 2018); **Exhibit R-0240-EN**, Annotated Agenda for the Foreign Trade Council of the Senate, 12 March 2020 (**Exhibit R-0240-NL**, Annotated Agenda for the Foreign Trade Council of the Senate, 12 March 2020); **Exhibit R-0241-EN**, Bundestag Press Release, Investment protection within the EU, 04 November 2020 (**Exhibit R-0241-DE**, Bundestag Press Release, Investment protection within the EU, 04 November 2020); **Exhibit R-0242-EN**, Bundestag Scientific services, The Landmark judgement of the European Court of Justice in the Slovak Republic v. Achmea B.V., 21 March 2018 (**Exhibit R-0242-DE**, Bundestag Scientific services, The Landmark judgement of the European Court of Justice in the Slovak Republic v. Achmea B.V., 21 March 2018); **Exhibit R-0243-EN**, Bundestag, Brief information, the Achmea ruling of the ECJ and arbtiration proceedings on domestic facts, 17 April 2018 (**Exhibit R-0243-DE**, Bundestag, Brief information, the Achmea ruling of the ECJ and arbtiration proceedings on domestic facts, 17 April 2018).

800 See **Exhibit R-0238**, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, Principle 7.

disputes. That was confirmed in the Declaration of EU Member States of 15 January 2019 and in the Termination Treaty of 5 May 2020. In addition, both the Netherlands and Germany issued, on multiple occasions, statements to their respective Parliaments informing investors of the consequences of the *Achmea* ruling.

614. The dispute before this Tribunal was registered on 2 February 2021, well after *Achmea*, and the clear guidance provided by the Contracting Parties in that respect. Hence, Claimants could not have relied in good faith on the presumption that Article 26 ECT contained a valid offer to arbitrate.

12.3.3.7 The ECT modernisation process has confirmed that Article 26 will not apply to disputes between EU Member States and their investors

615. In case the Tribunal still has any doubt as to whether the offer to arbitrate contained in Article 26 ECT applies to intra-EU disputes, the modernisation of the ECT provides useful clarification on this issue.

616. On 24 June 2022, *all* 53 ECT Contracting States concluded an agreement in principle that amends and clarifies certain provisions of the ECT. Relevant for the discussion here is the introduction of a new Article 24(3) that:

> "***clarifies*** *that Articles 7 (Transit), 26 (Investment dispute settlement), 27 (disputes between Contracting Parties), 29 (trade with non -WTO members) shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations*".

617. This provision specifically applies to the EU, as the EU is a Regional Economic Integration Organization ("**REIO**") pursuant to Article 1(3) ECT. This provision *clarifies* – which is distinct from an amendment – that the ECT should not be applied to intra-EU disputes such as the one at hand. An interpretation by this Tribunal that would nevertheless result in such application, is *contra legem*.

12.3.3.8 Conclusion

618. The Netherlands submits that the EU's constitutional framework and the *ex tunc* effect of rulings of the CJEU have precluded intra-EU arbitration proceedings from the start. This is also reflected in the drafting history of the ECT. For that reason, the Netherlands and Germany never had any BIT between them. The issue of intra-EU disputes under the ECT became apparent as of 2006, when the first intra-EU cases appeared arising from claims against the recently acceded Member States. From the beginning many EU Member States and the European Commission have resisted the intra-EU application. Ever since the CJEU has issued its ruling in *Achmea,* it was particularly evident and known to other Contracting Parties, as well as investors in the EU what the consequences of that ruling were. The Netherlands and Germany acknowledged and incorporated the final and binding interpretation that the CJEU had issued. Therefore, the Netherlands, Germany and other EU Member States issued a Declaration on 15 January 2019 to that effect. In addition, they signed the Termination Treaty on 5 May 2020. In those instruments, they recognised that the offer to arbitrate intra-EU disputes was inapplicable, but provided legal certainty for investors that had brought disputes *before* the incompatibility with EU law was confirmed. The Netherlands and Germany have communicated, on multiple occasions, to their respective Parliaments what the consequences of *Achmea* were for EU investors. Should there still be any doubt, the modernisation of the ECT as concluded on 24 June 2022, *clarifies* the issue for greater certainty.

619. Hence, Claimants knew, or should have known, that they could not rely in good faith on the offer to arbitrate pursuant to Article 26 ECT when they registered their claim at ICSID on 2 February 2021. Based on these considerations and the particular nature of this case, this Tribunal should therefore decline jurisdiction.

12.4 Article 26 of the ECT must be interpreted in line with the EU Treaties

620. The above shows that there is a lack of a binding offer to arbitrate – at least since the *Achmea* judgment. This does not conflict with a

peremptory norm of general international law, nor any rights of the other Contracting Parties as all Contracting Parties to the ECT in the context of the modernisation process acknowledge and agree with the clarification. The law of treaties does not preclude EU Member States from following and abiding by that practice as a means of harmonizing their obligations under the EU Treaties and the ECT. This was recently confirmed in the *Green Power v. Spain* ruling and follows from the freedom of states to modify a treaty *inter se*.

12.4.1 EU Treaties as a source of international law

621. Article 26(6) ECT reads "*a tribunal established under paragraph (4)* ***shall*** *decide the issues in dispute in accordance with this Treaty* ***and*** *applicable rules and principles of international law.*" This provision not only applies to the merits of the dispute, but also applies to decisions on jurisdictional matters.[801]

622. Treaty law, as codified in the Vienna Convention on the Law of Treaties (the "**VCLT**"), applies to any treaty which is the constituent instrument of an international organization, such as the EU, and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.[802] Pursuant to Article 31(1) VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. According to the Netherlands, the ordinary meaning of the terms "shall" in combination with "and" in Article 26(6) ECT explicitly require Tribunals to actively decide the matter in accordance with applicable rules and principles of international law. The Netherlands submits that the ordinary meaning of these two words does not leave room for this Tribunal to dismiss the relevance of other applicable rules and principles of international law when deciding matters of jurisdiction and merits in this present arbitration, especially when the application of such rules and principles can take place in conformity with the ECT. This includes taking into account relevant provisions of the EU Treaties, as interpreted by the CJEU, as the EU Treaties are agreements governed by international

801 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 5.32.

802 **Exhibit CL-0013**, Vienna Convention on the Law of Treaties, Article 5.

law and applicable to Claimants, as nationals of an EU Member State, and the Respondent, an EU Member State. Claimants and the Respondent are therefore bound to comply with both the ECT and EU law. In this case, a harmonious application is possible. Therefore, the Tribunal is, per Article 26(6) ECT, obliged to do so.

623. The *Electrabel* tribunal considered the EU Treaties as a whole to be applicable as international law, including for jurisdictional purposes, in which it concluded that there was "*no relevant inconsistency between EU law, the ECT and the ICSID Convention in the present case, as regards both the merits of the Parties' dispute and the Tribunal's jurisdiction to decide this dispute.*"[803] In line with this argument, the Netherlands has submitted to the German Court that as a principle, international law, the ECT and EU law coexist next to each other.

624. When a conflict of norms appears, treaties must be interpreted in conformity. That means, that this Tribunal has the task to find a way to interpret provisions of all of these treaties equally, it will take into account the final and binding rulings issued by the CJEU that prevent application of Article 26 ECT within an intra-EU context and not apply Article 26 ECT. The Contracting Parties to this dispute also clearly abide by this interpretation.

625. In the joint Declaration of 15 January 2019, the Netherlands, Germany and 20 other Member States provided instructions to future tribunals. The Declaration reads "*international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.*"[804]

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803 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 5.33.

804 See **Exhibit R-0238**, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection.

626. However, if such harmonious interpretation proves to be impossible, the CJEU ruled in the context of the *Mox Plant* arbitration proceedings that "*the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention*."[805] After all, in several rulings, the CJEU underlined that an international agreement concluded by the European Union and the Member States form an integral part of the legal order of the European Union when applied specifically in an intra-EU context.[806] As a result, the dispute becomes a dispute concerning the interpretation or application of the EU Treaties which is covered by one of the methods of dispute settlement established by the EU Treaties. [807] As such, EU law prevails with the result of the inapplicability of the incompatible provision.

627. This was also the conclusion of the *Electrabel* tribunal. Even though the tribunal concluded that no contradiction between EU law and the ECT existed, the tribunal continued to discuss the hypothetical situation that there was indeed a contradiction. As a result, the Tribunal concluded: "*in summary, from whatever perspective the relationship between the ECT and EU law is examined, the Tribunal concludes that EU law would prevail over the ECT in case of any material inconsistency.*" As a result, the Tribunal should, in the current proceedings, conclude that Article 26(2)(c) ECT is not a valid offer to arbitrate.

12.4.2 The Tribunal must take the interpretation of EU law by the CJEU into account in its application of applicable rules and principles under Article 26(6) ECT

628. In *Achmea, Komstroy* and *PL Holdings,* discussed above, the CJEU issued a final and binding interpretation of the ECT as international law applicable between EU Member States within the overall framework of the EU Treaties. As the CJEU is exclusively competent

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805 See **Exhibit RL-0068**, Commission v. Ireland Melloni, CJEU, Case C-459/03, ECLI:EU:C:2006:345, Judgment, 30 May 2006, para. 125.

806 See amongst all, **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655; **Exhibit RL-0068**, Commission v. Ireland Melloni, CJEU, Case C-459/03, ECLI:EU:C:2006:345, Judgment, 30 May 2006.

807 **Exhibit RL-0068**, Commission v. Ireland Melloni, CJEU, Case C-459/03, ECLI:EU:C:2006:345, Judgment, 30 May 2006, paras. 125-128.

to rule on matters governed by the EU Treaties and concerning EU subjects, including the intra-EU effect of coinciding international obligations, these rulings should be taken into account by international tribunals.

629. After all, as the *BayWa r.e.* tribunal put it:[808]

> "*For just as the European treaties are part of international law, so the CJEU, which exercises jurisdiction as between EU Member States, is an international court whose decisions are binding on those states inter se. International law allows the states parties to a regime treaty to establish their own international courts with jurisdiction over and authority to bind the Member States on issues of international law affecting them.*"

630. The status of the CJEU as an international court entrusted with the exclusive task to give final and interpretative rulings, has been recognised by other judicial organs, including by courts in the United States.[809]

12.4.3 The relevance of EU Law for the interpretation of Article 26(2) ECT: the decisions in the *Green Power* case

631. The *Green Power* tribunal decided that for the context of Article 26 ECT, not only the entire text of the ECT is relevant, but also:

- Other instruments made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (Article 31(2)(b) VCLT);
- Subsequent agreements and practice (Article 31(3)(a)-(b) VCLT); and

808 **Exhibit RL-0085**, BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 02 December 2019, para. 280.

809 **Exhibit RL-0086**, Ernesto J. Sanchez, 'The European Court of Justice Approves Lawsuits By The European Community Against Cigarette Companies In U.S. Courts' (2006) 10(31) Insights, American Society of International Law.

- Other relevant rules of international law applicable in the relations between the parties (Article 31(3)(c) VCLT).

632. In relation to the first element, at the time of ratification, the EU made a statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter, in which it read that "*the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation*."[810] The *Green Power v. Spain*-Tribunal held that this statement is a clear and unequivocal indication that the EU saw the EU legal system as the natural means of dispute settlement of investor claims, and therefore withheld its unconditional consent to arbitration.[811]

633. The *Green Power* tribunal concluded that the consent to arbitration was not understood to apply in an intra-EU setting for two reasons. First, the fourth paragraph of the statement clearly suggests that the scenario envisaged is a claim by an investor of an ECT Contracting Party which is not an EU Member State. Second, the fifth paragraph of the statement recalls the exclusive role of the CJEU to examine any question relating to the application and interpretation of the EU Treaties and acts adopted thereunder.

634. For the second element, the *Green Power* tribunal considered that all subsequent agreements and subsequent practices must be taken into account for the interpretation and application of Article 26 ECT. In that regard, it used amongst all the Declaration of the EU Commission on behalf of the EU of 20 May 2015 and the Declaration of EU Member States of 15 January 2019 on the legal consequences of *Achmea* to interpret obligations of the ECT (see above). These declarations are equally important in the context of this dispute. In addition, the Netherlands submits that in analogy, this Tribunal may use the Termination Treaty, signed by the Netherlands and Germany to terminate intra-EU BITs, in this context. All three instruments

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810 **Exhibit R-0237**, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, 02 May 2019.

811 **Exhibit RL-0087**, Green Power Partners k/s, SCE Solar Don Benito aps v. Spain, SCC Arbitration V (2016/135), Award, 16 February 2022, para. 360.

specifically address matters of dispute settlement between investors of an EU Member State and EU Member States, precluding an arbitration provision in an international agreement concluded between Member States, and that such a provision should be disapplied or disregarded as of the moment States acceded to the EU.

635. Lastly, Article 31(3)(c) VCLT requires a systemic integration of the provision or the treaty in its wider context of international law applicable in the relations between the parties. The *Green Power* tribunal correctly observed that EU law is therefore relevant for the interpretation of the ECT.

636. Having established the relevance of EU law in determining its jurisdiction under the ECT, the *Green Power* tribunal then relied upon the CJEU's decisions in *Achmea*, *Komstroy* and *PL Holdings* to conclude that Article 26 ECT did not contain a valid standing offer to arbitrate investment disputes between an EU investor and an EU Member State. Jurisdiction was thus denied.

12.4.4 Freedom of States to modify a treaty *inter se*

637. The EU Member States that are Contracting Parties to the ECT have followed and abided by the practice of not applying Article 26(2)(c) ECT in their mutual relations. This practice has resulted in the modification of the effect of that provision as between EU Member States that are Contracting Parties to the ECT. As will be shown, this modification is permitted by international law and compatible with the relevant provisions of the VCLT.

638. As the 'widest and most secure foundation' of the law of treaties[812], the VCLT is characterised by a high degree of flexibility to accommodate variations in State practice and developments in practice. This is reflected in particular in the largely residual nature of the provisions of the VCLT leaving room for States to mold their treaty relations as they deem (most) appropriate provided that certain fundamental principles underlying the law of treaties (such as the integrity of the treaty; legal

812 **Exhibit R-0244**, Yearbook of the International Law Commission, 1962, vol. II, document A/5209, para. 17.

certainty; stability of treaty relations) and overriding legal obligations are respected.[813]

639. As reflected in its Article 41, the VCLT recognises and takes a permissive approach towards the idea that one or more parties to a multilateral treaty may modify that treaty between themselves alone (modifications *inter se*). As the drafting history and commentary to Article 37 – later to become Article 41 – makes clear, the main point of discussion concerned the conditions under which *inter se* modification would be permissible, not the possibility as such.[814] From different provisions of the VCLT it follows that modification by an agreement *inter se* is not permitted in the following situations: a modification that would conflict with obligations of the Member States of the United Nations under the Charter of the United Nations (Article 103 of the UN Charter; Article 30 (1) VCLT); a modification that is explicitly prohibited by the treaty (Article 30 (2) VCLT [815]); a modification of an obligation owed *erga omnes partes* and/or a modification that would affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations (Article 41 (1)(b)(i) VCLT); or a modification of a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole (Article 41 (1)(b)(ii) VCLT). As will be explained below, the present case is not within the scope of any of these situations

640. Modification of a treaty *inter se* may be based on an agreement between one or more parties, as envisaged in Article 41 VCLT, but it can also be based on other sources of international law, particularly subsequent practice or custom *inter se*.[816] It is undisputed and also

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813 **Exhibit RL-0088**, Anthony Aust, Vienna Convention on the Law of Treaties (1969), June 2006, in Anne Peters and Rüdiger Wolfrum(eds), Max Planck Encyclopedia of Public International Law.

814 **Exhibit RL-0089**, ILC Draft Articles on the Law of Treaties with commentaries dated 1966, Article 37, para. 1.

815 **Exhibit RL-0089**, ILC Draft Articles on the Law of Treaties with commentaries dated 1966, Article 26, para. 7.

816 The existence of custom *inter se* has been confirmed by the case law of the International Court of Justice, see **Exhibit RL-0090**, Asylum case (Colombia v. Peru), ICJ, Judgment, 20 November 1950, p. 266 at p. 277; and **Exhibit RL-0091**, Case concerning Right of Passage over Indian Territory (Portugal v. India), ICJ, Judgment, 12 April 1960, p. 6, at pp. 40–43. **Exhibit RL-0092**, Draft conclusions on identification

confirmed by the International Court of Justice (the "**ICJ**") that rules of customary international law may not only be general in nature; regional or local custom that applies only among a limited number of States is also possible.[817] Modification of treaties by subsequent practice had originally been considered by the International Law Commission (the "**ILC**"), but was not taken on board by States in the final draft during the Diplomatic Conference.[818] Also, the ILC had provisionally adopted a paragraph for the modification of a treaty by a new rule of customary law, but after re-examination, decided to dispense with it on the ground that "*modification through the emergence of a new rule of customary law*, […] *would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties to the treaty*" and "[considering] *that the question formed part of the general topic of the relation between customary norms and treaty norms which is too complex for it to be safe to deal only with one aspect of it in the present article*".[819] Modification of a treaty by custom *inter se* falls thus outside the ambit of the VCLT, but is covered by other rules of international law instead.

641. In the case of Article 26 ECT, modification by EU Member States is based on custom *inter se* that is supported by practice and *opinio juris*. The practice of not applying Article 26(2)(c) ECT stems from EU law, including the interpretation thereof by the CJEU in its *Achmea*, *Komstroy* and *PL Holdings* judgments. The CJEU in the *Komstroy* judgment "*concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State*."[820] This interpretation has been consistently confirmed by the EU Member States, in particular in their

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of customary international law with commentaries dated 2018, draft Conclusion 16, para. 1, p. 154.

817 **Exhibit RL-0093**, Dispute regarding navigational and related rights (Costa Rica v. Nicaragua), ICJ, Judgment, 13 July 2009, para. 34.

818 **Exhibit RL-0094**, United Nations Conference on the Law of Treaties, Volume III, Documents of the Conference, Report of the Committee of the Whole, paras. 342-348. See also **Exhibit RL-0095**, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties dated 2018, para. 3 to Draft Conclusion 7.

819 **Exhibit RL-0089**, ILC Draft Articles on the Law of Treaties with commentaries dated 1966, Article 38, para. 3.

820 **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 66.

Declaration of 15 January 2019: "*international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied*." It has also been confirmed in the modernisation process of the ECT where a new Article 24(3) has been introduced that "*clarifies that Articles* […], *26 (Investment dispute settlement)*, […] *shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations.*"[821] All Contracting Parties to the ECT have accepted this practice, as a binding rule, together forming unambiguous articulations of *opinio juris*.

642. The modification *inter se* is not included in an agreement and Article 41 VCLT therefore does not apply, but the elements contained therein support the conclusion that this modification *inter se* by the EU Member States is compatible with international law.

643. First, the modification *inter se* of Article 26 ECT is not explicitly prohibited by the ECT nor does the non-application of Article 26(2) ECT to disputes between an EU Member State and an investor of another EU Member State conflict with their obligations under the UN Charter.

644. Second, as the CJEU held in the *Komstroy* case, and despite the multilateral nature of the ECT, Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties.[822] Article 26 ECT is therefore not an obligation owed *erga omnes partes* precluding any modification thereof. Due to the reciprocal nature of Article 26 ECT, any modification *inter se* does not affect the enjoyment

821 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022.

822 **Exhibit CL-0012**, ECJ, Judgment of 2 September 2021, Komstroy, ECLIEUC2021655, para. 64.

by the other Contracting Parties of their rights under the ECT or the performance of their obligations.

645. Third, the modification *inter se* of Article 26 ECT is neither contrary to the effective execution of the ECT nor to the object and purpose of the ECT as a whole. The purpose of the ECT as set out in its Article 2 is to promote long-term cooperation in the energy field. The judicial protection of investors is guaranteed within the EU legal order through the national courts and the CJEU. No arguments have been put forward [by Claimants] which would suggest that there are any shortcomings with respect to the possibility to acquire legal protection as required under EU law before the national courts of the Netherlands. On the contrary RWE has started legal proceedings before the court in The Hague. This mechanism equally contributes to the effective execution of the ECT and to realise its object and purpose as a whole.

646. Fourth, Article 41(2) VCLT requires the notification of a modification by an agreement *inter se* to the other parties of a multilateral treaty. In this respect, it is relevant to note that such notification serves to provide "further protection" to the other parties[823] and not to protect natural or legal persons under the jurisdiction of the parties modifying a treaty *inter se* and, hence, not Claimants. Furthermore, Claimants and all other Contracting Parties to the ECT are fully aware of the practice *inter se* between EU Member States, including between Germany and the Netherlands, in the application of the ECT in their mutual relations.

647. In conclusion, all the conditions for a modification *inter se* have been met. Modification of the effect of Article 26 ECT as between EU Member States is compatible with international law. Between EU Member States, Article 26(2) ECT has been modified *inter se* through custom and must be disapplied as between the Netherlands and Claimants.

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823 **Exhibit RL-0089**, ILC Draft Articles on the Law of Treaties with commentaries dated 1966, Article 37, para. 3.

12.5 Conclusion

648. Where consent is absent, no jurisdiction may be found. The Netherlands respectfully submits that this Tribunal has no jurisdiction to hear this dispute because the Kingdom of the Netherlands did not extend a binding offer to arbitrate to investors of the Federal Republic of Germany. The principle of the autonomy of EU law is one of constitutional importance in the EU legal order. The autonomy of EU law as explained by the CJEU in consistent case law, prevents application of incompatible treaties within the EU's legal order. This also applies to investor-State arbitration agreements in an intra-EU setting. This became particularly clear since the CJEU issued its *Achmea* judgment, followed by multiple expressions issued after that date instructing future tribunals and investors on the consequences of that ruling. Nevertheless, this is also apparent from the drafting history of the ECT, the declarations issued by the European Commission and the Member States and recently clarified in the agreement in principle on modernisation of the ECT by all 53 ECT Contracting Parties. As such, Claimants knew or should have known when the Coal Act entered into force, and later when they triggered this dispute, that Article 26 ECT is not a valid arbitration agreement. This does not conflict with a peremptory norm of general international law, nor any rights of the other Contracting Parties as all Contracting Parties to the ECT in the context of the modernisation process acknowledge and agree with the clarification. The law of treaties does not preclude EU Member States from following and abiding by that practice as a means of harmonizing their obligations under the EU Treaties and the ECT. This was recently confirmed in the *Green Power v. Spain* ruling and follows from the freedom of states to modify a treaty *inter se*. In other words, Article 26(2)(c) ECT is not a valid offer to arbitrate and is reason for this Tribunal to decline jurisdiction in this particular case.

13 CLAIMANTS' CLAIMS ARE INADMISSIBLE

649. In the event that the Tribunal finds that it has jurisdiction, the Netherlands respectfully raises an objection that Claimants' claims are inadmissible.

650. A claim is inadmissible when it is not ripe or capable of being examined judicially. As was held in *Abaclat v. Argentina*:[824]

> "*Generically, the admissibility conditions relate to the claim, and **whether it is ripe and capable of being examined judicially**, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.*"

651. Similarly, a claim is inadmissible when it is not suitable for adjudication on the merits:[825]

> "***Admissibility deals with the suitability of the claim for adjudication on the merits**.*"

652. Likewise, the tribunal in *Hochtief v. Argentina* emphasised that the admissibility of a claim requires the claim to be ripe and suitable for the proper administration of justice:[826]

> "[T]*he principles governing the admissibility of claims are rooted not only in the notion of a claim that is inherently **ripe** and properly made, but also in the **proper administration of justice**. Admissibility is concerned both with the claim itself and with the arbitral process.*"

653. Moreover, when a tribunal considers a certain claim clearly without merit, it can decide to treat it separately from the other claims as a question of admissibility. This was held by the tribunal in *Occidental v. Ecuador* in relation to claimant's expropriation claim:[827]

> "*A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility.*"

654. Claimants' claims are not suitable for adjudication on the merits. No losses have been incurred by Claimants prior to this arbitration, nor

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824 **Exhibit RL-0096**, Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion on Jurisdiction and Admissibility, 04 August 2011, para. 18.

825 **Exhibit RL-0097**, Zachary Douglas, The International Law of Investment Claims, Cambridge University Press (2009), para. 310.

826 **Exhibit RL-0098**, Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, para. 206.

827 **Exhibit RL-0099**, Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN 3467, Final Award, 01 July 2004, para. 80.

will have been incurred during this arbitration, whereas Claimants allege breaches of the ECT that require the existence of losses (**Section 13.1**). Accordingly, an assessment of Claimants' claims requires unwarranted speculation about exclusively future circumstances (**Section 13.2**).

655. In any event, Claimants' expropriation claim is clearly without merit and should therefore be declared inadmissible (**Section 13.3**).

13.1 No losses could have been incurred before or during this arbitration

656. When Claimants initiated these arbitration proceedings, no losses could have been incurred as a result of the Coal Act, nor could any losses be incurred during this arbitration.

657. First, it is not in dispute that the Coal Act prevents coal-fired electricity generation in Eemshaven not as of 2017, 2019 or today, but only as of 2030. Moreover, the Coal Act does not prevent coal and biomass plants – such as Eemshaven – to continue their operations by generating electricity from biomass, or other fuels, as of 2030.

658. Claimants agree that the Coal Act takes effect for Eemshaven only as of 2030.[828] Accordingly, Claimants' position is that the Coal Act will (future tense) allegedly require Claimants to close their power plant by 2030, on the basis that conversion at any point before 2030 will allegedly not be possible due to a lack of profitability of biomass-fuelled electricity generation:[829]

> "*With the Coal Ban, Eemshaven can no longer burn coal from 1 January 2030. Hence,* ***the plant will have to close by the end of 2029, since NERA finds that it would not be viable to continue operating*** *using only unsubsidised biomass.*"

659. These are exclusively future circumstances that are not capable of causing any loss prior to or pending this arbitration.

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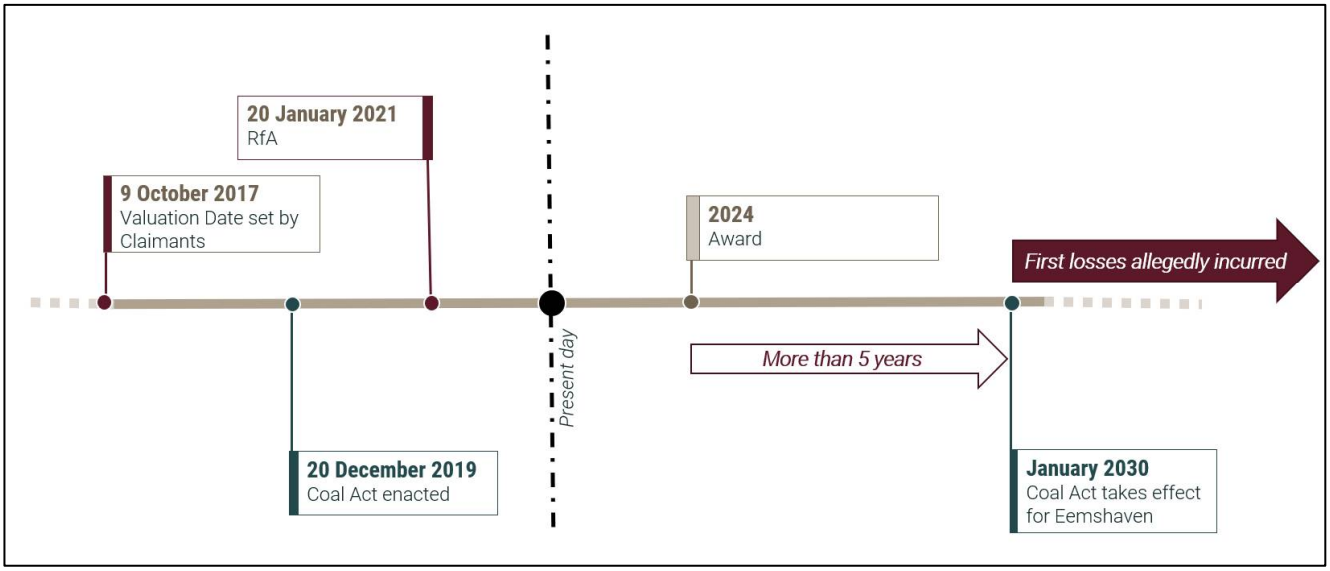
828 Memorial, para. 666: "*Eemshaven may not fire coal from 1 January 2030 onwards*".
829 **Exhibit CER-0002**, Brattle Expert Report, para. 8.

660. Second, Claimants' submissions acknowledge that it is only as of 2030 that Claimants may allegedly incur any losses, in the form of expected income after 2030:

> "*Claimants'* […] *damage arises as a consequence of the early shut down of Eemshaven* ***in 2030*** *due to the Coal Act.*"[830]
>
> "*the* [EUR] *1.4* [billion] *is based on the* ***expected income after 2030****.*"[831]

661. Were the Tribunal to render its Award in 2024 (as is currently scheduled), this would be years before the first appearance of any alleged loss taking place.



13.2 Assessment of Claimants' claims requires unwarranted speculation about exclusively future circumstances

662. Since Claimants' claims pertain to losses that can only be incurred in the period after 2030, they are premised on speculative assumptions about what will allegedly happen years after this arbitration has concluded. Whether Claimants will incur losses after 2030 as a result

830 Memorial, para. 553.
831 **Exhibit** [redacted].

of the Coal Act – and whether a breach of the ECT would occur – is (entirely) dependent on these assumptions.

663. Claimants' claims assume *inter alia* that:

- First, their investment will have been able to operate profitably based on coal until 2030 and beyond, rather than have been forced by adverse market developments to have ceased burning coal before 2030 (in which case no losses would be incurred as of 2030 due to the Coal Act); and

- Second, their investment will not have been able to convert profitably to fully biomass-fuelled electricity generation (or to convert to electricity generation on a different fuel other than coal) at any point before 2030 (in which case no losses would be incurred as of 2030 due to the Coal Act).

664. Consequently, if the claims were admitted, the Tribunal and the Parties are required to speculate about the development of energy markets (including the prices and demand for electricity, coal, CO2, biomass and gas) and the future of coal plants in general, a highly volatile and geo-politically sensitive industry, long after this arbitration has concluded.

665. This exercise would be undertaken not merely to determine quantum – if the Tribunal were to reach that stage – but also to determine whether any ECT breach occurred as a result of the Coal Act.

666. For instance, to establish a breach of Article 13 ECT, Claimants must show that they have been (past tense) substantially deprived of their investment – at the very least when the Tribunal examines the merits of the claim. The same applies to the allegation that no fair and equitable treatment was granted (Article 10 ECT). As held by the tribunal in *Rompetrol v. Romania*:[832]

> "*The final preliminary matter to be dealt with* […] *is* […] ***whether damage is an essential element of the kind of claims for***

832 **Exhibit RL-0101**, The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 06 May 2013, paras. 187-190.

> ***breach** advanced in this case.* [a breach of the FET standard in Article 3 of the 1995 Netherlands-Romania BIT]
>
> […]
>
> [T]*he Tribunal is in no doubt that those provisions have principally in mind 'disputes' over* ***breaches which occasion actual (and therefore assessable) loss*** *or damage to the investor. As a matter of law, though, it remains the case that breaches of that kind of obligation under an investment treaty may give rise to claims for relief of different kinds: for example for the cessation of host State measures against an investor, or for the re-instatement of a status quo ante, or (if the circumstances were appropriate) for a bare declaration of breach.* ***To the extent,*** *however,* ***that a claimant chooses to put its claim*** *(as in the present Arbitration)* ***in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach***."

667. This implies a significant risk of determinations that will likely turn out to be incompatible (in whole or in part) with the reality as it exists in 2030 and beyond. This can be seen from the fact that the assumptions on which Claimants' claims are premised are already doubtful if only presently available evidence is taken into account. This uncertainty is compounded if, as would be required, the Tribunal and the Parties were to attempt to ascertain what would materialise years after this arbitration has concluded.

668. The first assumption – that Claimants can operate profitably by burning coal in the period until 2030 – cannot be made on present evidence. Claimants' investment was troubled by profitability issues from the start. When Eemshaven started producing electricity in 2016, it recorded repeated losses every year prior to the adoption of the Coal Act.[833] Its future prospects going forward remain bleak. According to Claimants' experts, it is [redacted] that Eemshaven cannot run profitably on coal and will have to cease operations before the Coal Act takes effect in 2030.

833 See Sub-section 4.3.

669. Brattle have conducted a probabilistic analysis based on one hundred simulations that are supposed to represent the totality of the most probable market developments over the technical lifespan of the Eemshaven.[834] The result of this exercise is displayed in the figure below taken from the Brattle Report:[835]

670. Brattle's exercise reveals that in [redacted] of the 100 potential outcomes (each outcome being "*equally likely to occur*"[836]), Claimants will incur no losses, or negative damages. This is because market conditions will render the burning of coal loss-making before 2030. This finding is described by Brattle in their report submitted in the Dutch proceedings as follows:

> "***There are approximately [redacted] price paths*** [out of a 100] ***where there are either no, or slightly negative damages*** *i.e. there is no loss in value between the but-for and actual cases or the FMV is slightly higher in the actual case.* ***These cases arise where it is unprofitable for the plant to continue operations after 2030 or shortly thereafter****, and the unexpected closure prevents Eemshaven from implementing the cost minimising*

834 **Exhibit CER-0002**, Brattle Expert Report, para. 11.
835 **Exhibit CER-0002**, Brattle Expert Report, Figure 15, Sorted Distribution of the Loss in Value of Eemshaven Due to the Coal Ban.
836 **Exhibit CER-0002**, Brattle Expert Report, paras. 14 and 228.

strategies it is able to employ in the planned closure under the Coal Ban."[837]

671. In [redacted] of 100 cases,[838] this will, in turn, lead to Eemshaven's shutdown before 2030 to avoid further losses.[839] Consequently, according to Claimants' experts the [redacted] is that Eemshaven will cease operations before 2030, that is before the Coal Act takes effect for Eemshaven, for commercial reasons unrelated to the Coal Act.

672. The second assumption – that as of 2030 Eemshaven (provided it is still in business) will not be able to generate electricity profitably with fuels other than coal – cannot be made either.

673. Claimants have publicly stated to shareholders that they intend to continue generating electricity in Eemshaven after 2030, and they are well underway in the process of converting Eemshaven to full biomass use (see Section 9.1).

674. Moreover, Compass explain that on the basis of the data relied on by Brattle, converting to full biomass use could be economically viable. Applying Brattle's set of assumptions and calculation method to

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837 **Exhibit R-0245**, Dan Harris and Serena Hesmondhalgh, Expert Report: Damage Caused to Eemshaven by the Coal Ban, Brattle First Eemshaven Report (Dutch Proceedings), Brattle Group, 19 February 2021, para. 207. This explanation is in the Report submitted in the Dutch proceedings. The Brattle Report presented in the Dutch proceedings is nearly identical to the one presented in this arbitration. Curiously enough, however, this helpful explanation was removed from the Report prepared by Brattle for the arbitration: **Exhibit R-0003**, Redline of first Brattle report submitted in the Dutch Proceedings against the Brattle report submitted in the arbitration, 18 December 2021, p. 104 (pdf).

838 **Exhibit CER-0002**, Brattle Expert Report, Harris-Hesmondhalgh Workpapers, Tables H, Tab H2. See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 68.

839 This is established based on the "shut-down rule" used by Brattle, according to which, Eemshaven will close after two years of cash losses in the but-for case if it expects that it will also make losses in the next year. In the actual scenario, Brattle shortened the shut-down rule by one year. That is, if Eemshaven makes losses in one year and expects to make losses in the next year, it closes. **Exhibit CER-0002**, Brattle Expert Report, paras. 194-198. See also **Exhibit R-0245**, Dan Harris and Serena Hesmondhalgh, Expert Report: Damage Caused to Eemshaven by the Coal Ban, Brattle First Eemshaven Report (Dutch Proceedings), Brattle Group, 19 February 2021, para. 207.

biomass conversion,[840] Compass explain that conversion to biomass would be profitable in [redacted] of Brattle's post-2030 scenarios:[841]

675. The figure above shows that, using Brattle's evidence, in [redacted] of [redacted][842] scenarios where Eemshaven is still in business by 2030 according to Brattle's calculations, a conversion to biomass would be profitable.[843]

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840 Compass explain that for the purpose of this assessment, "[g]*iven that the possibility to convert Eemshaven to burn biomass would mean that the plant could run until 2054, for this sensitivity we assume in the Actual scenario the same closure decision criteria than Brattle do in the But-for scenario, and the corresponding impact of the closure decision on additional modelling assumptions*": **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, footnote 95.

841 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Figure V and para. 108.

842 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 108.

843 In some of those scenarios, biomass-based electricity generation is even more profitable than coal-based electricity generation: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Figure V. At the same time, Claimants' allegation (as also set out in the NERA Report) that in October 2017 (or in 2021) Eemshaven could not be profitably converted to full biomass use is disputed, but also beside the point. If the Coal Act goes into effect in 2030, it is only relevant whether in 2030 Eemshaven can operate fully on biomass (or on any fuel other than coal).

676. In other words, there is [redacted] possibility that (i) Eemshaven would still be in business in 2030 as a coal plant; and (ii) it will not be able to generate profits after 2030, because it will not be able to profitably convert to biomass. The [redacted] shows that, in the scenarios where Eemshaven is still in business by 2030, a conversion is likely profitable and Claimants' statements to the contrary fail as explained further in Sub-section 18.3.4.

677. Accordingly, Claimants' assumptions cannot be verified using [redacted]. An assessment of what would materialise years after this arbitration has concluded is even more speculative. Any allegations of loss should be assessed when such losses have actually occurred, with a case-file containing data at that point, rather than assumptions. The Netherlands' compliance or non-compliance with the ECT cannot be contingent on speculations about the future.

678. Moreover, there is no need or justification for such speculation. If – in 2030 – Claimants still have an investment and suffer a substantial deprivation of its value as a result of the Coal Act amounting to a breach of the ECT, Claimants may seek to commence an arbitration at that time and seek compensation for losses then. At present, however, Claimants' claims are not ripe or suitable for adjudication and, hence, inadmissible.

13.3 In any event, Claimants' expropriation claim is evidently without merit and therefore inadmissible

679. It follows from the above that the case put forward by Claimants should be declared inadmissible in its entirety. Should the Tribunal however decide otherwise, the expropriation claim should nonetheless be treated separately and declared – as it is clearly without merit – inadmissible.

680. The Parties agree that "[i]*t is evident that no formal expropriation has taken place*".[844] It is undisputed that Claimants remain in full control of

[844] Memorial, para. 456.

Eemshaven. It is also undisputed that Eemshaven continues to operate without any hindrance and produce electricity as usual, and will continue to do so at least until the end of 2029. At the same time, in light of the ongoing geo-political circumstances, Eemshaven is currently yielding high profits to Claimants.[845] It cannot therefore be seriously questioned that as of today Eemshaven has not been expropriated.

681. Likewise, Claimants do not dispute that as of 2030, they will continue to remain in control of Eemshaven. In addition, both before and after the announcement of the 2017 Coalition Agreement, and up until today, Claimants have repeatedly indicated to public authorities, media outlets and shareholders that they intend to continue to use Eemshaven as a biomass-fired power plant.[846] On this basis, even fast-forwarding to 2030, there is no reasonable indication that any expropriation of Eemshaven will take place.

682. Moreover, not only will Claimants remain fully in control of an operating plant also after 2030, their investment will also retain its value.

683. Claimants' expropriation claim is advanced on the basis of a calculation of loss in value put forward by their damages experts, Brattle. According to Brattle, who looked at projected cash flows at the date of valuation, the fair market value (the "**FMV**") of Eemshaven on 9 October 2017 – Brattle's chosen valuation date for the purpose of quantum – was EUR [redacted] million absent the Coal Act and EUR [redacted] taking into account the impact of the Coal Act.[847] On this basis, Claimants submit that they have been substantially deprived of their investment, having allegedly lost more than [redacted] of its value due to the Coal Act.[848] This approach is, however, flawed and misleading.

684. First, the suggestion that Eemshaven lost [redacted] of its value due to the Coal Act is not only wrong as a matter of quantum (see Chapter 18 of

845 **Exhibit R-0246**, RWE, Interim Report, H1 2022.
846 See Section 9.1.
847 **Exhibit CER-0002**, Brattle Expert Report, para. 14. See also para. 7.
848 Memorial, paras. 467-468 and 633.

this Counter-Memorial and the Compass Report), but also methodologically inapposite in the determination of liability.

685. Brattle calculated Eemshaven's loss of value on the basis of an *ex ante* approach comparing two cash flow projections at the chosen valuation date. This, however, is not a reasonable basis to determine whether an actual expropriation has taken place.

686. As indicated above, today's reality shows that Eemshaven is fully operational and providing Claimants with profits. This evidence cannot be ignored – let alone replaced by a 2017 cash flow projection – in the assessment of whether Eemshaven has substantially lost its value and/or has been subject to indirect expropriation. Claimants have equally failed to provide any justification why the Tribunal should ignore the existing data for the purposes of establishing liability.

687. Second, Brattle's calculations are based on an instruction to ignore all value arising from a potential conversion to biomass, i.e., to assume that "*the Coal Act will lead to the closure of Eemshaven at the end of 2029*".[849] In other words, Claimants – and, by extension, the Brattle Report – ignore the possibility of Eemshaven to fire 100% biomass or to other alternative use. Accordingly, Brattle's valuations disregard any value Eemshaven will have after 2030.

688. This is without basis. Claimants have repeatedly expressed their intentions to convert Eemshaven into a biomass-fired power plant, even before the adoption of the Coal Act.[850] The value of the possibility of converting Eemshaven to biomass should be taken into account when assessing the alleged value decrease – not only for the purpose of quantum (see Sub-section 18.3.4), but also for the purpose of assessing liability. It is therefore illogical to purposely ignore this fact, also in light of the transitional period granted under the Coal Act, during which Claimants could realise such conversion.[851]

849 **Exhibit CER-0002**, Brattle Expert Report, para. 2(c).
850 See Section 9.1.
851 See Section 7.3.

689. Brattle's assessment is therefore of no use in matters of liability and does not provide substantiation to Claimants' indirect expropriation allegation.

690. Third, Claimants do not provide any actual evidence concerning the substantial deprivation of value allegedly suffered. Eemshaven's alleged loss in FMV is not recorded anywhere in Claimants' financial documents, nor have Claimants taken an impairment due to the alleged impact of the Coal Act on their profitability.[852]

691. On the basis of the above, the Netherlands submits that Claimants' expropriation claim is clearly without merit and should therefore be declared inadmissible.

692. In conclusion, the Netherlands respectfully requests the Tribunal to declare the claims put forward by Claimants as inadmissible. Claimants' claims are not ripe, nor suitable for adjudication. Claimants have not incurred any losses as a result of the Coal Act prior to this arbitration, nor will they incur losses as a result of the Coal Act during this arbitration. Moreover, Claimants' claims are premised on speculative assumptions about what will allegedly happen in the future, years after this arbitration has concluded. Whether Claimants will incur losses after 2030 as a result of the Coal Act – and whether a breach of the ECT would occur – is (entirely) dependent on these assumptions. Such speculation about exclusively future circumstances is unjustified and unwarranted. The Netherlands compliance or non-compliance with the ECT cannot be contingent on speculations about the future.

693. In addition, Claimants' expropriation claim should be declared inadmissible as it is entirely without merit. Eemshaven still has significant value. Claimants remain – and will remain – in full control of an operating plant, which continues to yield profits to them. At the same time, Claimants have repeatedly publicly indicated that they intend to continue to use Eemshaven as a biomass-fired power plant, even prior to the adoption of the Coal Act. There is therefore no

852 See in more detail in Sub-section 18.3.5.1 of this Counter-Memorial and **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 161 and 164.

indication that any expropriation of Eemshaven has taken place as a result of the adoption of the Coal Act, as alleged by Claimants.

PART H: THE NETHERLANDS HAD THE RIGHT TO PASS THE COAL ACT

14 THE NETHERLANDS' RIGHT TO REGULATE

694. The passing of the Coal Act falls within the Netherlands' right to regulate.

695. The right to regulate is a principle of public international law that entails that a State may prescribe – and amend – laws within its territory to protect public interests, such as public welfare and the environment (**Section 14.1**).

696. The right of States to prescribe and amend laws is also established in the context of international investment law. International investment law recognises that States, in the exercise of the right to regulate, will have to balance different and possibly competing interests. The outcome of that balancing exercise is accorded deference when reviewed (**Section 14.2**).

697. The ECT similarly reflects that Contracting Parties, in the exercise of their right to regulate, will have to balance different interests, including environmental interests (**Section 14.3**).

14.1 The right to regulate under general international law

698. The international legal principle of State sovereignty forms the basis of a State's right to regulate. Together with the principle of equality, sovereignty constitutes one of the basic principles of international law reflected in Article 2 UN Charter.[853]

699. The right to regulate is an expression of a State's exclusive territorial sovereignty. It includes the right to prescribe the laws that set the boundaries of the public order of the State. It also includes the State's right to make changes to existing laws.

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853 **Exhibit RL-0102**, Charter of the United Nations, 26 June 1945, among others, Article 2(1): "*The Organization is based on the principle of the sovereign equality of all its Members.*"

700. In principle a State is free to choose its methods for achieving its regulatory objectives. Under international law a State has the right to freely choose and develop its economic, political, social and cultural systems. For example, the Charter of Economic Rights and Duties of States adopted by UN General Assembly Resolution 3281 in 1974 provides in Article 1 that:[854]

> "*Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever*."

701. Article 2 Charter of Economic Rights and Duties of States also includes the right of a State to regulate foreign investment. Article 2(2)(a) in particular states that:[855]

> "*Each state has the right: (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities* […]."

702. Decisions of the ICJ also recognise a State's right to regulate as an expression of State sovereignty. The ICJ held in *Nicaragua v. The United States of America* that:[856]

> "*A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic, and social systems.*"

14.2 The right to regulate in international investment law

703. The right to regulate is not only an established concept under general international law, but also in the context of international investment

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854 **Exhibit RL-0103**, Charter of Economic Rights and Duties of States, 12 December 1974, Article 1.

855 **Exhibit RL-0103**, Charter of Economic Rights and Duties of States, 12 December 1974, Article 2.

856 **Exhibit RL-0104**, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ, Judgment, 27 June 1986, para. 258.

law. It is codified, among other investment treaties, in the Netherlands Model BIT of 2019[857] and in the ECT modernisation.[858]

704. As part of the modernisation of the ECT it has also been reaffirmed that Contracting Parties to the ECT have the right to regulate vis-à-vis investments and investors within the meaning of the ECT in the interest of legitimate public policy objectives. Such objectives "*may include the protection of the environment, including climate change mitigation and adaptation*".[859] The ECT modernisation recognised the "*urgent need to effectively combat climate change*" and reaffirmed "*the respective rights and obligations of the Contracting Parties under* […] *the UNFCCC* [and] *the Paris Agreement*".[860]

705. Moreover, investment tribunals have consistently affirmed a State's right to amend its laws, regardless of an express codification of that principle in the relevant investment treaty. The tribunal in *OOO Manolium v. Belarus* held that the right to regulate is inherent to a State's sovereignty:[861]

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857 See **Exhibit RL-0105**, Netherlands Model BIT of 2019, 22 July 2019, Article 2(2) "*The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons."*. Eminent scholars have welcomed the inclusion of the right to regulate in the new Netherlands Model BIT, see **Exhibit RL-0106**, Dr. Yulia Levashova LL.M. and Dr. Tineke Lambooy LL.M., Position paper on the Dutch Model Investment Agreement, 28 January 2019 who argue the inclusion "*constitutes a strong sign that, in the opinion of the contracting states, the role of tribunals in solving any future international investment disputes is to balance the host state's public interests with the interests of the investor when interpreting and applying the provisions of the applicable investment agreement*."

858 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 5. See also for example the investment treaty between Canada and the EU: **Exhibit RL-0107**, Comprehensive Economic and Trade Agreement (CETA), 30 October 2016, Article 8.9(1) "*For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.*"

859 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 5.

860 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 6.

861 **Exhibit RL-0108**, OOO Manolium-Processing v. The Republic of Belarus, PCA Case No. 2018-06, UNCITRAL, Final Award, 22 June 2021, para. 424.

> "*States are sovereign, and sovereignty implies the right to regulate the general welfare.*"

706. Similarly, the tribunal in *Parkerings v. Lithuania* held that a State has an undeniable right to modify laws at its own discretion:[862]

> *"It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion."*

707. Tribunals have further emphasised that investment treaties are not a bar to a State's right to regulate and amend its laws. As the tribunal in *Invesmart v. Czech Republic* concluded:[863]

> *"International investment treaties were never intended to do away with their signatories' right to regulate."*

708. Accordingly, investment treaties do not freeze a State's laws, or dispose of the State's right to amend its laws.[864] As the tribunal in *Micula v. Romania* held:[865]

> "*The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to legitimate expectation of stability.*"

709. Rather, investment treaties merely preclude an exercise of a State's right to regulate that is *improper*. This includes situations where the exercise of the right to regulate is manifestly arbitrary, discriminatory on wrongful grounds, or done in bad faith.

710. When exercising its right to regulate, a State has to balance different and often competing interests. The State's identification and relative weighing of each of the different interests involved forms the core of the State's right to regulate. Accordingly, investment tribunals give

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862 **Exhibit RL-0109**, Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

863 **Exhibit RL-0110**, Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009, para. 498.

864 **Exhibit CL-0103**, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, para. 261, finding that the existence of an investment treaty "*does not mean the freezing of the legal system or the disappearance of the regulatory power of the State.*"

865 **Exhibit RL-0111**, Ioan Micula and Others v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 666.

deference to the State when reviewing decisions that fall within the right to regulate.

711. Thus, the tribunal in *Electrabel v. Hungary* held that it is not appropriate for an investment tribunal "*to second-guess a State's decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances,* ***balancing different and competing factors***."[866]

712. Similarly, for the tribunal in *Philip Morris v. Uruguay*, investment tribunals should pay "*great deference*" to governmental judgments of national needs in matters such as the protection of public health (and, as the Netherlands submits, the environment).[867] The tribunal also affirmed that there is a "*margin of appreciation*" granted to States' regulatory decisions, that is not limited to the context of the ECHR but that "*applies equally to claims arising under BITs*",[868] at least in contexts such as public health.

713. Similarly, the tribunal in *Urbaser v. Argentina* referred to "*the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*."[869]

714. The right to regulate and the related margin of appreciation that is granted to States is not a 'carte blanche', as Claimants allege.[870] States may not exercise their right to regulate improperly, which they do if they act manifestly arbitrarily, discriminate on wrongful grounds or act in bad faith when balancing the different interests involved.

715. The Coal Act was adopted in the exercise of the Netherlands' right to regulate, following an extensive legislative process, that involved a weighing of the different interests involved at multiple stages. The

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866 **Exhibit RL-0112**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 181.

867 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 399.

868 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 399.

869 **Exhibit RL-0113**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016, para. 594.

870 Memorial, para. 478.

process included (i) a consideration of the interests of stakeholders (including Claimants) and the general public in the context of a consultation process; (ii) a review of the Coal Act's compliance with EU law and international law (including the ECHR and the ECT) by an independent body (the Council of State); (iii) a detailed description as to how the Government had weighed the different interests in the Explanatory Memorandum and other parliamentary (and publicly available) documents; and (iv) a debate within the House of Representatives and subsequently the Senate where the Government's weighing of interests was reviewed by elected representatives. In addition, the Coal Act provides for the possibility to grant compensation should the Act lead to an individual and excessive burden.

14.3 The balancing of interests that Contracting Parties undertake is reflected in the ECT

716. The ECT recognises Contracting Parties' right to regulate as a balancing exercise performed between different interests, including environmental interests.

717. This is reflected in the objective of environmental protection recorded in the preamble (**Sub-section 14.3.1**), Article 2 (**Sub-section 14.3.2**), Article 19 and the principles embedded therein (**Sub-section 14.3.3**) and Article 24 (**Sub-section 14.3.4**). This objective must be taken into account when interpreting and applying the ECT, as tribunals have similarly held.

14.3.1 Preamble

718. Article 31 VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. The preamble is part of the context of the treaty.[871]

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871 **Exhibit CL-0013**, Vienna Convention on the Law of Treaties, Article 31(2): "*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text,* ***including its preamble*** *and annexes* […]".

719. The preamble to the ECT reflects the intention of the Contracting States to strengthen their cooperation in the field of energy, but also to balance this with environmental concerns and international environmental obligations.

720. Specifically, the preamble refers to the increasingly urgent need for measures to protect the environment and recalls several international environmental agreements, including the UNFCCC:

> "*Recalling **the United Nations Framework Convention on Climate Change**, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and*
>
> *Recognizing the **increasingly urgent need for measures to protect the environment**, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes*".

721. The preamble thus confirms that investments in the energy sector under the ECT are made in the context of (i) the "*increasingly urgent need"* for ECT Contracting Parties to adopt *"measures to protect the environment*" and (ii) treaties concluded by ECT Contracting States that contain important climate change objectives, such as the UNFCCC.

722. The modernisation of the ECT reflects the same. Thus, the "*Contracting Parties recognised the **urgent need to effectively combat climate change***" and "*reaffirm the respective rights and obligations of the Contracting Parties under multilateral environmental and labour agreements, such as **the UNFCCC**, the **Paris Agreement** and ILO fundamental conventions, as relevant for the energy sector*".[872]

14.3.2 Article 2 ECT and the European Energy Charter

723. Article 2 ECT provides that the ECT establishes a legal framework for the energy field "*in accordance with the objectives and principles of*

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872 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 6.

the [European Energy] *Charter*". Environmental protection is among the objectives of the European Energy Charter.

724. The preamble to the European Energy Charter highlights "*the signatories' common interest in problems of energy supply, safety of industrial plants, particularly nuclear facilities, and environmental protection*" and the aim "*to utilise fully the potential for environmental improvement, in moving towards sustainable development*". One of the objectives specifically mentioned in Title I: Objectives is "*Energy efficiency and environmental protection*".

725. By referring to the objectives of the European Energy Charter, these same objectives – including environmental protection – were recognised as a relevant object and purpose of the ECT as well.[873]

14.3.3 Article 19 ECT

726. Article 19 ECT similarly reflects that environmental protection is part of the balancing exercise that Contracting Parties have to undertake. The provision stipulates that Contracting Parties must minimise the harmful environmental impact of energy production in their territories:

> "***In pursuit of sustainable development*** *and taking into account its obligations under those international agreements concerning the environment to which it is party,* ***each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts*** *occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety.*"

727. Article 19 ECT has been referred to in arbitral decisions.

728. For instance, in *Eiser v. Spain* the tribunal in explaining the objective of the ECT referred to Article 19(1) ECT. It emphasised that the ECT's focus "*on developing secure long-term energy cooperation is coupled*

873 See **Exhibit CL-0023**, Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37, Award, para. 398, in which the tribunal held that "[i]*n view of the express reference of Article 2 of the ECT to the European Energy Charter, the Tribunal considers this document, notably its preamble and its "Title 1: Objectives:* […] *to be* ***relevant to enlighten the ECT's object and purpose***."

with provisions addressing the environmental aspects of energy development".[874]

729. In *Stadtwerke München v. Spain*, the tribunal mentioned Article 19 ECT when providing background for the case concerning the revocation of incentives for renewable energy producers. The tribunal mentioned the UNFCCC which contains the international commitments of States to reduce climate change, and the EU Directive 2001/77/EC of the European Parliament and of the Council on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market. In this respect, the tribunal emphasised the objectives of the ECT by referring to the preamble, Article 2 ECT and Article 19 ECT. The tribunal stated that Article 19:[875]

> "*set out various general obligations with respect to the environment, including that the Contracting Parties shall "…have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution…".*"

730. Additionally, Article 19 ECT provides for two fundamental principles of international environmental law: the precautionary principle (see paras. 731 - 735 below) and the 'polluter pays' principle (see paras. 736 - 741 below).

The precautionary principle

731. Article 19(1) ECT provides that States "*shall strive to take precautionary measures to prevent or minimise environmental degradation*".

732. The precautionary principle is an environmental law principle that is based upon the notion that States have a duty to implement preventive

874 **Exhibit CL-0007**, Eiser Infrastructure Limited et al. v. Spain, ICSID Case No. ARB13/36, Award, para. 100.

875 **Exhibit CL-0061**, Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, para. 53.

measures to protect the environment, including in the event of scientific uncertainty over the likelihood of environmental harm.[876]

733. Principle 15 Rio Declaration contains the most authoritative definition of the precautionary principle. Principle 15 states:

> "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*"

734. This principle is reflected in numerous international instruments, including the UNFCCC. [877] There is strong evidence that the precautionary principle has developed into a customary international law principle.

735. The precautionary principle was also applied in the recent investment arbitration cases, including *Eco Oro v. Colombia*. In examining the proportionality of Colombia's measures in relation to its objective of protecting an important environmental site, the tribunal stated:[878]

> "[T]*he precautionary principle is clearly relevant when considering the effect and proportionality of the measures with respect to the protection of the páramos."*
>
> *"Whilst Eco Oro says that the precautionary principle is not applicable, it seems to the Tribunal that this is precisely the circumstance in which this principle −as for example reflected in the preamble to the 1992 Biodiversity Convention and set*

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876 **Exhibit RL-0114**, Jacqueline Peel, 'Chapter 18: Precaution' in Lavanya Rajamani, J. Peel (eds), The Oxford Handbook of International Environmental Law (2nd Edn) OUP (2021), Chapter 18, pp. 316-318.

877 E.g., **Exhibit RL-0115**, Law of the Sea Convention 1982, **Exhibit RL-0116**, Ozone Lazyer Convention 1985 and its Montreal Protocol 1987, **Exhibit RL-0117**, 1991 ECE Convention on Environmental Impact Assessment, **Exhibit RL-0118**, Biodiversity Convention 1992, **Exhibit RL-0119**, 1996 Protocol to the London Dumping Convention, **Exhibit RL-0120**, 1994 Convention to Combat Desertification, **Exhibit RL-0121**, Regulations on prospecting and exploration for polymetallic sulphides in the Area, **Exhibit RL-0061**, Treaty on the Functioning of the European Union, 26 October 2012, **Exhibit RL-0031**, United Nations Framework Convention on Climate Change, 14 June 1992 and the **Exhibit CL-0002**, Energy Charter Treaty.

878 **Exhibit RL-0122**, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, para. 654.

> *out in Principle 15 of the Rio Declaration on Environment and Development− does apply*."

The 'polluter pays' principle

736. In addition, Article 19 ECT provides "*that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution*."

737. The PPP is defined as "*an economic policy for allocating the costs of pollution or environmental damage borne by public authorities*" that involves "*implications for the development of international and national law on liability for damage*".[879] The application of the PPP has two dimensions. First, polluters bear the costs of their pollution, including the cost of measures to prevent, control and remedy pollution. They are therefore encouraged to search for a more efficient internalisation of costs through the development of the environmentally friendly practices. Second, the polluter will be liable for environmental damage, when caused.[880]

738. The PPP originated from a series of recommendations issued by the OECD in the period 1970-1989.[881] The PPP received full international recognition in 1972, when it was incorporated into the Rio Declaration.

739. Principle 16 Rio Declaration refers to the PPP in the following manner:

> "*National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*."

879 **Exhibit RL-0123**, Patricia Birnie, Alan Boyle and Catherine Redgwell, International Law and the Environment (3rd edn) OUP (2009), p. 322.

880 **Exhibit RL-0124**, European Court of Auditors, Special Report: The Polluter Pays Principle: Inconsistent Application across EU Environmental Policies and Actions, 01 January 2021.

881 E.g., **Exhibit RL-0125**, OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects on Environmental Policies, 26 May 1972; **Exhibit RL-0126**, OECD, Recommendation of the Council on the Implementation of the Polluter-Pays Principle, 14 November 1974.

740. The same definition, or a definition similar to Principle 16, has been included in numerous treaties.[882] The TFEU also refers to the PPP in Article 191[883] and is one of the key EU environmental policy principles guiding EU legislation.[884] The implementation of the PPP among EU Member States is dependent upon national authorities, that can choose between different schemes, such as liability laws, taxation, charges, emission limit values and licensing procedures.[885]

741. The PPP and the principle relating to the prevention of transboundary harm were first articulated in the *Trail Smelter* arbitration case. In this case the tribunal asserted the now accepted rule of international law[886] that State sovereignty over natural resources is subject to certain environmental obligations of States to guarantee that activities occurring within their jurisdiction do not cause damage to other States. The PPP has also formed the basis for the creation of liability regimes on the basis of strict liability.[887]

14.3.4 Article 24 ECT

742. Article 24(2)(i) ECT includes general exceptions concerning measures "*necessary to protect human, animal or plant life or health*." The exceptions referred to in Article 24(2)(i) ECT were modelled after

882 For example, **Exhibit CL-0002**, Energy Charter Treaty; **Exhibit RL-0127**, 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic; **Exhibit RL-0119**, 1996 Protocol to the London Dumping Convention, and **Exhibit RL-0128**, 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

883 **Exhibit RL-0061**, Treaty on the Functioning of the European Union, 26 October 2012, Title XX Environment, Article 191.

884 **Exhibit RL-0049**, Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), 24 November 2010; **Exhibit RL-0129**, Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives. **Exhibit RL-0130**, Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, 21 April 2004.

885 **Exhibit RL-0124**, European Court of Auditors, Special Report: The Polluter Pays Principle: Inconsistent Application across EU Environmental Policies and Actions, 01 January 2021, p. 9.

886 **Exhibit RL-0131**, Trail Smelter (United States v. Canada), Arbitral Decision, 18 March 1941.

887 **Exhibit RL-0132**, The Draft Principles on Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities of the International Law Commission dated 2006.

Article XX of the 1994 GATT. As a result, States may justify taking measures necessary to pursue their climate policies.

743. In *RWE Innogy v. Spain* the tribunal made several observations regarding Article 24(2)(i) ECT. First, the tribunal considered Article 24(2) ECT to be "*of importance"* and part of the relevant context when interpreting the ECT. Second, the tribunal mentioned that the drafters of Article 24(2) ECT took "*Article XX GATT as their starting point, and the doctrine and cases with respect to Article XX may shed light on the intention behind Article 24(2).*" Third, in respect of the interpretation of the FET standard, the tribunal noted that "*Article 24(2) ECT militates against any expansive concept of [the] FET standard under Article 10(1).*"[888]

744. The tribunal considered that in a situation where a regulation is adopted to protect human life, in the sense of Article 24(2) ECT, it would not be regarded "*as unfair and inequitable unless it was arbitrary or discriminatory or in some other way contrary to customary international law*."[889]

745. In sum, the right to regulate is a principle of public international law that includes that a State may prescribe – and amend – laws within its territory to protect public interests, such as public welfare and the environment. This is also well recognised in the context of international investment law. The exercise of the right to regulate is not a blanket exception. States have to balance different and possibly competing interests. In doing so, they cannot act manifestly arbitrarily, discriminate on wrongful grounds or act in bad faith. As outlined above, the ECT reflects on a general level that Contracting Parties, in the exercise of their right to regulate, will have to balance different interests, including environmental interests. This balance is also included in the substantive standards of the ECT, as set out in Chapters 15 and 16.

888 **Exhibit RL-0133**, RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Award, 18 December 2020, paras. 445-447.

889 **Exhibit RL-0133**, RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Award, 18 December 2020, para. 446.

15 THE NETHERLANDS DID NOT BREACH ARTICLE 13 ECT BY ADOPTING THE COAL ACT

746. Pursuant to Article 13(1) ECT:

> "*Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:*
>
> *(a) for a purpose which is in the public interest;*
> *(b) not discriminatory;*
> *(c) carried out under due process of law; and*
> *(d) accompanied by the payment of prompt, adequate and effective compensation.*"

747. The Parties agree that "[i]*t is evident that no formal expropriation has taken place*".[890] Indeed, following the adoption of the Coal Act, Claimants are and remain in ownership and possession of Eemshaven and the Environmental Permit. Moreover, Eemshaven continues to operate and generate profit. Accordingly, the Parties agree that the Coal Act does not amount to an expropriation.[891]

748. The Coal Act does not amount to indirect expropriation – i.e., "*a measure or measures having effect equivalent to nationalisation or expropriation*" – either.

749. Rather, the adoption of the Coal Act complies with Article 13 ECT. First, the Coal Act is a valid exercise of the Netherlands' police powers for the protection of general welfare (**Section 15.1**). Second, the Coal Act did not have an effect equivalent to expropriation (**Section 15.2**).

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890 Memorial, para. 456.
891 "*Claimants are still in ownership and possession of Eemshaven and the permits*." Memorial, para. 456.

15.1 The Coal Act is a valid exercise of the Netherlands' police powers and therefore no expropriation took place

750. The right to regulate described in Chapter 14 is reflected in the police powers doctrine, which Claimants acknowledge.[892] The police powers doctrine is a customary international law concept originating from the principle of State sovereignty.

751. Under the police powers doctrine, a State measure resulting in economic loss to an investor, but which falls within the State's regulatory ambit, will not qualify as an indirect expropriation and will not give rise to the obligation to pay compensation.

752. In the words of the Iran-US Claims Tribunal, it is an "*accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide regulation within the accepted police power of States*".[893]

753. The customary international law basis of the police power doctrine means that it can be invoked in an investment arbitration even if it is not expressly referred to in the applicable investment treaty.[894] Article 31(3)(c) VCLT requires that treaty provisions be interpreted in the light of any relevant rules of international law applicable to the relations between the parties. This includes customary international law.

754. A number of investment arbitration tribunals have expressly referred to the customary international law status of the police powers doctrine,[895] or have done so implicitly by applying the police powers

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892 Claimants have similarly recognised its existence. Memorial, para. 476: "*The limits of the **state's regulatory power (which as such is undisputed**) is to be found* […]." See also para. 479.

893 **Exhibit RL-0134**, Sedco, Inc. v. National Iranian Oil Company and the Islamic Republic of Iran, IUSCT Case Nos. 128 and 129, Interlocutory Award, 17 September 1985, para. 90.

894 **Exhibit RL-0135**, Joost Vinulaes, 'Sovereignty in Foreign Investment Law' in Z. Douglas, J. Pauwelyn and J. E. Vinulaes (eds), The Foundations of International Investment Law, OUP (2014), p. 329.

895 E.g., **Exhibit RL-0136**, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award, 05 November 2021, para. 332: "[…] *Rather, a State's police powers and its right to regulate under customary international law constitute "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3)(c) of the VCLT and have to be taken into account in interpreting the provisions in a BIT on*

doctrine when interpreting and applying an investment treaty.[896] For instance, the tribunal in *Saluka v. Czech Republic* confirmed the customary international law nature of the police powers doctrine, stating that "*the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that*

expropriation, such as Article 4(1) and (2) of the BIT." See also **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 290; **Exhibit RL-0110**, Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009, para. 498; **Exhibit RL-0137**, Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 103.

896 **Exhibit RL-0138-EN**, Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia, ICSID Case No. UNCT/18/1, Award, 12 March 2021, para. 519 (**Exhibit RL-0138-ES**, Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia, ICSID Case No. UNCT/18/1, Award, 12 March 2021); **Exhibit RL-0122**, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, para. 635; **Exhibit CL-0115**, Olympic Entertainment Group AS v. Republic of Ukraine, PCA Case No. 2019-18, Award, para. 86; **Exhibit RL-0136**, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award, 05 November 2021, para. 339; **Exhibit RL-0139**, Bank Melli Iran and Bank Saderat Iran v Bahrain, PCA Case No. 2017-25, Final Award, 09 November 2021, para. 632; **Exhibit CL-0120**, Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award, paras. 364-366; **Exhibit CL-0119**, Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt, PCA Case No. 2012-07, Final Award, para. 221; **Exhibit RL-0140**, Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case no. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 1329; **Exhibit RL-0141**, Koch Minerals Sárl, Koch Nitrogen International Sárl v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.19; **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 295; **Exhibit CL-0093**, Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award, para. 202; **Exhibit RL-0142**, Oxus Gold v. The Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015, paras. 741-744; **Exhibit RL-0143-FR**, SAUR International S.A. v Republique Argentine, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 06 June 2012, para. 401; **Exhibit CL-0056**, El Paso Energy v. Argentina, ICSID Case No. ARB/03/15, Award, paras. 236-240; **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266; **Exhibit RL-0145**, AWG Group Ltd. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 139; **Exhibit CL-0144**, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 139; **Exhibit RL-0146**, Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, 03 August 2005, para. 7 of Part IV Chapter D; **Exhibit CL-0080**, CME Czech Republic BV v. Czech Republic, UNCITRAL, Partial Award, para. 603.

are "commonly accepted as within the police power of States" ***forms part of customary international law today***".[897]

755. In a similar vein, the tribunal in *Quiborax v. Bolivia* held that:[898]

> "*International law has generally understood that regulatory activity exercised under the so-called "police powers" of the State is not compensable.*"

756. The police powers doctrine has predominantly been applied and accepted as a defence in the context of expropriation claims.[899] In the words of *Suez v. Argentina* tribunal:[900]

> "*The police powers doctrine is a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights. In effect, the doctrine seeks to strike a balance between a State's right to regulate and the property rights of foreign investors in their territory.*"

757. When applying the police powers doctrine, the standard of review of a State's conduct undertaken by an arbitral tribunal must include "*a*

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897 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 262.

898 **Exhibit CL-0093**, Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award, para. 202.

899 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para 262; **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 294; **Exhibit RL-0110**, Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009, paras. 497-499; **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266; **Exhibit RL-0137**, Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 103. It should be also noted that in some FET decisions the police powers doctrine is mentioned. For example, in *EDF v, Romania*, in assessing the disputed measures under an FET, a tribunal stated that the state's measure (GEO 104) was motivated by the 'need to fight corruption' and that, consequently, the '*GEO 104 was ... a measure falling within the police power of the State, taken in the public interest.*' **Exhibit CL-0029**, EDF (Services) v. Romania, ICSID Case No. ARB/05/13, Award, para. 292.

900 **Exhibit CL-0144**, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 148.

significant measure of deference towards the State" that took the impugned measure.[901] The *Invesmart* tribunal held that:[902]

> "[n]*umerous tribunals have held that when testing regulatory decisions against international law standards,* ***the regulators' right and duty to regulate must not be subjected to undue second-guessing*** *by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions.*"

758. The tribunal in *Koch Minerals v. Venezuela* further noted that:[903]

> "[s]*uch a tribunal cannot simply put itself in the position of the State and weigh the measure anew, particularly with hindsight*".

759. Arbitral tribunals have repeatedly recognised that measures adopted for the protection of *inter alia* human health and environment fall within the police powers doctrine.[904] For instance, the tribunal in *Chemtura v. Canada* held that the contested measures were "*motivated by the increasing awareness of the dangers presented by lindane for human health and environment*" and that "[a] *measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation*".[905]

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901 **Exhibit RL-0141**, Koch Minerals Sárl, Koch Nitrogen International Sárl v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.20. See also **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 305; **Exhibit RL-0136**, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award, 05 November 2021, para. 340.

902 **Exhibit RL-0110**, Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009, para. 501.

903 **Exhibit RL-0141**, Koch Minerals Sárl, Koch Nitrogen International Sárl v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.20.

904 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, paras. 300-307; **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266; **Exhibit RL-0137**, Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 103; **Exhibit RL-0122**, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, paras. 635, 642.

905 **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266.

760. In a similar way, the tribunal in *Eco Oro Minerals v. Colombia* recognised that the challenged measures were "*designed and applied to protect a legitimate public welfare objective, namely the protection of the environment*" and hence were "*a legitimate exercise by Colombia of its police powers*".[906]

761. Likewise, the tribunal in *Feldman v. Mexico* recognised that protection of the environment falls within the broader public interest governments are responsible for:[907]

> "***governments must be free to act in the broader public interest*** *through* ***protection of the environment****, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like.* ***Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this****.*"

762. Similarly, as explained in Section 14.3, the ECT recognises the importance of environmental protection. Among other international environmental agreements with energy-related aspects, the preamble to the ECT specifically recalls the UNFCCC. Furthermore, Article 19 ECT makes reference to key environmental principles from the Rio Declaration, including the precautionary principle and the PPP.

763. Claimants have tried to anticipate an argument by the Netherlands that "*climate change measures could not constitute an expropriation*".[908] Claimants' contention is irrelevant. The Netherlands does not contend that such a "*blanket exemption*"[909] exists. Rather the Netherlands contends, and Claimants recognise,[910] that – under certain conditions – it has a right to regulate in order to protect public interests such as the environment.

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906 **Exhibit RL-0122**, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 09 September 2021, paras. 635, 642.

907 **Exhibit RL-0137**, Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 103.

908 Memorial, para. 478.

909 Memorial, para. 478.

910 Memorial, para. 479.

764. Contrary to Claimants' contention, the police powers doctrine applies to the Coal Act (**Sub-section 15.1.1**). Proportionality (**Sub-section** 15.1.2) and foreseeability (**Sub-section 15.1.3**) are not formal requirements of the police powers doctrine, but even if they were, the Coal Act would satisfy those requirements.

15.1.1 The Coal Act is a *bona fide* regulation adopted in a non-discriminatory manner and aimed at the general welfare

765. The scope, conditions, and effect of the police powers doctrine has been recorded by the tribunal in *Saluka v. Czech Republic*:[911]

> "*It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed to the general welfare.*"

766. The *Saluka* tribunal further noted that where these conditions are met "*a State does not commit an expropriation and **is thus not liable to pay compensation to a dispossessed alien investor***".[912]

767. Prior to *Saluka,* the *Methanex v. USA* tribunal had already declared that:[913]

> "*[A]s a matter of general international law, **a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process** and, which affects, inter alios, a foreign investor or investment is **not deemed expropriatory and compensable** unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.*"

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911 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 255. See also **Exhibit RL-0110**, Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009, paras. 497-499.

912 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 262. See also **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 294.

913 **Exhibit RL-0146**, Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, 03 August 2005, para. 7 of Part IV Chapter D.

768. In a similar vein, the tribunal in *Chemtura v. Canada* held:[914]

> "*Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. […] [The measures were taken] in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment**. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation***."

769. Likewise, in *Philip Morris v. Uruguay* the tribunal found:[915]

> "***The principle that the State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality****, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose **should not be considered as expropriatory** did not find immediate recognition in investment treaty decisions. But a consistent trend in favor of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action.*"

770. In clarifying which State measures qualify within the police power doctrine, tribunals have also referred to the definitions provided in the Harvard Draft and the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (Third Restatement).[916]

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914 **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266.

915 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 295.

916 The reference to the Harvard Draft was made in **Exhibit RL-0147**, Pope & Talbot Inc v. The Government of Canada, UNCITRAL, Interim Award, 26 June 2000, para. 102; **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 256; **Exhibit CL-0144**, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 139; **Exhibit CL-0056**, El Paso Energy v. Argentina, ICSID Case No. ARB/03/15, Award para. 238; **Exhibit RL-0148**, Burlington Resources Inc.

> The Third Restatement stipulates that "*a State is not responsible for loss of property or for other economic disadvantage resulting from **bona fide general** taxation, **regulation**, forfeiture for crime, or other action that is commonly accepted as within the police power of States, **if it is not discriminatory***".[917]

771. Claimants appear to agree that *Saluka v. Czech Republic* is a reliable authority to determine the scope of application of the police powers doctrine.[918]

772. Similarly, the Contracting Parties to the ECT have confirmed in the context of the modernisation of the ECT their view that the same conditions for application of the police powers doctrine as set out in *Saluka* are to apply (specifically to measures to mitigate climate change):[919]

> "*As a general rule, **non-discriminatory measures** that are adopted to **protect legitimate policy objectives**, such as public health, safety and the environment (including with respect to climate change mitigation and adaptation), **do not constitute indirect expropriation**.*"

773. This general rule agreed by the ECT Contracting Parties applies to the interpretation and application of the ECT as a reflection of customary international law applicable in the relations between the ECT Contracting Parties (Article 31(3)(c) VCLT).

774. Accordingly, a State measure does not amount to an expropriation where – in the normal exercise of its regulatory powers – the measure was:

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v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 394. **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 292; **Exhibit CL-0093**, Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award, para. 202.

917 **Exhibit CL-0144**, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 139; **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 293.

918 Memorial, para. 484.

919 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, definition of 'Indirect Expropriation', p. 4.

- adopted in a non-discriminatory manner;
- a *bona fide* regulation; and
- aimed to the general welfare.

775. Each of these conditions is met in the present case. This is not in dispute between the Parties:

- the Coal Act was adopted in a non-discriminatory manner: there is no difference in treatment between domestic and foreign investors. Claimants agree that the Coal Act "*is non-discriminatory*";[920]
- the Coal Act is a bona fide regulation: it serves the public purpose of reducing CO2 emissions to prevent harmful climate change, and was adopted through a regular legislative process. In Claimants' words, "[w]*ith the* [Coal Act], [the Netherlands] *pursued a rational policy objective*"[921], the Coal Act "*serves a public purpose,* [and] *has been enacted after public consultation*";[922] and
- the Coal Act is aimed at general welfare: reducing CO2 emissions in the fight against global warming (in fulfilment of national policies and international obligations) is a purpose that is aimed at the general welfare.[923] Claimants recognise that the Coal Act "*aims to reduce CO2-emissions*".[924]

776. In light of the above, the Coal Act does not qualify as a measure of expropriation, and, correspondingly does not require compensation. Claimants' assertion that the Coal Act does not fit within the

920 Memorial, para. 480.
921 Memorial, para. 431.
922 Memorial, para. 480.
923 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 301. The tribunal considered that it is the position under general international law that public health, safety, and the environment are to be considered as legitimate public welfare objectives.
924 Memorial, para. 18.

Respondent's police powers[925] is conclusory and unsupported by authorities.

15.1.2 The Coal Act is proportionate to the objective it means to achieve

777. For the police powers doctrine to apply, there is no independent requirement that the measure in question be proportionate, as Claimants suggest. In any event, the Coal Act is proportionate.[926]

778. First, proportionality is not an independent requirement when applying the police powers doctrine, as articulated by *Saluka v. Czech Republic* and many other tribunals.[927] While some tribunals have referred to proportionality in relation to the police powers doctrine, these remain the minority and are insufficient to elevate a proportionality requirement to the level of customary international law.[928] Moreover, the limited number of tribunals that have referred to proportionality as part of the police powers doctrine, have emphasised that it is to be

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925 Memorial, para. 479.

926 Memorial, Section D.III.3 (b) (ee).

927 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 262; **Exhibit RL-0146**, Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, 03 August 2005, para. 7 of Part IV Chapter D; **Exhibit CL-0120**, Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award, paras. 364-366; **Exhibit RL-0140**, Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case no. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 1329; **Exhibit RL-0141**, Koch Minerals Sárl, Koch Nitrogen International Sárl v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.20; **Exhibit RL-0142**, Oxus Gold v. The Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015, paras. 741-744; **Exhibit CL-0056**, El Paso Energy v. Argentina, ICSID Case No. ARB/03/15, Award, paras. 236-240; **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266; **Exhibit CL-0144**, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 139; **Exhibit RL-0145**, AWG Group Ltd. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 139.

928 Claimants cite only four cases, whereas the police powers doctrine has been applied by a few dozen tribunals. See **Exhibit CL-0038**, LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, para. 195; **Exhibit CL-0046**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, para. 122; **Exhibit CL-0058**, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, para. 522; Exhibit CL-0059, **Exhibit CL-0059**, PL Holdings Sarl v. Poland, SCC Case No. V 2014/163, Partial Award, paras. 373-391.

reviewed with deference to the State's reasons for adopting the measure.

779. For instance, in *Tecmed v. Mexico*, which Claimants mainly rely upon to assert a requirement of proportionality,[929] the tribunal stated that "*due deference*" is owed to the State.[930] Moreover, the *Tecmed* tribunal found that there were other factors than environmental protection that had had a decisive effect on the State's conduct (the denial of a permit renewal), including "*political circumstances*".[931]

780. Similarly, the tribunal in *LG&E v. Argentina* – also referred to by Claimants in relation to a proportionality requirement – held that the State's action would have to be "*obviously disproportionate to the need being addressed*".[932] The tribunal in *Deutsche Bank v. Sri Lanka* noted that even measures that severely impact an investor can be "*justified by a substantial public interest*".[933]

781. Second, even if the Tribunal considered proportionality an independent supplementary requirement to the police powers doctrine, this requirement is fulfilled. The proportionality of the Coal Act is addressed in full in Sub-section 16.4.2.

782. In short, by adopting the Coal Act, the Netherlands did not act in a manner that is "*obviously disproportionate*" to the need to curb climate change and reduce CO2 emissions.[934] The Coal Act is a rational measure adopted to reduce CO2 emissions, as is undisputed between the Parties.[935] Meeting the goals of the Paris Agreement requires coal-fired plants – the largest emitters of CO2 in the Netherlands – to cease

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929 See Memorial, para. 489. In the context of the police powers doctrine, Claimants also rely on this award in fn. 376 and para. 484.

930 **Exhibit CL-0046**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, para. 122.

931 **Exhibit CL-0046**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, para. 127.

932 See Memorial, Section D.III.3 (b) (ee) fn 384. **Exhibit CL-0038**, LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, para. 195.

933 See Memorial, Section D.III.3 (b) (ee) fn 384. **Exhibit CL-0058**, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, para. 522.

934 Some of the alternatives proposed by Claimants include a revocation of the permit, or nationalisation of coal plants. See Memorial, para. 492. Undoubtedly, these measures would present far more severe interferences than the one actually adopted.

935 Memorial, para. 431, "*With the Coal* [Act]*, Respondent pursued a rational policy objective*."

emissions from 2030.[936] Alternative policies to the Coal Act were investigated and, for reasons extensively detailed at the time of adoption of the Coal Act (see further Sub-section 16.4.2), found to be less effective or legally untenable. Among others, closing coal plants was also discussed. In light of the proportionality of the measure, the Government decided not to mandate the closure of the plants, but to impose a less far-reaching measure, namely a prohibition on the generation of electricity by firing coal as from a certain future date. This has given the plant operators the option, in addition to continued plants operation until 2030, to convert and further produce electricity with a fuel other than coal.[937]

783. The effect of the Coal Act on power plants such as Eemshaven is not "*obviously disproportionate*" either. Eemshaven was designed and permitted to fire not just coal, but also to fire alternative fuels such as biomass. Eemshaven may currently fire up to 30% biomass, and Claimants have announced – even before adoption of the Coal Act – their plan to increase this to 100% biomass, as part of their plan to phase out all coal usage in the Netherlands by 2030 (and Europe-wide by 2040).[938] At the same time, according to Claimants, the costs of full conversion to biomass amount to "*roughly EUR* [redacted] *to 457 million*"[939]:

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936 **Exhibit R-0087-EN**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II, 29 565, no. 3, 24 May 2003, p. 1 (**Exhibit R-0087-NL**, Explanatory note to the amendment law implementing European Directive 2003/87/EG, Parliamentary papers II 2003/04, 29 565, no. 3, 24 May 2004). It is also difficult to see how reduction of CO2 emissions is a "*pursuit of self-set political goals*". See Memorial, para. 493.

937 See Sub-section 5.2.3.

938 Claimants' statement that they "*own a coal-fired power plant*" is therefore highly misleading. Memorial, para. 491. Equally misleading is Claimants' statement that "*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*." See Memorial, para. 492. As explained in Sub-section [6.2.4], the Minister recognised the alternative measure referenced by the Council of State (a ban on the use of coal) as appropriate: "*The* [Advisory Division of the Council of State] *advises against the amendments.* ***I accept this advice*** [...] ***I also agree with the Division's analysis that a closure law*** [a law whereby on a certain date electricity production with coal-fired power stations is prohibited] ***is an appropriate way to force the possible closure of coal-fired power plants***." **Exhibit R-0247-NL**, Letter from the Minister of Economic Affairs to the Parliament, Parliamentary Papers II 2016/17, 34 627, no. 14, 18 July 2017, pp. 2-3 (**Exhibit R-0247-NL**, Letter from the Minister of Economic Affairs to the Parliament, Parliamentary Papers II 2016/17, 34 627, no. 14, 18 July 2017).

939 Memorial, para. 656. This estimate is overstated, as explained in the Appendix to this Counter-Memorial, see Appendix A.3 below.

only approximately [redacted]-14.3% of the initial investment in Eemshaven of EUR 3.2 billion. Moreover, nothing prevents Claimants from converting Eemshaven to an alternative fuel. For instance, Claimants' damages experts at Brattle concede that coal-fired power plants have undergone conversion to gas in the past.[940]

784. The Coal Act grants a ten-year transitional period (until 2030) to the owners of coal-fired power plants to adapt their facilities to an alternative fuel of their choice and to continue recouping their investment by firing coal.[941]

785. In *Olympic Entertainment Group v. Ukraine*, the tribunal considered whether a transitional mechanism for affected investors was included and found that an adjustment period could have made the Gambling Ban Law proportionate. [942]

786. Similarly, the tribunal in *Renergy v. Spain* held in the context of FET that:[943]

> "*(iii) Abruptness of the change:* ***The more time a host State gives to the investor to adjust to the new regulatory regime****, i.e. through timely announcing the change and/or implementing* ***a transitional period*** *during which the new regime does not yet (fully) apply,* ***the more likely it is that Relative Stability is respected****; contrariwise, if the regime*

940 **Exhibit CER-0002**, Brattle Expert Report, para. 250.

941 Claimants misrepresent the transitional period as a form of non-financial compensation. This is simply not correct. Equally incorrect is Claimants' attempt to draw a parallel with *Santa Elena v. Costa Rica* to establish that "[t]*he existence of the transition period does not affect the existence of an expropriation already now*". To support this proposition, Claimants state that in *Santa Elena v. 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*." This is misleading. *Santa Elena v. Costa Rica* concerns a case in which an expropriatory decree was issued in 1978, including a payment amount. After 20 years of domestic courts legal proceedings in Costa Rica, the claimant decided to commence an investment arbitration. There is no parallel. First, the case concerns a direct expropriation. Second, the expropriatory decree was effective when issued, in 1978. The more than 20-year period in between was not a transition period. It is impossible to see how domestic court proceedings concerning an expropriatory decree relate to an enacted law which effects will only apply to Claimants in 2030. See Memorial, paras. 462-467 and 497; **Exhibit CL-0040**, Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica ICSID Case No. ARB961, Award.

942 **Exhibit CL-0115**, Olympic Entertainment Group AS v. Republic of Ukraine, PCA Case No. 2019-18, Award, paras. 98-100.

943 **Exhibit RL-0149**, Renergy S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 681.

change even features elements of retroactivity, or at least retrospectivity, this makes the legislative changes more likely to violate legitimate expectations".

787. In these circumstances, although not a requirement for the application of the police powers doctrine, precluding the use of coal for the production of energy following a transition period is not "*obviously disproportionate*" to the objective of mitigating the severe effects of climate change. The Netherlands refers to Sub-section 16.4.2 for further discussion of proportionality.

15.1.3 The Coal Act was not unforeseeable

788. For the police powers doctrine to apply, it is not required that the measure is foreseeable, as Claimants suggest. In any event the Coal Act was not unforeseeable.[944]

789. First, foreseeability is not a requirement when applying the police powers doctrine, as articulated by *Saluka v. Czech Republic*. The tribunal in *Saluka v. Czech Republic* did not include any reference to a requirement of foreseeability, nor did the tribunal in *Chemtura v. Canada*, nor the ECT Contracting Parties in their ECT modernisation efforts on the conditions applicable to the police powers doctrine.[945] Nor is there any other authority to support the inclusion of foreseeability as a requirement of the police powers doctrine as it applies under customary international law.

790. In *Tecmed v. Mexico* – the only case cited by Claimants in this context – the tribunal did not state that foreseeability is an additional requirement either. The quote which Claimants cite refers to the proportionality analysis and mentions foreseeability only in passing, not as a requirement for the police powers doctrine to apply.[946]

791. Second, the Coal Act was not unforeseeable.[947] The Netherlands has not made any specific commitments towards Claimants to freeze its

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944 Memorial, Section D.I.3 (b) (cc).

945 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 5.

946 **Exhibit CL-0046**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, paras 149-150.

947 See also Sub-section 16.3.1.

regulatory energy and environmental framework. To the contrary, it stated that it could not guarantee that future restrictions on CO2 emissions would not be adopted,[948] particularly if there was no prospect of CCS implementation. It was evident that significant CO2 emission reduction was needed and the Netherlands expressly warned potential investors that changes in the framework would likely occur.

792. This was confirmed by the Council of State which stated that at least by 2007 "*the debate at the time was dominated by possibilities to limit greenhouse gas emissions*".[949] It appears that Claimants rely on statements on the foreseeability of the closure of coal plants.[950] However, the Coal Act phases out the use of coal to generate electricity, it does not mandate the closure of coal plants. The Council of State's advice follows a line of policies aimed at CO2 emission reduction that preceded the advice.

793. As early as 1999, the Implementation Note made clear that for the period after 2012, if CCS "*is not used, reversing the growth of CO_2 emissions in the* [amongst others the energy sector] *must be achieved by reducing the energy consumption and carbon intensity of the energy supply*".[951]

794. Later, in 2003, the Clean Fossil Policy Memo stated in clear terms that "[t]*he climate problem is growing and continued international climate policy (post-Kyoto), is likely to lead to further restrictions on greenhouse gas emissions*".[952] In light of the expected post-Kyoto

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948 **Exhibit R-0030-EN**, Energy Report 2005, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

949 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 12 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

950 Memorial, para. 485.

951 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

952 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19: "[…] *a further tightening of emission targets in the post-Kyoto period is conceivable*" (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

tightening of CO2 emission reduction requirements, it would "*most likely* [be] *a necessity*" to use 'clean fossil'.[953]

795. Similarly, the Long-Term Vision for Security of Supply of 2003 highlighted the detrimental effects of coal plants on the environment and clarified that "*extra emissions from new coal-fired power stations must fit within hard national ceilings and the sectoral targets*".[954]

796. The Energy Report 2005 stated that:

- the use of coal was only acceptable "*under the condition that it does not interfere with the realisation of the CO2 emission agreements*";[955]
- new coal plants would not be allowed to emit CO2 through the end of their life span. It explains that "[a] *coal-fired power station that is built now has a life span until around 2050. Around that time, this power station may no longer emit CO2" of which the "promoters* [of new coal-fired power stations] *must be fully aware of when deciding on new coal-fired power stations*";[956] and
- further tightening of emission requirements should be expected as "*it is impossible to guarantee that there will be no subsequent tightening of emission requirements*".[957]

797. In the letter of 28 June 2007, the Minister of Housing, Spatial Planning and the Environment further expressed several warnings about the

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953 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19. On p. 5, 'clean fossil' is defined as the extraction, transport and conversion of carbon-containing materials into energy and/or other materials, so that so that as little CO2 is emitted to the atmosphere as possible in the process (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

954 **Exhibit R-0043-EN**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II 2002/03, 29 023, no. 1, 03 September 2003, p. 11 (**Exhibit R-0043-NL**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II, 2002/03, 29 023, no. 1, 03 September 2003).

955 **Exhibit R-0030-EN**, Energy Report 2005, p. 10 (**Exhibit R-0030-NL**, Energy Report 2005).

956 **Exhibit R-0030-EN**, Energy Report 2005, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

957 **Exhibit R-0030-EN**, Energy Report 2005, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

expected compliance of potential new coal plants with the Netherlands' climate goals, including that – in light of the increased European and Dutch climate ambitions – it was "*very questionable whether the market conditions for power plants based on fossil energy sources are still the same as when the relevant environmental permits were applied for*" and that investors would need to take this into account.[958]

798. As part of the 2008 Sector Agreement, Claimants expressed their intention to use CCS technology to achieve the progressive reduction of CO2, including at Eemshaven in particular.[959] To this end, Claimants undertook to invest in a CO2 capture demonstration project and expected to realise a demonstration project at Eemshaven in 2015, and large-scale application of CCS by 2020.[960]

799. However, Claimants did not follow through on their commitment to realise a CCS demonstration project, let alone large-scale application of CCS by 2020.

800. The emphasis on CO2 reduction in Dutch policy continued after the construction of Eemshaven commenced. The Energy Report 2011 centred on achieving low-carbon economy and reiterated that the "*government sets strict conditions in the areas of CO2 reduction, safety and environmental management*"[961] within which companies had to operate. The 2013 Energy Agreement was agreed to make energy production more sustainable.[962] Similarly, in the Energy Report 2016, the focus lay on making electricity production carbon neutral.[963]

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958 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 2 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

959 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Annex 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

960 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Annex 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

961 **Exhibit R-0103-EN**, Energy Report 2011, p. 18 (**Exhibit R-0103-NL**, Energy Report 2011).

962 **Exhibit R-0106-EN**, 2013 Energy Agreement (**Exhibit R-0106-NL**, 2013 Energy Agreement).

963 **Exhibit R-0145-EN**, Energy Report 2016, pp. 5-7, 35, 126-127 (**Exhibit R-0145-NL**, Energy Report 2016).

801. Claimants failed to reduce CO2 emissions substantially – or even to produce an actionable plan to do so – prior to the adoption of the Coal Act (and continuing up to the present date). Failure to achieve these substantial CO2 reductions made it foreseeable that the Netherlands would adopt measures to enforce its policy of securing significant CO2 reductions.

802. The Netherlands refers to Sub-section 16.3.1 for further discussion of foreseeability.

15.2 The Coal Act does not constitute a measure having effect equivalent to expropriation

803. The Parties agree that following the adoption of the Coal Act, Claimants are and remain in ownership and possession of Eemshaven and the Environmental Permit. Accordingly, the Parties agree that the Coal Act does not amount to a direct expropriation.[964]

804. An indirect expropriation requires a total or substantial deprivation of the value of the investment (**Sub-section 15.2.1**). This requirement has not been met, neither in respect of Eemshaven (**Sub-section 15.2.2**), nor in respect of the Environmental Permit (**Sub-section 15.2.3**). Moreover, there is no causal link between the adoption of the Coal Act and the alleged substantial deprivation (**Sub-section 15.2.4**).

15.2.1 Requirements for an indirect expropriation

805. A State measure does not amount to an indirect expropriation unless a number of requirements have been fulfilled. At least three requirements are of particular relevance to the case at hand: (i) the investment must have effectively been 'taken'; (ii) when assessing whether such a taking has occurred, the investment must be considered as a whole; and (iii) such taking and the associated substantial deprivation of value must have been caused by a measure adopted by the State.

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964 "*It is evident that no formal expropriation has taken place*" because "*Claimants are still in ownership and possession of Eemshaven and the permits*." Memorial, para. 456.

806. First, pursuant to Article 13(1) ECT, an indirect expropriation is a measure "*having effect **equivalent** to nationalisation or expropriation.*" [965] This is in line with the approach taken in the modernisation of the ECT, Netherlands Model BIT and EU investment treaties such as CETA.[966]

807. Claimants appear to accept that this requirement is only satisfied when there has been "*a total or 'substantial' deprivation of the value of the investment or the use and enjoyment of the investment*."[967] However, Claimants go on to attempt to lower the bar by insisting that they need only establish the loss of "*at least a substantial **part of the value** of their investment*".[968] Claimants further appear to suggest that a diminution of 90% of the fair market value of an investment is sufficient to constitute an expropriation.[969]

808. As explained below, this approach misconstrues what may constitute an "*effect equivalent*" to expropriation, for which "*the test is whether th[e] interference is sufficiently restrictive to support a conclusion that the property has been '**taken**' from the owner*".[970]

809. The tribunal in *Electrabel v. Hungary* held that to meet the test of indirect expropriation, an investor must establish that the effect of the measure in question is "***materially the same***" as where the investment "***had been expropriated or nationalised***".[971] That means that the investor needs to prove, by the facts of the case, that "*its investment **lost all significant economic value***".[972]

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965 **Exhibit CL-0002**, Energy Charter Treaty, Article 13(1).

966 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, Definition of Indirect Expropriation; **Exhibit RL-0105**, Netherlands Model BIT of 2019, 22 July 2019, Article 12; **Exhibit RL-0107**, Comprehensive Economic and Trade Agreement (CETA), 30 October 2016, Article 8.12 and Annex 8-A.

967 Memorial, para. 458.

968 Memorial, para. 459.

969 Memorial, para. 467.

970 **Exhibit RL-0147**, Pope & Talbot Inc v. The Government of Canada, UNCITRAL, Interim Award, 26 June 2000, para. 102.

971 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 6.53.

972 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 6.53. In a similar vein, the *Burlington Resources v. Ecuador* tribunal held that "[…] *there is an*

810. The same tribunal also found that:[973]

> "*the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor* ***to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment****.*"

811. Similarly, the tribunal in *Hydro Energy v. Spain* held that a "*substantial deprivation*" – Claimants' preferred term – in fact means the loss of *all* significant value equivalent to a deprivation of ownership:[974]

> "*expropriation, direct or indirect, entails "substantial deprivation",* ***i.e. the loss of all significant economic value, where the loss of value is such that it could be considered equivalent to a deprivation of property****, or the loss of all attributes of ownership.*"

812. Likewise, the tribunal in *Cavalum v. Spain* – also relied on by Claimants[975] – found that:[976]

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indirect expropriation when the effects of the challenged measure are equivalent to a taking. In particular, the investor must show that the challenged measure caused ***a total and permanent loss of value*** *or control of the investment*." **Exhibit RL-0148**, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 156. See also **Exhibit RL-0136**, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award, 05 November 2021, para. 335. See also **Exhibit RL-0150**, UNCTAD Series on Issues in International Investment Agreements II, Expropriation (2012), p. 65.

973 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 6.62.

974 **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, para. 531.

975 Memorial, para. 458, fn. 359. Claimants' own authorities support a high threshold. For instance, the tribunal in *Philip Morris v. Uruguay* referred to "*a major adverse impact*". **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 192. Similarly, the tribunal in *UAB E Energija v. Latvia* held that the "*interference has to be* ***unreasonable****, to cause the* ***investment*** *to be* ***neutralized or useless***". **Exhibit CL-0028**, UAB E Energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award, para. 1074. See also **Exhibit CL-0037**, Peter A. Allard v. Government of Barbados, PCA Case No. 2012-06, Award, para. 263; and **Exhibit CL-0034**, Eurus Energy Holdings Corporation v. Kingdom of Spain ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, paras. 257-258.

976 **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, para. 652.

> "*[a]s the above account of the relevant principles establishes, regulatory measures can amount to indirect expropriation, but if they are to amount to indirect* ***expropriation there must be substantial deprivation, i.e., the loss of significant economic value such as can be considered to be equivalent to a taking of property*** *or of the* ***core attributes of ownership***."

813. The same tribunal went on to make clear that establishing a loss in value is not sufficient to constitute an indirect expropriation:[977]

> "*In contrast, a loss in the value of an investment in consequence of measures taken by a State that is* ***not on a scale equivalent to a taking of the investment will not constitute expropriation***."

814. In this connection, in assessing whether there has been an "*effect equivalent*" to an expropriation, tribunals have looked to whether the typical hallmarks of an expropriation are present. For example, the tribunal in *PSEG v. Turkey*, echoing the tribunal in *Pope & Talbot v. Canada*,[978] found that there must additionally be some deprivation of control of the investment:[979]

> "*The Tribunal has no doubt that indirect expropriation can take many forms. Yet, as the tribunal in Pope & Talbot found,* ***there must be some form of deprivation of the investor in the control of the investment****, the management of day-to day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.*"

815. Similarly, in *Encana v. Ecuador*, the tribunal refused to find an indirect expropriation when investments had "*suffered financially … [but] were nonetheless able to continue to function profitably and* ***to engage in***

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977 **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, para. 652. See also **Exhibit RL-0085**, BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 02 December 2019, paras. 430-432.

978 **Exhibit RL-0147**, Pope & Talbot Inc v. The Government of Canada, UNCITRAL, Interim Award, 26 June 2000, para. 100.

979 **Exhibit RL-0151**, PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 278. See also, **Exhibit RL-0152**, Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 79.

the normal range of activities".[980] The tribunal further considered that the claimant had not established that the impugned measure had "***brought the companies to a standstill*** *or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments*".[981]

816. Indeed, as held by the tribunal in *BG v. Argentina*, citing *LG&E v. Argentina*, [982] "*a measure does not qualify as equivalent to expropriation if the 'investment continues to operate, even if profits are diminished***'**".[983]

817. In a similar way, the tribunal in *InfraRed v. Spain* dismissed claimants' expropriation claim because (i) "[c]*laimants have clearly maintained* ***control*** *over their investment*"; (ii) "*the plants at issue remain*[ed] ***operational***"; and (iii) "[c]*laimants* [would] *continue to* ***benefit*** *from their investment,* ***if only marginally so***".[984]

818. In line with the above, the threshold for a finding of indirect expropriation is high. Investment tribunals have consistently rejected expropriation claims where the operation of the investment was not completely annihilated, where the investor had remained in control of its investment, where the investor had continued to operate or where the investment had retained some value.

819. Second, Article 13(1) ECT requires that the investment is "***subjected to a measure or measures*** *having effect equivalent to nationalisation or expropriation*". Accordingly, the State measure – rather than some

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980 **Exhibit RL-0153**, EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award, 03 February 2006, para. 591.

981 **Exhibit RL-0153**, EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award, 03 February 2006, para. 591.

982 **Exhibit CL-0038**, LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, para. 191.

983 **Exhibit RL-0154**, BG Group Plc. v. The Republic of Argentina, UNCITRAL, Final Award, 24 December 2007, para. 268.

984 See also **Exhibit RL-0155**, InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award, 02 August 2019, paras. 507-509.

other circumstance such as market developments – must cause the investment to lose all its value.[985]

820. In the words of the tribunal in *Infinito Gold v. Costa Rica*, "*for a measure to amount to an indirect expropriation, it must cause the deprivation of the investment… there must be a* ***causal link*** *between the measure and the deprivation*."[986]

821. Similarly, the tribunal in *Cargill v. Poland* emphasised that "*compensation will only be awarded if there is a* ***sufficient causal link*** *between the breach of the BIT and the loss sustained by the Claimant*".[987]

822. Third, the alleged expropriated asset must be a separate investment capable of being expropriated.[988]

823. As held by the tribunal in *Electrabel v. Hungary*:[989]

> "*it is clear that both in applying the wording of Article 13(1) ECT and under international law, the test for expropriation is applied to the relevant* ***investment as a whole****, even if different parts may separately qualify as investments for jurisdictional purposes*."

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985 **Exhibit CL-0090**, SD Myers Inc v. Canada, UNCITRAL, First Partial Award, para. 316; **Exhibit CL-0096**, Joseph C Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, para. 155; **Exhibit CL-0074**, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 787.

986 **Exhibit RL-0156**, Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Award, 03 June 2021, para. 717.

987 **Exhibit RL-0157**, Cargill, Incorporated v. Republic of Poland, ICSID Case No. ARB(AF)/04/2, Award, 05 March 2008, paras. 632-635.

988 **Exhibit RL-0152**, Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 67; **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 283; **Exhibit RL-0158**, Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 09 October 2014, paras. 283 and 286-287; **Exhibit RL-0148**, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paras. 257-258, 260, 398 and 456; **Exhibit RL-0137**, Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 111.

989 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 6.58

824. Likewise, the tribunal in *Venezuela Holdings v. Venezuela* stated:[990]

> "*The Tribunal considers that, under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the* ***investment as a whole****. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature.*"

15.2.2 The Netherlands did not (indirectly) expropriate Eemshaven

825. The Coal Act does not amount to a taking of Eemshaven. Eemshaven – which is operating normally to this date – has and continues to have economic value following the adoption of the Coal Act.

826. First, regardless of the Coal Act, Eemshaven continues to have economic value until 2030.

827. It is undisputed that there has been no taking of possession or control over the plant. After the announcement and enactment of the Coal Act, there has not been and neither will be any governmental interference with Claimants' control over the plant until 2030 or thereafter.

828. Moreover, Claimants continue to benefit from their investment. It is undisputed that Claimants have been, and will continue to be, able to fully benefit from their investment until at least 2030. The Coal Act has no impact at all on the plant's ability to generate cash flows for 13 years from the 2017 Coalition Agreement and for more than 10 years from the Coal Act's entry into force in 2019. This corresponds to around one third of the alleged lifetime of the plant.

829. It is therefore not correct to suggest that the Coal Act "*substantially deprives Claimants of the value and the use of the plant*".[991] The value of Eemshaven has by no means been reduced by at least 90%, the threshold referred to in the case Claimants rely on.[992] The Coal Act

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990 **Exhibit RL-0158**, Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 09 October 2014, para. 286.

991 Memorial, para. 456.

992 Referring to calculations made by Brattle, Claimants state that the value of Eemshaven has decreased by [redacted] as a result of the Coal Act: Memorial, paras. 467-

has not deprived – and will not deprive – Claimants from using the plant, which can run on coal until 2030. Claimants will continue to benefit from the plant.

830. Second, Eemshaven will also continue to have value after 2030. After 2030, the plant does not have to close down due to the inability to fire coal, as Claimants suggest. Eemshaven is not just a coal-fired power plant. It may already co-fire up to 30% biomass.[993] Furthermore, it may be converted to fire 100% biomass or other alternative use.

Eemshaven may be converted to a biomass powerplant

831. As set out in Section 9.1, Claimants have repeatedly expressed – even before the adoption of the Coal Act – their intention to convert Eemshaven to fire 100% biomass.

832. Moreover, Claimants have gradually been increasing Eemshaven's biomass co-firing allowance "*towards the ultimate goal of 100% production on biomass*".[994]

833. It is undisputed that from a technical standpoint, conversion to full biomass use is possible.[995] In RWE's 2019 Annual Report and in statements made by [redacted] and [redacted],[996] Claimants considered conversion of Eemshaven to fire only biomass technically possible.[997] Claimants confirm the same in their submissions in the

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468. Claimants' statement and Brattle's calculation of the value decrease are incorrect, as explained in Chapter 18. Moreover, the *Tokios Tokelés v. Ukraine* tribunal set a higher threshold of [redacted]. **Exhibit RL-0159**, Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 120.

993 See Section 9.1.

994 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, p. 3.4 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019); see Section 9.1.

995 See e.g., Memorial, para. 13, where RWE clearly indicates that the only debate is whether such conversion would be economical. See also Memorial, paras. 321-330. **Exhibit C-0002**, RWE Annual Report 2019, p. 44: "*we can continue operating our Amer 9 and Eemshaven hard coal-fired power plants in the Netherlands after the established end dates for coal if we fully convert them to biomass.* […] *Conversion to 100 % biomass-firing would involve significant additional expenses.* "

996 [redacted] See Section 9.1.

997 See Section 9.1.

Dutch proceedings.[998] The technical feasibility of the full conversion of a coal plant to biomass is further documented in publicly available information in relation to other plants.[999] Claimants agree that "*the Eemshaven power plant could switch to sustainable biomass*".[1000]

Claimants have not demonstrated that a conversion to a biomass powerplant would not be economical

834. Claimants fail to present evidence to support their contention that converting Eemshaven so as to fully fire biomass from 2030 would not be economical.

835. The NERA Report does not provide any technical evidence (such as in relation to the costs or duration of a conversion) to support the assessment that Eemshaven cannot be economically converted. Moreover, NERA's analysis suffers from a number of flaws:

- NERA have assessed whether a full conversion to biomass was possible based on information available on 9 October 2017.[1001] This date is irrelevant: the relevant question is whether a full conversion to biomass (or any other fuel) will be feasible on or around 2030, when Eemshaven will no longer be allowed to fire coal. The same applies for NERA's assessment as of today.[1002] See Section A.1 of the Appendix to this Counter-Memorial.

998 **Exhibit R-0002-EN**, RWE's Writ of Summons, 26 February 2021, para. 481: "*RWE explains this in more detail in the following paragraphs for, first of all, biomass as the only possible real alternative fuel, in the sense that it has been shown in practice that it is technically possible to run a complete power plant on it*" (**Exhibit R-0002-NL**, RWE's Writ of Summons, 26 February 2021).

999 For example, four out of six units of the Drax plant in the United Kingdom, a 4,000 MW plant that originally fired 100% coal, have been fully converted to (only) fire biomass instead of coal: **Exhibit R-0248-EN**, Het Financieele Dagblad 'On the way to negative CO2 emissions with biomass', 14 February 2020 (**Exhibit R-0248-NL**, Het Financieele Dagblad 'On the way to negative CO2 emissions with biomass', 14 February 2020). Two out of six units of the Drax plant still fire coal, leading to a total biomass-firing rate of 94%, but these two units are rarely used anymore and will no longer fire coal as of 2025.

1000 [redacted] See also Memorial, para. 56.

1001 **Exhibit CER-0001**, NERA Expert Report, para. 8.

1002 **Exhibit CER-0001**, NERA Expert Report, para. 85.

- The evidence referred to by NERA, including reports published by analysts [redacted] and [redacted], suggests that a conversion is or will become possible.[1003] NERA chooses to ignore this evidence without any valid reason. See Section A.2 of the Appendix to this Counter-Memorial.

- NERA's analysis relies on an estimate of the capital expenditures ("**capex**") required to convert Eemshaven to fire 100% biomass. This capex estimate, a range of EUR [redacted] to EUR 457 million,[1004] is flawed and cannot be relied on.[1005] See Section A.3 of the Appendix to this Counter-Memorial.

- Several other fundamental assumptions underlying NERA's analysis are also incorrect. These assumptions concern, among other things, NERA's assessment of alleged regulatory risks and the type of biomass that can be used for electricity generation.[1006] See Section A.4 of the Appendix to this Counter-Memorial.

836. Likewise, NERA's conclusion that "*a reasonable and prudent investor would not make the necessary conversion investment*"[1007] is at odds with Claimants' conduct. As explained in Section 9.1, Claimants intend to convert Eemshaven to run on 100% biomass and have been taking steps to that effect, knowing that biomass co-firing subsidies will lapse.

837. Additionally, Claimants attempt to rely on other sources to support their claim that a conversion to another use than coal-fuelled electricity

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1003 **Exhibit CER-0001**, NERA Expert Report, para. 87. [redacted].

1004 **Exhibit CER-0001**, NERA Expert Report, paras. 23 and 77 and footnote 9.

1005 While the costs of conversion of a coal plant logically depend largely on the technical specifics of the plant, this range of EUR [redacted] to EUR 457 million is barely substantiated: NERA do not perform any independent technical assessment themselves, nor do they appear to rely on any other technical input that could support their estimate. Instead, they base their estimate on oversimplified calculations and incorrect assumptions. As a result, the capex estimate is overstated. **Exhibit CER-0001**, NERA Expert Report, paras. 23 and 77 and footnote 9.

1006 **Exhibit CER-0001**, NERA Expert Report, para. 59, first bullet and Section 2.1.

1007 **Exhibit CER-0001**, NERA Expert Report, header above para. 9.

generation would not be economical. None of these sources support the argument:

- The letter referred to by Claimants in which the Minister of Economic Affairs would have allegedly recognised that firing biomass was not economically viable[1008] actually forecasts that because ETS prices would increase and biomass prices could decrease, plants would consider using biomass "*even without government subsidies*" – implying that the Minister *did* expect that the use of biomass could become economical. [1009] Moreover, the letter is dated 26 June 2006; whether biomass was economical at that time is not relevant.[1010]

- Claimants further rely on a Frontier Economics report from 2019, which was commissioned by Uniper in relation to its coal plant at the Maasvlakte in Rotterdam. Among other things, this report is based on assumptions which were provided to it by Uniper, for example with regard to efficiency, the capex required to convert the plant and whether or not the plant could keep running while the conversion takes place.[1011] Moreover, the report projects ETS prices based on 2017 numbers, ignoring that both the actual and the projected ETS prices increased significantly between then and the date of the report,[1012] and ignores the possibility of using other types of biomass than wood pellets.[1013] In addition, the report relates specifically to Uniper's plant and does not provide any insight in the possibility to convert another coal plant: the costs of conversion and operation may vary considerably between

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1008 Memorial, para. 133.

1009 **Exhibit C-0053**, Parliamentary Papers II 2005/06, 29 023, no. 28, Letter from the Minister of Economic Affairs, 26 June 2006, p. 8.

1010 For the same reason, RWE's other references to historical circumstances and documents are irrelevant. See for example Memorial, paras. 119-120.

1011 **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. 8.

1012 **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. 15.

1013 **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. 8. See also Section A.4 of the Appendix and **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 210.

plants, including between plants with different sizes (Uniper's plant has a capacity of 1,070 MW, [1014] compared to Eemshaven's 1,560 MW).[1015]

838. On the contrary, available evidence points in the opposite direction. Brattle's modelling suggest that [redacted] of the scenarios where Eemshaven is still in business by 2030, a conversion to biomass would be profitable.[1016] Moreover, Claimants pursued a revision of the Environmental Permit to increase production on biomass.[1017]

839. It is unlikely that Claimants would spend years attempting to obtain an increase of their biomass co-firing allowance, knowing that further co-firing would not be subsidised, if they were under the impression that firing biomass is not viable without subsidies.

Eemshaven may be converted to other alternative use

840. As explained in Section 9.2, biomass-fuelled energy generation is not the only possible alternative use to which coal plants can be converted. This follows from examples in other (former) coal plants, as well as RWE's statement that "[i]*t would of course be technically possible to convert the plant to fire other fuels*".[1018] Claimants' experts concede that coal-fired plants have already been converted profitably to natural gas.[1019]

841. In addition, Claimants are presently developing hydrogen use at a large scale.[1020] Further, using biogas and other sources of renewable

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1014 **Exhibit R-0249**, Maasvlakte Energy Hub.

1015 This was already explained by the Minister of Economic Affairs in October 2019. **Exhibit R-0161-EN**, Memorandum of Reply regarding Act prohibition coal for electricity production, Parliamentary papers I 2019-2020, 35 167, 17 October 2019, pp. 12-13 (**Exhibit R-0161-NL**, Memorandum of Reply regarding Act prohibition coal for electricity production (Parliamentary papers I 2019-2020, 35 167, no. B), 17 October 2019).

1016 See Section 13.2 and [redacted], Expert Report of Compass Lexecon, 05 September 2022, para. 108.

1017 See Sub-section 15.2.3.

1018 Memorial, para. 488. See also **Exhibit CER-0002**, Brattle Expert Report, para. 247 with specific reference to the possibility to convert to gas.

1019 **Exhibit CER-0002**, Brattle Expert Report, para. 250.

1020 See Section 9.3.

energy in Eemshaven may be equally possible.[1021] Claimants do not take a position as to the feasibility of conversion to other alternative uses than biomass-fuelled energy production. No evidence is provided with respect to the feasibility of a conversion to other alternative uses. Claimants only state that NERA "*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.*"[1022] However, NERA's instructions, assessment and conclusion are limited to biomass only: they explain that they were instructed "*to independently assess whether a reasonable and prudent investor would invest in converting a coal-fired plant like Eemshaven to using biomass by 2030 in the absence of biomass support schemes.*"[1023]

15.2.3 The Netherlands did not (indirectly) expropriate the Environmental Permit

842. The Coal Act does not amount to an indirect expropriation of the Environmental Permit: (i) the Environmental Permit is not a separate asset capable of being expropriated; and (ii) the effect of the Coal Act on the Environment Permit is not equivalent to an expropriation. The Environmental Permit is derivative of the law more generally: it confirms that Eemshaven is in compliance with existing law, and sets the conditions by which Claimants must abide when operating Eemshaven. The Environmental Permit does not confer any freestanding right on Claimants.

843. First, the Environmental Permit is an accessory Eemshaven, and has no separate use apart from the plant. It is issued to the owner of the plant. It cannot, for instance, be used for a different plant, nor can it be monetised through a sale.

844. For the purposes of assessing whether the test for indirect expropriation is fulfilled, the investment must be assessed as a whole (i.e., Eemshaven), including accessories such as permits. The

1021 See Section 9.2.
1022 Memorial, para. 553.
1023 **Exhibit CER-0001**, NERA Expert Report, para. 6.

Environmental Permit is not a separate asset capable of being expropriated.

845. As set out in Sub-section 15.2.2, the Coal Act does not constitute an indirect expropriation of Eemshaven. Therefore, the Coal Act cannot constitute an indirect expropriation of the Environmental Permit (which was granted for the purpose of building and operating the plant).

846. Second, even if the Tribunal decides that the Environmental Permit shall be treated as a separate investment, Claimants fail to show that the effect of the Coal Act on the permit is equivalent to an expropriation. Claimants' own authorities do not support a different conclusion.[1024]

847. As set out in Sub-section 15.2.1, for an indirect expropriation to occur, a measure must cause a substantial deprivation of value or use, such that the effect is materially the same as if the relevant asset had been directly expropriated. The Coal Act does not result in the substantial deprivation of the Environmental Permit's value or use.

848. The Environmental Permit is of use as long as Eemshaven is. The Coal Act will not have any effect on the operations of Eemshaven – and thus on the usefulness of the Environmental Permit – until 2030. As Claimants will be able to use the Environmental Permit in the same manner as before for more than a decade after the enactment of the

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1024 Memorial, paras. 470-471. For instance, in *Saar Papier v. Poland*, the tribunal stated that the "*the factory set up by Saar Papier could handle **only** imported makulatura*". **Exhibit CL-0043**, Saar Papier Vertriebs GmbH v. Poland, Final Award, para. 87. Similarly, in *Tecmed v. Mexico* the tribunal noted that "*the Landfill could **not be used for a different purpose***" and hence lost all its value. **Exhibit CL-0046**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, para. 177. Any parallel with the present dispute is therefore untenable. Eemshaven is not only a coal-fired power plant. It can already fire up to 30% of biomass. Moreover, Claimants have previously expressed their intentions to convert to 100% biomass. See Chapter 9.1, Memorial, para. 48. At the same time, the 10 year transitional period facilitates the process of conversion. See Section 7.3. Claimants' reliance on *Middle Eastern Cement v. Egypt* is also misguided. In this case, the measure at issue concerned a cement import prohibition decree, which was later revoked by the Egyptian authorities. Respondent in that case conceded that the claimant had been deprived of its rights due to the decree during at least 4 months. **Exhibit CL-0044**, Middle Eastern Cement v. Egypt, ICSID Case ARB/99/6, Award, para. 107. In respect of *Antoine Goetz v. Burundi*, Claimants fail to substantiate how a revocation of a free zone certificate is similar to the present case. See Memorial, para. 471. **Exhibit CL-0045**, Antoine Goetz and others v. Republic of Burundi, ICSID Case No. ARB/95/3, Decision on Liability.

Coal Act, the Coal Act does not amount to a substantial deprivation of the value or use of the Environmental Permit.

849. Moreover, for the period after 2030, there is equally no substantial deprivation of the value or use of the Environmental Permit. While the Environmental Permit originally authorised Claimants to operate Eemshaven on 90% coal and 10% biomass,[1025] it was later modified to change the use of the plant. It now allows for the use of up to 30% biomass.[1026]

850. Claimants do not show that the Environmental Permit cannot be modified again so that the plant can fire 100% biomass or any other alternative fuel.[1027]

851. Equally, Claimants' conduct does not suggest that the Coal Act rendered the Environmental Permit useless. Claimants pursued a revision of the Environmental Permit after the date on which they allege that the permit was rendered without value (9 October 2017): a request was made to revise the Environmental Permit on 8 November 2018; the submission of the Environmental Impact Assessment 2019 was made in June 2019; and approval of the revision was received in 2021. Claimants would not pursue a revision of a permit which they considered of no value or use.

15.2.4 There is no sufficient showing of causality between the alleged future closure of Eemshaven and the Coal Act

852. According to Claimants' expert Brattle, at the valuation date, it was [redacted] that Eemshaven would close before 2030 for commercial reasons,[1028] in which case the Coal Act will have no bearing on the plant. Simply put, if the plant closes before 2030 for commercial reasons, the plant cannot also close from 2030 as a result

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1025 Memorial, paras. 48 and 60.

1026 Memorial, paras. 48 and 50.

1027 Claimants merely state without substantiation (and in an entirely different context than expropriation) that whether it would be legally feasible converting Eemshaven to alternative fuels is "*unclear*" and that "*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*". See Memorial, paras. 654 and 656. See also Section 9.1.

1028 **Exhibit CER-0002**, Brattle Expert Report, Harris-Hesmondhalgh Workpapers, Tables H, Tab H2. See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 68. See Sections 13.2 and 17.2.

of the Coal Act. Conceptually, property can only be expropriated if it exists. If the plant had otherwise been closed due to reasons other than the Coal Act, it cannot be expropriated.

853. Moreover, in [redacted] scenarios where the plant would not close before 2030 according to Brattle, a conversion to 100% biomass would be feasible (see Sub-section 13.2). This means that – according to Brattle's modelling – there are [redacted] out of 100 simulations in which the Eemshaven plant will need to close due to the inability to profitably convert to biomass, while it would have been able to profitably generate electricity with coal absent the Coal Act. In other words, based on Brattle's modelling, there is [redacted] chance that the Eemshaven plant will need to close on account of the Coal Act.[1029]

854. There is accordingly not a sufficient showing of a causal link between the alleged future closure of the plant and the Coal Act.

16 THE NETHERLANDS DID NOT BREACH ARTICLE 10 ECT

855. Pursuant to Article 10(1) ECT:

> "*Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*"

856. The Coal Act is compatible with the requirements of Article 10(1) ECT, contrary to what Claimants allege. The Netherlands will address the following elements of Article 10(1) ECT:

1029 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 108.

- The starting point under Article 10(1) ECT, like under investment law generally, is that a State has a right to regulate. Absent manifest arbitrariness or discrimination on wrongful grounds, the regulations that the State choose to adopt are reviewed with deference (**Section 16.1**).

- The Coal Act does not violate any obligation under the first sentence of Article 10(1) ECT, because that sentence does not provide for any self-standing obligation (**Section 16.2**).

- The Coal Act does not violate the fair and equitable treatment ("**FET**") standard in the second sentence of Article 10(1) ECT (**Section 16.2**). Specifically, the Netherlands did not frustrate any legitimate expectations. These can arise only where specific representations were made to an investor to induce an investment, and such representations were not made.

- The Coal Act is a necessary, reasonable and proportionate measure within the meaning of the third sentence of Article 10(1) ECT (rather than an arbitrary or disproportionate measure) to address global warming. The Coal Act provides a transition period of more than 10 years and contains a provision to ask for damages in case of an excessive burden (**Section 16.3**).

- The Coal Act does not violate the umbrella clause in the fifth sentence of Article 10(1) ECT. Specifically, the Sector Agreement 2008 does not preclude the adoption of the Coal Act (**Section 16.4)**

- The Coal Act does not violate the obligation to provide the most constant protection and security in the third sentence of Article 10(1) of the ECT (**Section 16.5**).

16.1 The starting point under Article 10(1) ECT is that the State has a right to regulate and its conduct is reviewed deferentially

857. As set out in Chapter 14, it is a principle of international law generally, and investment law specifically, that a State has the right to regulate,

including the adoption and amendment of laws. The State is in charge of the general interest and must determine which regulations and policies are adopted and in doing so must balance the relevant interests involved. When the State does so, its determination is accorded deference absent manifest arbitrariness or discrimination on wrongful grounds.

858. Arbitral tribunals have affirmed the same principles and their applicability for purposes of the interpretation and application of the ECT.

859. The tribunal in *Renergy v. Spain*, applying the ECT, referred to States' "*undisputed right to regulate*".[1030] Likewise, the tribunal in *Hydro Energy v. Spain*, constituted under the ECT, concluded from its "*very extensive review of arbitral practice*" that the "*State's sovereign right to regulate has been affirmed in many awards*", including ECT awards.[1031]

860. Similarly, the tribunal in *Electrabel v. Hungary*, applying the ECT, found that "*it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest*".[1032]

861. As a consequence of a State's inherent right to regulate, a legal framework is "*by definition subject to change*", as noted by the ECT tribunal in *AES v. Hungary*:[1033]

> *"The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause.* ***A legal framework is by definition subject to change*** *as it adapts to new circumstances day by day and* ***a state has the sovereign right to exercise its powers which include legislative acts****."*

1030 **Exhibit RL-0149**, Renergy S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 608.

1031 **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, paras. 581-582.

1032 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 7.77

1033 **Exhibit CL-0031**, AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, para. 9.3.29.

862. Further, when the State exercises its right to regulate, absent manifest arbitrariness or discrimination on wrongful grounds, that exercise is to be accorded deference or a margin of appreciation under the ECT. As held by the ECT tribunal in *RREEF v. Spain:*[1034]

> "*In order to appreciate the legitimacy (or illegitimacy) of the Claimants' expectations in the present case, it must be kept in mind that it is generally recognized that* ***States are in charge of the general interest and, as such, enjoy a margin of appreciation in the field of economic regulations****. As a result, the threshold of proof as to the legitimacy of any expectation is high and only measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State.*"

863. Similarly, in *Cavalum v. Spain* and *Hydro Energy v. Spain* the tribunals held that under the ECT "*the State is entitled to a "high measure of deference".*"[1035]

864. Likewise, in *CEF Energia v. Italy*, the tribunal held that conduct of a State under the ECT is assessed "*in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders."*[1036]

865. As noted in Chapter 14, deference towards the State is especially justified where there is a strong public interest involved, as is the case with the protection of public health and the environment. It was held by the tribunal in *Philip Morris v. Uruguay* that "[t]*he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of*

1034 **Exhibit RL-0160**, RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Award, 11 December 2019, para. 262

1035 **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, para. 424, with the reference to **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 305 and **Exhibit RL-0161**, Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 115; also 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, para. 582.

1036 **Exhibit CL-0116**, CEF Energia BV v. Italian Republic, SCC Case No. V2015/158, Award, para. 185(9).

national needs in matters such as the protection of public health."[1037] Similarly, in *Methanex v. United States*,[1038] the tribunal held that an investor should anticipate regulatory change in areas where high levels of regulation can be foreseen, unless the host country has given assurances that no regulatory changes will take place.

866. The same deference applies where States act in furtherance of international commitments and obligations[1039] – for example when, as noted by the tribunal in *David Aren v. Costa Rica*, the State "*has enacted internal legislation in environmental matters that are not only consistent with most international conventions but are at the forefront of most jurisdictions*".[1040] The starting point is therefore that a State may modify its laws without thereby breaching Article 10(1) ECT, and that when reviewed under Article 10(1) ECT any modification of laws is accorded deference absent manifest arbitrariness or discrimination on wrongful grounds.

16.2 The Netherlands did not violate any obligation under the <u>first</u> sentence of Article 10(1) ECT

867. The first sentence of Article 10(1) ECT provides that ECT Contracting Parties shall encourage and create stable and transparent conditions for Investors to make Investments.

1037 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 399. Tribunals have paid similar regard to public interests involved in **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010; **Exhibit RL-0113**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016; **Exhibit RL-0162**, Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic, PCA Case No. 2017-08, Award, 07 October 2020.

1038 **Exhibit RL-0146**, Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, 03 August 2005, para. 9.

1039 **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010; **Exhibit RL-0163**, David R. Aven and Others v. Republic of Costa Rica, Case No. UNCT/15/3, Award, 18 September 2018; **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award.

1040 **Exhibit RL-0163**, David R. Aven and Others v. Republic of Costa Rica, Case No. UNCT/15/3, Award, 18 September 2018, para. 439.

868. This provision does not impose a self-standing stability obligation on Contracting Parties, contrary to what Claimants suggest.[1041] Tribunals have consistently rejected the suggestion that the first sentence of Article 10(1) ECT establishes an independent obligation of stability.

869. The tribunal in *Isolux v. Spain* held that there is no "*autonomous obligation*" of stability:[1042]

> "[T]*he Arbitral Tribunal* ***does not find in this Article*** **[10(1)]** ***an autonomous obligation for the Contracting Parties to promote and create stable and transparent conditions*** *for the realization of investments in their territory whose violation per se would generate rights to favor of investors of another Contracting Party. It would be absurd, for example, for an investor to sue a State for compensation for not having promoted stable and transparent conditions for making investments in its territory if said abstention was not the cause of the violation of another obligation towards the investor, such as the of granting investment fair and equitable treatment, protection and security, etc.*"

870. Accordingly, the *Isolux* tribunal did "*not separately examine the alleged violation by the Kingdom of Spain of an obligation to create stable and transparent conditions for making investments in its territory*".[1043] Instead, it examined the alleged violations in the context of the FET standard in the second sentence of Article 10(1) ECT.

871. The approach taken by the *Isolux v. Spain* tribunal has been endorsed and followed by subsequent ECT tribunals. In *Novenergia II v. Spain* the tribunal held that there is no "*separate or independent obligation"* of stability:[1044]

1041 See, Memorial under Sections D.I and D.V.1, e.g., para. 419: "*Article 10(1)(1) ECT of the ECT establishes a specific obligation to provide stable investment conditions.*"

1042 **Exhibit RL-0164-EN**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016, para. 764 (**Exhibit RL-0164-ES**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016).

1043 **Exhibit RL-0164-EN**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016, para. 766 (**Exhibit RL-0164-ES**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016).

1044 **Exhibit CL-0010**, Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain, SCC Case No. V2015/063, Final Award, paras. 643 and 646. See also **Exhibit CL-0021**, PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, para. 567: "*The Tribunal does not consider that stability is a stand-alone or absolute requirement under the ECT; rather, it views it as a requirement that is*

> "[T]*he Tribunal agrees with the arbitral tribunals' findings in Isolux, Plama and Eiser that the stability and transparency obligation is simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard, rather than a separate or independent obligation.*"

872. Similarly, in *Foresight v. Spain*, the tribunal held that there is "*not an independent obligation*" of consistency:[1045]

> "*As for the obligation of transparency and consistency, the Tribunal agrees with the findings of the tribunals in Plama v. Bulgaria, Charanne v. Spain, Isolux v. Spain, and Novenergia v. Spain that this is not an independent obligation. Rather, the obligation of transparency and consistency is "simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard.*"

873. Likewise, in *Stadtwerke München v. Spain* the tribunal found that the reference to stability in the first sentence of Article 10(1) ECT is not "*an independent obligation*" that is "*actionable by investors*", because it is "*far too general to create enforceable definitive rights of investors*":[1046]

> "*In other words,* ***the first sentence of Article 10(1) does not contain an independent obligation whose breach would be actionable by investors of the Contracting Parties****, and Spain's measures should instead be considered under the scope of the standard of fair and equitable treatment in Article 10(1) of the ECT, and in particular of the protection of the Claimants' legitimate expectations. As the Plama v. Bulgaria tribunal explained, "stable and equitable conditions are clearly part of the fair and equitable standard under the ECT.*"
>
> *Consequently, the Tribunal concludes that* ***the first sentence of Article 10(1) is far too general to create enforceable definite rights of investors against Contracting Parties****. The Tribunal therefore rejects the Claimants first claim and will assess the Respondent's measures in the light of the other standards analysed below.*"

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intertwined with and closely linked to FET. This view is in line with findings of other tribunals."

1045 **Exhibit CL-0008**, Foresight Luxembourg Solar 1 Sàrl et al. v. Spain, SCC Case No. V(2015/150), Final Award (with Partial Dissenting Opinion by Dr Vinuesa), para. 361.

1046 **Exhibit CL-0061**, Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, paras. 195-196.

874. In line with this settled line of case law,[1047] the Netherlands will address Claimants' allegations of stability as part of their allegation of legitimate expectations under the FET standard of Article 10(1) ECT.

16.3 The Netherlands did not violate any obligation under the FET standard in the second sentence of Article 10(1) ECT

875. The second sentence of Article 10(1) ECT contains ECT Contracting Parties' commitment to accord "*fair and equitable treatment*" (FET) to Investments.

876. In their ordinary meaning pursuant to Article 31(1) VCLT, the terms "*fair*" and "*equitable*" mean just, even-handed, unbiased and legitimate.[1048]

877. In the specific context of the ECT, the FET standard precludes: (i) a denial of justice in judicial or administrative proceedings; (ii) a fundamental breach of due process in judicial or administrative proceedings; (iii) discrimination on wrongful grounds; (iv) abusive conduct; and (v) manifest arbitrariness. This is reflected in case law of tribunals.[1049] As part of the modernisation of the ECT the FET standard will provide for a list of measures that constitute a violation of the standard.[1050] This is also reflected in the Netherlands Model BIT[1051] of 2019 and EU investment treaties such as CETA.[1052]

878. In addition, tribunals may take into account as part of the FET standard (vi) the frustration of a legitimate expectation that arose from a clear and specific representation or commitment to the investor to induce its

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1047 See also **Exhibit CL-0021**, PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, para. 567: "*The Tribunal does not consider that stability is a stand-alone or absolute requirement under the ECT; rather, it views it as a requirement that is intertwined with and closely linked to FET. This view is in line with findings of other tribunals.*"

1048 **Exhibit CL-0092**, MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID Case No ARB/01/7, Award, para. 113.

1049 See e.g., **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 7.74.

1050 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, p. 4.

1051 **Exhibit RL-0105**, Netherlands Model BIT of 2019, 22 July 2019, Article 9(2).

1052 **Exhibit RL-0107**, Comprehensive Economic and Trade Agreement (CETA), 30 October 2016, Article 8.10(2).

investment, and upon which the investor reasonably relied in deciding to make the investment.[1053]

879. Claimants do not allege a denial of justice, a fundamental breach of due process, discrimination or abusive conduct. Rather, Claimants agree that the Coal Act serves a public purpose, was enacted following public consultation and is non-discriminatory.[1054] Moreover, the Coal Act is clearly not discriminatory as it does not distinguish in any way between coal plants, let alone on wrongful grounds such as nationality. Similarly, the Coal Act was adopted in full accord with due process, following extensive opportunities for Claimants and other interested parties to give their views. Elements (i) through (iv) of the FET standard are accordingly not in dispute.

880. The remaining two elements of the FET standard – (v) manifest arbitrariness and (vi) frustration of specific commitments that were made to induce an investment – are in dispute between the Parties. Since Claimants' allegations of arbitrariness are not made within the context of the FET standard in the second sentence of Article 10(1) ECT but rather in the context of the third sentence of Article 10(1) ECT,[1055] these will be addressed in Section 16.4.

881. The Netherlands will in the remainder of this Section 16.3 address Claimants' allegation that its legitimate expectations were frustrated. Specifically, the Netherlands will address that:

- Legitimate expectations are formed when the investment was made (**Sub-section 16.3.1**).

- Claimants had no legitimate expectations at the time of investment (or thereafter). Legitimate expectations can only arise where specific commitments or representations were made, since the FET standard does not amount to a stabilization clause or stand-still provision that would preclude

1053 See e.g., **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 7.74.
1054 Memorial, para. 480.
1055 Memorial, para. 427.

regulatory change. The Netherlands has never made any specific commitment to Claimants (**Sub-section 16.3.2**).

- To the extent relevant, the Netherlands did not enact a regulatory framework designed to induce Claimants to invest either, let alone radically alter it subsequently (**Sub-section 16.3.3**).

- Any expectation on the part of Claimants that the regulatory framework would remain unamended would in any event be unreasonable (**Sub-section 16.3.4**).

16.3.1 Legitimate expectations form when the investment is made

882. As an initial matter, an investor's legitimate expectations are formed when the investment is made. As the tribunal in *CEF Energia v. Italy* held:[1056]

> "[T]*he protection under the FET standard may only concern those expectations of the investors that existed at the time when they made the investment.*"

883. The tribunal in *PV Investors v. Spain* similarly found that "*the investors' expectations must be assessed at the time of making the investment*".[1057] Likewise, in *Watkins Holdings v. Spain*, the tribunal held that "*the crucial date for determining legitimate expectations is the date of the actual investment or the irrevocable commitment to invest*."[1058]

884. Claimants allege that their irrevocable commitment to invest was made in March of 2009.

1056 **Exhibit CL-0116**, CEF Energia BV v. Italian Republic, SCC Case No. V2015/158, Award, para. 186.

1057 **Exhibit CL-0021**, PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, para. 575. See also **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, para. 474 and

1058 **Exhibit CL-0027**, Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, para. 517.

885. The Second Claimant, RWE Eemshaven Holding II B.V., was however incorporated on 30 June 2016.[1059] Claimants have not explained when the Second Claimant invested in Eemshaven, but this can in any event not have been earlier than its corporate existence.

886. Claimants did not have and could not have legitimate expectations, whether in March 2009 (First Claimant) or after June 2016 (Second Claimant), that the legal framework would remain unaltered.

16.3.2 No clear and specific commitments were made by the Netherlands to Claimants

887. To give rise to legitimate expectations under Article 10 ECT, a State must have provided (a) a clear and specific commitment that is (b) directly addressed to the investor, and (c) on which he reasonably relied. As noted by the *Eskosol* tribunal, citing *El Paso v. Argentina*:[1060]

> "[T]*he FET standard can be breached if there is a* ***violation of a specific commitment****," in the sense of* ***a commitment "directly made to the investor,"*** *for example in a letter of intent or "through a specific promise in a person-to-person business meeting.*"

888. Similarly, in *Eiser v. Spain* it was held that the commitment would need to take the form of "***explicit undertakings directly*** *extended to investors and* ***guaranteeing*** *that States will not change their laws or regulations*".[1061]

1059 **Exhibit C-0003 EN**, Excerpt from the Commercial Register for RWE Eemshaven Holding II BV, Netherlands Chamber of Commerce (**Exhibit C-0003 NL**, Excerpt from the Commercial Register for RWE Eemshaven Holding II BV, Netherlands Chamber of Commerce).

1060 **Exhibit CL-0026**, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, para. 425. See likewise **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 426: "[…] *legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law*." **Exhibit CL-0083**, Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, ARB/09/20, Award, para. 270: "*reliance on specific and unambiguous State conduct, through* ***definitive, unambiguous and repeated assurances****, and targeted at a specific person or identifiable group*".

1061 **Exhibit CL-0007**, Eiser Infrastructure Limited et al. v. Spain, ICSID Case No. ARB13/36, Award, para. 362.

889. Likewise, in *Infracapital v. Spain*, the tribunal required a "***specific and unambiguous*** *assurance, promise or commitment by a competent authority that it will freeze the legislation in favour of a specific investor*".[1062]

890. Or in the words of the tribunal in *Isolux v. Spain*, what is needed is "***specific commitments*** *addressed to* [the investor] *personally, for example, in the form of a stabilization clause*".[1063]

891. In similar vein, the tribunal in *GPF GP S.à.r.l v. Republic of Poland* stated with reference to several authorities[1064] that:

> "*To qualify as legitimate, the investor's expectations must be based on assurances (or representations) (i)* ***given by the State in order to encourage the making of the investment****; (ii) addressed* ***specifically to the investor****; (iii)* ***sufficiently specific in content****. In addition, an investor must establish that it placed reliance upon the assurance (or representation).*"

1062 **Exhibit RL-0165**, Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 566.

1063 **Exhibit RL-0164-EN**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016, para. 775 (**Exhibit RL-0164-ES**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016).

1064 **Exhibit RL-0157**, Cargill, Incorporated v. Republic of Poland, ICSID Case No. ARB(AF)/04/2, Award, 05 March 2008, para. 490; **Exhibit CL-0056**, El Paso Energy v. Argentina, ICSID Case No. ARB/03/15, Award, paras. 375-377; **Exhibit RL-0166**, White Industries Australia Limited v. The Republic of India, Final Award, 30 November 2011, para. 10.3.17; **Exhibit CL-0037**, Peter A. Allard v. Government of Barbados, PCA Case No. 2012-06, Award, paras. 194, 220-225 and 287; **Exhibit RL-0158**, Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 09 October 2014, para. 256; **Exhibit RL-0154**, BG Group Plc. v. The Republic of Argentina, UNCITRAL, Final Award, 24 December 2007, para. 310; **Exhibit RL-0167**, Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award, 02 May 2018, para. 360.

892. Numerous recent rulings have followed this approach,[1065] which is in line with the approach in the modernisation of the ECT.[1066]

893. As follows from Chapter 3, the Netherlands did not offer any undertaking of regulatory immutability of the energy and environmental framework to Claimants, much less an explicit undertaking guaranteeing that Claimants would be permitted to unabatedly emit CO2 from the burning of coal of the lifetime of Eemshaven.

894. Claimants do not refer in the Memorial to any specific undertaking addressed to either of them to the effect that environmental and energy laws would not be changed, and none exists.[1067]

895. On the contrary, the Netherlands expressly stated that it gave no guarantees that its regulatory framework would remain static. In fact, it warned repeatedly that fossil fuels, and coal in particular, would be subject to a changing regulatory environment.

1065 **Exhibit CL-0095**, Franck Charles Arif v. Republic of Moldova, ICSID Case No ARB/11/23, Award, paras. 534-535; **Exhibit CL-0116**, CEF Energia BV v. Italian Republic, SCC Case No. V2015/158, Award, para. 185; **Exhibit RL-0168**, Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award, 15 May 2019, para. 500. See also **Exhibit RL-0162**, Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic, PCA Case No. 2017-08, Award, 07 October 2020, para. 462: "*To qualify as legitimate, the investor's expectations must be based on assurances (i) given by the State in order to encourage the making of the investment; (ii) addressed specifically to the investor; and (iii) that are sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance. While some arbitral decisions may have chosen a broader definition of legitimate expectations, the cumulative three-pronged test just referred to well respects the essence of FET in this Tribunal's opinion, which is confirmed by numerous investment treaty awards*"; **Exhibit RL-0167**, Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award, 02 May 2018, para. 360.

1066 Claimants refer to the test for legitimate expectations in *Thunderbird*, which does not reflect the trending approach towards legitimate expectations in recent jurisprudence, as codified in the Agreement in Principle on the Modernisation of the ECT. A key difference is that the more modern authorities insist on specificity of assurances and precision of expectations. See **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022.

1067 To the extent Claimants rely on the 2008 Sector Agreement, reference is made to Section 16.5.

896. Starting as of 1999 with the Coalition Agreement, in the Clean Fossil Policy Memo of September 2003, the Government stated that "[t]*he climate problem is growing and continued international climate policy (post-Kyoto), is* ***likely to lead to further restrictions*** *on greenhouse gas emissions*".[1068]

897. Thereafter, in the Energy Report 2005, when discussing coal plants, the Government stated that "*it* ***is impossible to guarantee*** *that there will be no subsequent tightening of emission requirements*".[1069]

898. Similarly, in a letter of 10 April 2006, the Minister of Economic Affairs emphasised that the Government required any investor in a coal plant to "*also takes into account* ***future developments*** *in national and European energy and environmental policy*."[1070]

899. Further, the Minister of Housing, Spatial Planning and the Environment stated on 28 July 2007 that environmental targets "*will not be without consequences for the development of energy demand and for the use of fossil fuels*."[1071]

900. In particular, the Minister warned that "***in time****, the CO2 emissions from coal-fired power plants* ***are not compatible*** *with the climate ambitions of Europe and of this government*". Rather, "*coal plants will in the end* ***only be acceptable*** *through a combination of the highest possible efficiency, the use of a substantial portion of biomass, usage of heat released and the application of CO2 capture and underground storage*".[1072]

1068 **Exhibit R-0028-EN**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, p. 19: "[…] *a further tightening of emission targets in the post-Kyoto period is conceivable*" (**Exhibit R-0028-NL**, Clean Fossil Policy Memo, Parliamentary papers II 2003/04, 28 241, no. 6, 22 September 2003).

1069 **Exhibit R-0030-EN**, Energy Report 2005, p. 27 (**Exhibit R-0030-NL**, Energy Report 2005).

1070 **Exhibit R-0045-EN**, Answer from the Minister of Economic Affairs, Acts II 2005/06, no. 1224, p. 2611, 10 April 2006 (**Exhibit R-0045-NL**, Answer from the Minister of Economic Affairs, Acts II 2005/06, no. 1224, p. 2611, 10 April 2006).

1071 **Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 2 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

1072 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5

901. Not only did the Netherlands not commit to Claimants (or anyone else) to leave its regulatory framework unchanged, it expressly warned potential investors that changes in the framework would likely occur. This was in view of the "*continued international climate policy*" within the framework of the UNFCCC and the "*climate ambitions"* of the EU and the Government, both of which would likely lead to further restrictions, making it impossible to guarantee that no further regulation would be adopted.

902. To the extent Claimants suggest that the Environmental Permit amounts to a specific commitment to induce their investment, this is incorrect.

903. First, a permit is an administrative requirement which applies to every prospective energy operator. It does not constitute a *specific* commitment directed at the First Claimant.

904. Second, a permit is no commitment of immutability of laws. It is merely a confirmation that the holder of the permit complies with the law as it exists, not that the law will not be changed in the future. The law also specifically provided for the possibility and, where applicable, the obligation to amend permits in the interest of protecting the environment.[1073]

905. Third, Eemshaven's environmental permit rather emphasises the requirement of drastic CO2 reduction and provides for co-firing of other fuel.

906. The permit cites the Cramer Letter to state that: "[i]*n time, the CO2 emissions from coal-fired power plants are* […] *not compatible with the climate ambitions of Europe and of this government*" unless the coal plant operators keep their coal plants aligned with climate policy

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(**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

1073 **Exhibit RL-0044-EN**, The Environmental Law (General Provisions) Act, 06 November 2008, Article 2.31(1)(b) provides that "[t]*he competent authority* ***shall*** *amend the provisions of the environmental permit if it becomes apparent* […] *that the adverse consequences caused by the facility for the environment* ***can****, or in view of developments to the technical possibilities for protecting the environment,* ***must*** *be further limited*." (**Exhibit RL-0044-NL**, The Environmental Law (General Provisions) Act, 06 November 2008).

"*through a combination of the highest possible generation efficiency, the use of a substantial proportion of biomass, utilization of released heat and the application of CO2 capture and underground storage*." Similar concerns and objections raised by individuals and non-profit organisations are also cited in the permit.[1074]

16.3.3 No regulatory regime aimed at inducing investment was enacted, let alone reversed

907. Certain tribunals have found that, absent a specific commitment addressed to the investor, legitimate expectations can also arise from a legal framework that was put in place with the specific aim to induce foreign investment. For instance, the tribunal in *Isolux v. Spain* held that:[1075]

> "[…] *an investor may derive legitimate expectations either from (a)* ***specific commitments addressed to it personally****, for example, in the form of a stabilization clause, or (b)* ***rules*** *that are not specifically addressed to a particular investor but* ***which are put in place with a specific aim to induce foreign investments*** *and on which the foreign investor relied in making his investment*."

908. The Netherlands submits that the correct interpretation of Article 10(1) ECT, in accordance with the modernisation of the ECT, is that expectations that are general, such as are purportedly derived from a legislative framework, are not capable of giving rise to legitimate expectations. Only specific commitments directed to the investor personally can give rise to legitimate expectations.

909. However, even those tribunals that considered that a legal framework can give rise to legitimate expectations, only considered so where that legal framework had been put in place "*with a specific aim to induce foreign investments"*.

1074 As mentioned above at para. 236, Greenpeace raised the question of whether Claimants would be able to align their investment in Eemshaven to the expected imminent developments in CO2 emissions policies.

1075 **Exhibit RL-0164-EN**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016, para. 775 (**Exhibit RL-0164-ES**, Isolux Netherlands BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016).

910. Moreover, any legitimate expectations derived from such a legal framework to induce foreign investment could only be violated where the State had radically altered this type of regime.

911. Thus, in *Antin v. Spain*, applying this expansive standard, the tribunal found that only where a regulatory regime was (a) specifically created to induce investments and (b) radically altered subsequently, could Article 10(1) ECT be engaged. In all other circumstances an ECT Contracting Party can be freely "*exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest*":[1076]

> "*In sum, considering the context, object and purpose of the ECT, the Tribunal concludes that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather* ***means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered*** *—i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes*."

912. Likewise, in *Isolux v. Spain*, the tribunal concluded from a survey of arbitral case law prepared by UNCTAD that legitimate expectations may only be derived from rules "*put in place* ***with a specific aim to induce foreign investments***."[1077]

913. In *OperaFund v. Spain*, the tribunal embraced the holdings of the *Antin* tribunal that a "*regulatory regime* ***specifically created to induce*** *investments in the energy sector cannot be radically altered*".[1078]

1076 **Exhibit CL-0006**, Antin Infrastructure Services Luxembourg Sárl et al. v. Spain, ICSID Case No. ARB/13/31, Award, para. 532. See also **Exhibit CL-0064**, OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award, para. 509.

1077 **Exhibit CL-0060**, Isolux v. Spain, SCC Case No. V2013/153, Award (Extracts) dated 12 July 2016 and Dissenting Opinion, para. 775.

1078 **Exhibit CL-0064**, OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award, para. 509.

914. Similarly, in *Eiser v. Spain*, relied on by Claimants,[1079] the breach of legitimate expectations flowed from the replacement of a regime specifically aimed at encouraging investment by a wholly different regulatory approach:[1080]

> "*As described below, the evidence shows that Respondent eliminated a favorable regulatory regime previously extended to Claimants and other investors* ***to encourage their investment in CSP****. It was then replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises. This new system was profoundly unfair and inequitable as applied to Claimants' existing investment, stripping Claimants of virtually all of the value of their investment.*"

915. In *Cavalum v. Spain* the tribunal held that it is "*inconceivable that a state would make a general commitment never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze, especially upon changing needs, or in a time of a crisis.*"[1081]

916. The Netherlands did not enact or change its legislative framework to induce the Claimants to invest. No inducement to investment was included in the legislative framework or otherwise. The legislative framework was not altered at the time that (or in the period before) Claimants made their investment with a view to attract potential investments. Claimants also do not point to any inducement enshrined in any part of the legal framework.

917. Dutch regulation was consistent and unchanged, in that the policy objective of CO2 emissions – and in particular, the requirement of CO2 emission reductions from coal plants – constituted a "*fundamental characteristic*"[1082] of the legal framework that Claimants invested in, and remained so.

1079 Memorial, para. 513.

1080 **Exhibit CL-0007**, Eiser Infrastructure Limited et al. v. Spain, ICSID Case No. ARB13/36, Award, para. 365.

1081 **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, para. 427.

1082 **Exhibit CL-0011 EN**, Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award (with Partial Dissenting Opinion by Professor Tawil), para.

918. First, policy expressions repeatedly emphasised that coal plants were required to comply with environmental policy and targets, including emissions reductions. In the Implementation Note issued in 1999, it was stated that fossil fuels would have to operate "*within the conditions of climate policy*".[1083] It was also clear that this would impact coal plants, and that the emissions of coal plants would have to be reduced to the level of gas combustion plans in order to meet the Kyoto Protocol's targets for 2008 to 2012.

919. Following the Implementation Note, a benchmark covenant was agreed between the Government and existing coal plants in order to reduce the plants' emissions to the level of gas fired plants.[1084] For the period after 2012, the Implementation Note provided that "*CO2 reductions domestically will have to play an increasing role in policy*", and that if CCS "*is not used, reversing the growth of CO_2 emissions in the* [amongst others the energy sector] *must be achieved by reducing the energy consumption and carbon intensity of the energy supply*".[1085]

920. Further, the Minister of Economic Affairs noted in 2003 that the "*extra emissions from new coal-fired power stations must fit within hard national ceilings and the sectoral targets*".[1086] That same year the Clean Fossil Policy Memo was published and reiterated that coal plants would have to reduce their CO2 emissions through CCS or other means in order to be viable. In 2004, the Minister of Economic Affairs again noted that it was a "*condition*" that any additional coal plants fit within the Government's environmental policies, and that any

517 (**Exhibit CL-0011 ES**, Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award (with Partial Dissenting Opinion by Professor Tawil)).

1083 **Exhibit R-0042-EN**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 73 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

1084 **Exhibit R-0085-EN**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002 (**Exhibit R-0085-NL**, Covenant on Coal-fired Power Plants and CO2 Reduction, 24 April 2002).

1085 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

1086 **Exhibit R-0043-EN**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II 2002/03, 29 023, no. 1, 03 September 2003, p. 11 (**Exhibit R-0043-NL**, Memorandum on the Long-Term Vision for Security of Supply, Parliamentary papers II, 2002/03, 29 023, no. 1, 03 September 2003).

additional coal plant would have to comply with these "*strict*" environmental policies.[1087]

921. This was repeated in the Energy Report 2005, which indicated that the use of coal was only acceptable "*under the condition that it does not detract from the realisation of the CO2 emission agreements*".[1088] The Energy Report 2005 provided that by 2050 coal plants would not be permitted to emit **any** CO2 emissions. This was followed by a warning that "*promoters* [of new coal-fired power stations] *must be fully aware of* [this] *when deciding on new coal-fired power stations*".[1089] It was therefore made clear to potential investors what they could expect – they had to progressively reduce the CO2 emissions of their coal plants. This progressive reduction was to commence from the start of operations of the plants. In the Clean and Efficient Work Programme of August 2007, it was noted that "[f]*rom 2015 onwards, very substantial CO2 reductions need to have been achieved*".[1090]

922. Or, as it was put in the Energy Report 2008, investors in coal plants were "*welcome provided that they take their efforts to compensate for the increase in CO2 emissions seriously*".[1091] Given Claimants' assertion that they took their final investment decision in 2009,[1092] this would have been the final word they heard from the Netherlands on the matter prior to making the decision to invest.

923. After Claimants' decision to invest, the debate regarding reduction of CO2 emissions remained at the forefront of national policy agenda. As

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1087 **Exhibit C-0038**, Proceedings II 2003/04, Appendix to the Treaties no. 1857, Questions asked by members of Parliament and answers given by the government. "*This fits within the energy policy, but the condition is that it must fit within the environmental policy of this government.* […] *a new coal-fired power plant must also comply with the strict, market-based and generic environmental policy*."

1088 **Exhibit R-0030-EN**, Energy Report 2005, p. 10 (**Exhibit R-0030-NL**, Energy Report 2005).

1089 **Exhibit R-0030-EN**, Energy Report 2005 p. 35 (pdf) (**Exhibit R-0030-NL**, Energy Report 2005).

1090 **Exhibit R-0035-EN**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007 p. 29 (**Exhibit R-0035-NL**, Ministry of Housing, 'New Energy for the Climate,' Spatial Planning and the Environment, Clean and Efficient Work Programme, 24 August 2007).

1091 **Exhibit R-0032-EN**, Energy Report 2008, p. 86 (**Exhibit R-0032-NL**, Energy Report 2008).

1092 Memorial, para. 23.

explained in Chapter 6, the Government continued its policy to reduce CO2 emissions. Concomitantly, global concern relating to reduction of CO2 emissions, which was high at the time Claimants decided to construct Eemshaven, only increased. This culminated *inter alia* with the conclusion of the Paris Agreement in 2015, which imposed legally binding commitments on States to pursue domestic mitigation measures and achieve NDCs. At EU level, the Paris Agreement ultimately resulted in a commitment of at least 55% CO2 emission reduction by 2030.[1093]

924. Therefore, the fundamental feature of the legal framework in place at the time that Claimants invested – i.e., the objective of achieving CO2 emission reductions – not only stayed, but in fact intensified as pressure on States to reduce CO2 emissions only increased.[1094]

925. Claimants refer to the Council of State's advice on the Vos Amendments to assert that "*no one could have expected the possibility of a coal ban before the 2015* [Van Weyenberg] *Motion*".[1095] This is misleading. In its advice (with reference to the European Convention on Human Rights) the Council of State emphasised that "*the debate at the time* [in 2007] *was dominated by possibilities to limit greenhouse gas emissions (such as carbon capture and storage; CCS)*".[1096] To the extent that a coal phaseout was not expressly discussed in 2007, this rested on the premise that energy production with coal would produce significantly reduced CO2 emissions through methods such as CCS. This premise was in line with the policy goal of CO2 reductions (in place before as well as after Claimants'

1093 The commitment undertook by the EU in the context of the Paris Agreement initially required a decrease of 40%, with the anticipation that a decision would be made at EU level for this commitment to increase to 55%, which ultimately occurred in June 2021, when the EU adopted the 'European Climate Act'. The Coal Act was adopted with a view to achieving targets a national target of 49%.

1094 **Exhibit RL-0149**, Renergy S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 681. As also noted by the tribunal in *Stadwerke v. Spain*: "[the FET standard] *does not protect it against the changes introduced to safeguard the public interest to address a change of circumstances* […]" **Exhibit CL-0061**, Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, para. 264.

1095 Memorial, para. 532.

1096 **Exhibit R-0152-EN**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017, p. 12 (**Exhibit R-0152-NL**, Advice of Advisory Division of the Council of State regarding Vos Amendments, Parliamentary papers II 2016/17, 34 627, no. 15, 24 July 2017).

investment). It stood to reason that if the premise which existed in 2007 did not materialise, further regulation aimed at reducing CO2 emissions – including a coal phaseout – would come into play.[1097] Furthermore, the term "*closure*" (used to describe a phaseout) is without taking into account the distinction of a lengthy transitional period, affording the coal plant owners the opportunity to transition to alternative fuels. Thus, a coal *phaseout* under the current conditions is not to be equated with a *closure* of the power plants.

926. Claimants' reference to the Netherlands drawing a conclusion as of 2017 that phasing out coal would not be necessary to reach climate goals[1098] is equally misleading. This conclusion expressly referred to the closure of new plants in order to reach the 2020 *Urgenda* targets. It indicated nothing with respect to whether any *further* coal plant phase outs would be necessary to reach CO2 emission reduction targets *beyond* 2020.

927. Second, the First Claimant recognised at the time of its investment that Dutch policy was aimed at CO2 emissions reductions, and that this could mean that the regulatory framework could change (as explained in Section 3.3). Among others, in its April 2006 starting memorandum, the First Claimant noted that climate policy was continuously developing and that "*more stringent requirements will be imposed with respect to the emissions of power plants*".[1099] It reiterated

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1097 Claimants need not have anticipated the ***exact*** measure that would follow in the wake of their failure to reduce CO2 emissions, e.g., through CCS. Tribunals have referred to investor generally anticipating changes to the regulatory framework, without being specific about the exact change. In *Belenergia v. Italy*, as well as in *Isolux v. Spain*, the tribunal refers to the possibility to foresee and anticipate "*the **unfavourable evolution** of the investment regime*". **Exhibit RL-0169**, Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, 28 August 2019, para. 91; **Exhibit CL-0060**, Isolux v. Spain, SCC Case No. V2013/153, Award (Extracts) dated 12 July 2016 and Dissenting Opinion, para. 781. In *Parkerings v. Lithuania*, the tribunal broadly referred to "*legislative changes*" / "*change of laws*" **Exhibit RL-0109**, Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 335. In *Urbaser v. Argentina*, the tribunal referred to the anticipation of measures "*having the purpose to implement* […] *fundamental rights*" **Exhibit RL-0113**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016, para. 622.

1098 Memorial, para. 531.

1099 **Exhibit R-0046-EN**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006, p. 10 (**Exhibit R-0046-NL**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006).

this in its application for an environmental permit on 20 December 2006 by stating that "*future developments* [were] *to be expected*" in the "*expected social desirability and need of CO2 removal in the long term*".[1100]

928. More than that, in its overtures to the Government, First Claimant described its prospective plant as a "*hypermodern biomass / coal plant*" and highlighted its CCS ambitions.[1101] In a letter sent on 22 March 2007 to the then Prime Minister of the Netherlands, First Claimant emphasised that "*RWE, too, wants to make a significant contribution to a sustainable energy management*" and that it had "*concrete plans to develop a 'zero CO2 emission' plant*".[1102] This sentiment was echoed in several other communications of First Claimant prior to 2009.[1103] In a request to meet with the Ministry of Foreign Affairs to discuss the prospects of CCS, First Claimant specifically acknowledged that "*the responsibility for taking the lead* [in CCS] *lies predominantly with industry*".[1104]

929. Third, the First Claimant did not comply with the existing policy requirements that were expected of it to reduce CO2 emissions. Under the 2008 Sector Agreement, the First Claimant was expected to "*promote that operators of new coal-fired power stations in the*

1100 **Exhibit R-0047-EN**, Request for environmental permit, 20 December 2006, p. 11 (**Exhibit R-0047-NL**, Request for environmental permit, 20 December 2006).

1101 **Exhibit R-0037-EN**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006 (**Exhibit R-0037-NL**, RWE's letter to the Ministry of Economic Affairs, 18 May 2006); **Exhibit R-0110-EN**, RWE's letter to the Minister of Economic Affairs, 03 August 2006 (**Exhibit R-0110-NL**, RWE's letter to the Minister of Economic Affairs, 03 August 2006).

1102 **Exhibit R-0034-EN**, RWE's letter to the Prime Minister, 22 March 2007 (**Exhibit R-0034-NL**, RWE's letter to the Prime Minister, 22 March 2007).

1103 See **Exhibit R-0121-EN**, RWE's letter to Province of Groningen, 21 September 2007 (**Exhibit R-0121-NL**, RWE's letter to Province of Groningen, 21 September 2007); **Exhibit R-0122-EN**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 04 February 2008 (**Exhibit R-0122-NL**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 04 February 2008); **Exhibit R-0123-NL**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 20 March 2008 (**Exhibit R-0123-NL**, RWE's letter to the Minister of Housing, Spatial Planning and the Environment, 20 March 2008); **Exhibit R-0094**, RWE's letter to Prime Minister, 14 November 2008.

1104 **Exhibit R-0048-EN**, RWE's email to M. Frequin, 05 March 2008, (**Exhibit R-0048-NL**, RWE's email to M. Frequin, 05 March 2008).

Netherlands will have reduced CO2 very substantially from 2015 onwards."[1105]

930. One of the intentions of the 2008 Sector Agreement was to procure that "*by 2015 CCS has been demonstrated at sufficient scale*" and that "*around 2020 CCS is sufficiently mature for the market and will be applied on a large scale*".[1106] For this purpose, the "*energy producers were to demonstrate CCS at sufficient scale by 2015*".[1107]

931. The 2008 Sector Agreement further contained a number of company-specific undertakings. The First Claimant undertook to invest in a CCS demonstration project that would be operable in 2015. Large-scale application was to follow by 2020:[1108]

> "*RWE's aim is to promote the available CCS technology through the aforementioned developments* ***in such a way that large-scale CO2 capture can be achieved in Eemshaven by 2020*** *by means of a so-called 'first train'.* ***RWE expects to be able to demonstrate this capture in 2015 and to have capture on a sufficient scale by 2020****, provided the technological development is so advanced that capture is economically feasible without disproportionate energy loss.*"

932. The First Claimant never completed its demonstration project for CCS.

933. This is of particular importance as the Government had already noted in 1999 that if CCS "*is not used, reversing the growth of CO_2 emissions in the* [amongst others the energy sector] *must be achieved by* ***reducing*** *the energy consumption and* ***carbon intensity of the energy supply***".[1109]

934. The same follows from the Environmental Permit, which cites the letter from Minister of Housing, Spatial Planning and the Environment of 28

1105 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.5 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1106 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.2.1 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1107 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 7.4.3 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1108 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Annex 2 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1109 **Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2, p. 34 (**Exhibit R-0042-NL**, Implementation Note on Climate Policy 1999, Parliamentary papers II 1998/99, 26 603, no. 2).

June 2007. The Environmental Permit explicitly states that: "[i]*n time, the CO2 emissions from coal-fired power plants are* […] *not compatible with the climate ambitions of Europe and of this government*" unless the coal plant operators keep their coal plants aligned with climate policy "*through a combination of the highest possible generation efficiency, the use of a substantial proportion of biomass, utilization of released heat and the application of CO2 capture and underground storage*."

935. The First Claimant also never presented any alternative plan to achieve its promised CO2 emission reduction.

936. Since the public policy objective of CO2 emission reduction continued to exist, First Claimant could not expect that regulation pursuing this objective would not be enacted. That would have required the Netherlands to reverse its objective of CO2 emission reduction, as dictated by the inaction of the First Claimant. Dutch regulation, however, stayed consistent with this objective.

937. Even if the Coal Act could be viewed as a radical change (*quod non*) it would still not qualify as "*sudden"* or *"unpredictable*". [1110] The Government repeatedly emphasised the requirement of compliance with environmental policy and targets, including with respect to CO2

1110 **Exhibit CL-0011 EN**, Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award (with Partial Dissenting Opinion by Professor Tawil), paras. 514-517: "[…] *an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest* […] *As for proportionality, the Arbitral Tribunal considers that this criterion is satisfied as long as the changes are not capricious or unnecessary and do not amount to* ***suddenly and unpredictably*** *eliminating the essential characteristics of the existing regulatory framework*". (**Exhibit CL-0011 ES**, Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award (with Partial Dissenting Opinion by Professor Tawil)).

reduction (*inter alia* in 2005,[1111] 2007,[1112] 2008,[1113] 2011[1114] and 2013[1115]). The premise at the time of investment was that Claimants would significantly reduce CO2 emissions – which did not materialise. There was an accumulation of warning signs that regulation would follow.

938. Furthermore, the entry into effect of the Coal Act is not abrupt.[1116] The Netherlands opted for the longest transitional period which still allows compliance with the Paris goals, i.e., 2030.[1117] The prohibition to use coal enters into force 10 years after the enactment of the Coal Act, and 13 years the coal phase-out was announced in the Coalition Agreement 2017. This delay affords Claimants the longest possible period to adjust to the production of energy without coal as well as visibility over the future of their plant. This is in line with the observations of Climate Analytics that phasing out coal by regulation

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1111 **Exhibit R-0030-EN**, Energy Report 2005: "***Coal*** *deserves renewed attention as a fuel for electricity generation, certainly with a view to promoting security of supply. However, this fuel will only be used under the condition that it does not interfere with the realisation of the CO2 emission agreements. Nor should it interfere with other policies. In the future, it will be possible to capture and safely store CO2 emissions from coal-fired power stations. The offer from the electricity sector to coinvest in a demonstration project for CO2 storage is an important first step.*" (**Exhibit R-0030-NL**, Energy Report 2005).

1112 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007, p. 5 *"In time, the CO2 emissions from coal-fired power stations are not compatible with the climate ambitions of Europe and of this government. Coal-fired power stations will ultimately only be acceptable through a combination of the highest possible generation efficiency, the use of a substantial proportion of biomass, utilisation of the heat released and the application of CO2 capture and underground storage.*" (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007).

1113 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1114 **Exhibit R-0103-EN**, Energy Report 2011 (**Exhibit R-0103-NL**, Energy Report 2011).

1115 **Exhibit R-0106-EN**, 2013 Energy Agreement (**Exhibit R-0106-NL**, 2013 Energy Agreement).

1116 As noted in **Exhibit RL-0149**, Renergy S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 681.

1117 In line with the scientific research of thinktank Climate Analytics, also referenced in the Explanatory Memorandum to the Coal Act: **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 1 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). See also **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, Executive Summary, p. VI.

provides certainty to energy sector investors, as opposed to a sudden closure due to changed market conditions.[1118]

939. Fourth, even apart from these requirements, the Environmental Permit (or the deepening of the waterways) do not reflect that a regulatory regime was set up to induce investment (or otherwise provide a specific commitment that regulation would be frozen).

940. The Environmental Permit was granted under the existing regulatory regime. No amendment was made to the regime to issue the permit. The issuance of a permit under existing law does not constitute a commitment or guarantee that that the framework will not be amended. If the First Claimant's reasoning were followed, it would imply that the Netherlands would provide a specific guarantee not to exercise its right to regulate with each permit it grants. This conclusion is untenable. As explained by the tribunal in *RREEF v. Spain*, a limitation on the right to regulate is an "*extraordinary act that must emerge from an unequivocal commitment*".[1119]

941. Moreover, the law governing First Claimants' permit specifically provides for the possibility and, where applicable, the obligation to amend permits in the interest of protecting the environment.[1120] It does not stand in the way of the State's right to regulate in this interest.

1118 **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, p. 31. This was likewise noted in the Letter of 19 January 2017 with respect to alternatives for reducing CO2 emissions.

1119 **Exhibit CL-0017**, RREEF v. Spain, ICSID Case No. ARB/13/30 Decision Resp, Princ Quantum, 30 November 2018, para. 244.

1120 **Exhibit RL-0044-EN**, The Environmental Law (General Provisions) Act, 06 November 2008, Article 2.30(1) stipulates that the competent authority must frequently assess whether the conditions of an environmental permit are still sufficient "*in view of developments in the area of technical possibilities for protecting the environment and developments relating to the quality of the environment*". Article 2.31(1)(b) requires that the competent authority modify the permit, if it becomes apparent from the assessment provided for in Article 2.30(1) that "*adverse consequences caused by the facility for the environment can* […] *or* […] *must be further limited*". Article 2.33(1)(d) stipulates that the authority must revoke the permit if a facility causes unacceptably detrimental consequences for the environment and these cannot be mitigated through a modification pursuant to Article 2.31. (**Exhibit RL-0044-NL**, The Environmental Law (General Provisions) Act, 06 November 2008). Environmental considerations are thus not "*reasons lying outside the law*", contrary to what Claimants imply in their Memorial, para. 530.

942. In sum, the Netherlands did not grant the First Claimant any specific undertaking that it would freeze the energy and environmental regulatory framework. Nor did it enact and subsequently repeal a regulatory regime aimed at inducing foreign investment.

16.3.4 Any supposed reliance on immutability of the legal framework would have been unreasonable

943. Even if it were assumed that the First Claimant expected that the legal framework was immutable, any reliance on such expectations would be unreasonable.

944. The tribunal in *Belenergia v. Italy* held that "[t]*o be legitimate, investors' expectations must not be frivolous* ***or unrealistic and must be grounded in reality***."[1121]

945. Similarly, the political and socioeconomic context in which the investment was made impacts the determination of the legitimacy of any expectations. In the words of the *Duke v. Ecuador* tribunal:

> "*To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment.* ***The assessment of the reasonableness or legitimacy must take into account all circumstances, including*** *not only the facts surrounding the investment, but also* ***the political, socioeconomic****, cultural and historical* ***conditions prevailing in the host State.*** *In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.*"[1122]

This observation has been echoed by numerous other tribunals.[1123]

1121 **Exhibit RL-0169**, Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, 28 August 2019, para. 571.

1122 **Exhibit CL-0071**, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, para. 340.

1123 In **Exhibit RL-0168**, Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award, 15 May 2019, para. 500, the tribunal took into account, as part of its legitimate expectations test, "*whether the reliance was reasonable, taking into account the prevailing social and economic circumstances in the energy sector and at the time";* **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 427: the tribunal held that "*in order to rely on legitimate expectations, the investor must assess the*

946. Tribunals have especially acknowledged the significance of the context of an investment in relation to sensitive areas of regulation, such as public health and the environment:

- In *Methanex v. the United States* the tribunal held that:

  "*Methanex entered a political economy in which it was widely known, if not notorious, that governmental* ***environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, nongovernmental organizations and a politically active electorate****, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds* ***for environmental and/or health reasons***."[1124]

- In *El Paso v. Argentina* the tribunal held that "*an investor cannot pretend to have legitimate expectations of stability of environmental regulations in a State […]* ***where concern for the protection of the environment and of sustainable development are high***".[1125]

- In *Chemtura v. Canada* the tribunal held that it "*cannot ignore that lindane has raised increasingly serious concerns both in*

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prospects of potential regulatory change in light of the reasonably to be expected changes in the economic and social conditions of the State; **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, paras. 304-305: the tribunal noted that "[investors'] *expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances;* **Exhibit RL-0109**, Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 335: the tribunal ruled that, based on the socio-political context, "*legislative changes, far from being unpredictable, were in fact to be regarded as likely*"*;* **Exhibit RL-0170**, Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015: the tribunal's FET ruling turned on the social and political context in Albania. "*The overwhelming necessities of the present and future*" were key factors considered in the tribunal's decision to deny the protection of an investor's expectations based on the stability argument. The tribunal underlined that "*these circumstances matter*".

1124 **Exhibit RL-0146**, Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, 03 August 2005, para. 9 of Part IV Chapter D.

1125 **Exhibit CL-0056**, El Paso Energy v. Argentina, ICSID Case No. ARB/03/15, Award, para. 361.

> *other countries and at the international level since the 1970s*".[1126]

947. Where an investor nonetheless invests in such an area, it can have no expectation of stability. As explained by the *Phillip Morris v. Uruguay* tribunal:[1127]

> "[…] *Manufacturers and distributors of harmful products such as cigarettes* […] ***can have no expectation that new and more onerous regulations will not be imposed*** *given by Uruguay to the Claimants or (as far as the record shows) to anyone else.*
>
> *On the contrary,* ***in light of widely accepted articulations of international concern*** *for the harmful effect of tobacco****, the expectation could only have been of progressively more stringent regulation*** […]."

948. Based on the context existing at the time of the First Claimant's investment in coal, further regulation to limit CO2 emissions was foreseeable. An expectation that Eemshaven would be allowed to continue to emit CO2 could not be grounded in reality.

949. First, when the First Claimant chose to make its investment in 2009, it was against the backdrop of ever-tightening CO2 emission reduction targets. As set out above in Chapter 2, the adoption of the Rio Declaration and the UNFCCC in 1992 served as an important framework that shaped the subsequent adoption of various climate policies around the globe. From 1992 on, it has been clear that every State is responsible for pursuing an effective climate policy aimed at limiting and reducing CO2 emissions. In 1997, the UNFCCC was expanded and reinforced by the Kyoto Protocol which, in Claimants' words, "*gave the UNFCCC teeth*".[1128]

950. At the EU level, the ETS was introduced in 2003. In 2007, the EU presented its policy views on the future climate policy which included

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1126 **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, paras. 134-135.

1127 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, paras. 429-430.

1128 Memorial, para. 103.

a requirement for global CO2 emissions to be 50% lower in 2050 than they had been in 1990 for the increase in global temperature to not exceed 2°C. The second phase of the ETS (from 2008 to 2012) imposed a tighter CO2 emission compared to the first phase. Also at the EU level, it was clear that CO2 emission targets would keep on being tightened.

951. Second, domestically the Netherlands had also been pursuing a policy of achieving increased levels of CO2 reductions well before Claimants made their decision to invest. As mentioned above in Sub-section 16.3.2, the Netherlands gave no guarantee that it would not change its emission reduction regulations so as to achieve increased emissions reductions. On the contrary, it had consistently adopted policy aimed at reducing CO2 emissions, including emission reduction in coal power plants, whether through stimulating CCS or otherwise.

952. The policy objective of emission reductions, and therefore, the perspective of further regulation – in line with the State's long-standing constitutional duty to protect the environment and public health[1129] – formed part of the legal framework from the inception of Claimants' investment.[1130]

953. Third, as also mentioned in Sub-section 16.3.3, the First Claimant acknowledged in April 2003 that "*more stringent requirements will be imposed with respect to the emissions of power plants*".[1131] It repeated this statement in 20 December 2006 by recognising that "*future*

1129 **Exhibit C-0020**, Constitution for the Kingdom of the Netherlands, Articles 21-22.

1130 **Exhibit RL-0113**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016, para. 622: "*When measures had been taken that have as their purpose and effect to implement such fundamental rights protected under the Constitution, they cannot hurt the fair and equitable treatment standard and the Concession Contract. In short, they were expected to be part of the investment's legal framework* […] *Respondent rightly recalls that the Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations*."

1131 **Exhibit R-0046-EN**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006, p. 10 (**Exhibit R-0046-NL**, RWE, 'Starting Note: Construction of a 1600-2200 MWe Coal-fired Power Plant Eemshaven by RWE Power AG' dated April 2006).

developments [were] *to be expected*" in the "*expected social desirability and need of CO2 removal in the long term*".[1132]

954. Fourth, both the Rio Declaration and ECT recognise the PPP. In the ECT, the Contracting Parties recorded their agreement that "*the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution*" (Article 19(1) ECT). Based on this principle, Claimants were aware that they could be required to bear the costs of the emissions that they were causing, or at least be required to accept regulation that sought to prevent Claimants from emitting from a certain future point in time (as the Coal Act does).

955. This was all the more to be expected where Claimants did not follow through on the requirement to achieve significant reductions of CO2 emissions, and had failed to make any visible progress in the area of CCS. As noted by the tribunal in *Biwater Gauff v. Tanzania*, due regard must be paid to "*countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct*" as well as "*the limit to legitimate expectations in circumstances where an investor itself takes on risks in entering a particular investment environment*".[1133]

956. In short, it followed from the international context and the context of Dutch policy that further emissions reductions measures could happen. There was a trajectory towards increased CO2 reduction, not stabilisation.

16.4 The Coal Act is a reasonable and proportionate measure within the meaning of the third sentence of Article 10(1) ECT

957. The Coal Act complies with the standard of reasonableness under Article 10(1) ECT.

1132 **Exhibit R-0047-EN**, Request for environmental permit, 20 December 2006, p. 11 (**Exhibit R-0047-NL**, Request for environmental permit, 20 December 2006).

1133 **Exhibit CL-0074**, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 601.

958. For a State measure to be not compliant with this standard, the measure must have no reasonable relationship to rational policy. This was the holding in *Saluka v. Czech Republic*:[1134]

> "*The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy.*"

959. The tribunal in *Investmart v. Czech Republic* echoed the same standard. It further noted that the question of the reasonableness of a measure is to be distinguished from an assessment of the merits of the measure:[1135]

> "*The standard to apply in assessing this question is whether the conduct of the Czech Republic bore a reasonable relationship to some rational policy.* ***This question is to be distinguished from any consideration of the merits of the policy*** *adopted by the Czech Republic.*"

960. Accordingly, as the tribunal in *Eskosol v. Italy* held, the question is "*'not whether the measures taken were or were not the best', but simply whether they were 'based on a reasoned scheme' that was itself reasonably connected to 'the aim pursued'*."[1136]

961. Further, as held in *Electrabel v. Hungary*, the analysis of whether a measure is unreasonable is subject to the "*substantial deference*" tribunals afford to the "*discretionary exercise of sovereign power, not made irrationally".*[1137] Thus, barring irrationality on the part of the State, the measure is to be regarded as reasonable in view of the deference to be granted to the State.

962. As held by the *PV v. Spain* tribunal, such deference is required because governments are frequently required to make policy choices

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1134 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 460. See also **Exhibit CL-0074**, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 693.

1135 **Exhibit RL-0110**, Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009, para 454.

1136 **Exhibit CL-0026**, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, para. 385.

1137 **Exhibit CL-0069**, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 8.35.

that can be viewed by certain constituents in a society as controversial or mistaken. Tribunals do not second-guess those choices:[1138]

> "*an arbitral tribunal* […] ***will normally not second-guess the State's choices****; it will not review de novo whether they are well-founded, nor assess whether alternative solutions would have been more suitable.* ***Governments often have to make controversial choices, which especially those directly affected may view as mistaken****, based on misguided* […] *theory, placing too much emphasis on certain social values over others.*"

963. Likewise in *Enron v. Argentina* it was held that if the measure corresponds with what "*the Government believed and understood was the best response*", it is not arbitrary unless "*impropriety is manifest*":[1139]

> "*The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary* ***in that they were what the Government believed and understood was the best response to the unfolding crisis****. Irrespective of the question of intention,* ***a finding of arbitrariness requires that some important measure of impropriety is manifest****, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.*"

964. Or, as put in *Philip Morris v. Uruguay*, the measure is reasonable where it is not "*entirely lacking in justification or wholly disproportionate*":[1140]

> "*In the end, the question is whether the* [measure] *in fact set was* ***entirely lacking in justification*** *or* ***wholly disproportionate****, due account being taken of the legitimate underlying aim*".

1138 **Exhibit CL-0021**, PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, para. 583.

1139 **Exhibit CL-0103**, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, para. 281.

1140 **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, paras. 418-419.

965. This continues to apply also where a measure enacted in the public interest is regarded as ill-conceived or undesirable by investors[1141] or negatively impacts investments. As observed, *inter alia*, by the tribunal in *Belenergia v. Italy*: [1142]

> "*The Tribunal agrees with Italy that the FET obligation does not prevent host States' regulatory autonomy.* […] *This means that* ***legitimate regulatory activity in the public interest does not amount to an FET breach even if it adversely affects investments***."

966. This deferential standard of review has been widely adopted in arbitral jurisprudence.[1143] Claimants agree that a State must be given "*a*

1141 **Exhibit CL-0031**, AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, para. 9.3.40: "[…] *The Tribunal has approached this question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection*"; **Exhibit CL-0090**, SD Myers Inc v. Canada, UNCITRAL, First Partial Award, para. 261 "[…] *tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections*."; **Exhibit RL-0171**, Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 299 "*the fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred*". This was echoed by e.g., **Exhibit RL-0172**, Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, para. 505; **Exhibit RL-0173-EN**, Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, ICSID Case No. ARB/13/2, Final Award, 07 March 2017, para. 527 (**Exhibit RL-0173-ES**, Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, ICSID Case No. ARB/13/2, Final Award, 07 March 2017).

1142 **Exhibit RL-0169**, Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, 28 August 2019, para. 572. The same was observed in **Exhibit RL-0174**, Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 and **Exhibit RL-0172**, Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016.

1143 See e.g., **Exhibit CL-0021**, PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, para. 626; **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, paras. 582 and 676(5); **Exhibit RL-0172**, Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, para. 505; **Exhibit CL-0090**, SD Myers Inc v. Canada, UNCITRAL, First Partial Award, para. 261; **Exhibit RL-0171**, Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April

certain level of deference" and that the question of the analysis must be conducted on a "*prima facie*" basis, to assess whether the reasons put forward by the State are "*manifestly*" without merit.[1144]

967. A deferential standard of review is especially applicable in the case of "*sensitive* [regulatory] *areas*", involving fundamental public interests.[1145] As noted above in Chapters 14 and 15, the protection of the environment and public health constitutes such a fundamental public interest.

968. In sum, in line with the approach adopted *inter alia in Electrabel v. Hungary*, *Saluka v. Czech Republic* and other arbitral jurisprudence, all that is required for a measure to be reasonable (and not arbitrary), is for it to have "*a logical (good sense) explanation and with the aim of addressing a public interest matter".*[1146]

969. In the present case, far from being arbitrary, the Coal Act aims to address a public interest and has a logical explanation (**Section 16.4.1**). The Coal Act was adopted against the background of International, EU and Dutch consensus and policy regarding the need for significant CO2 emission reduction, in order to address the (major) societal problem of global warming.[1147]

2011, para. 299; **Exhibit RL-0149**, Renergy S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 608.

1144 Memorial, para. 435.

1145 **Exhibit RL-0175**, Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para 9.37: "[necessary] *for international tribunals to exercise caution in cases involving a state regulator's exercise of discretion, particularly in sensitive areas involving protection of public health and the well-being of patients*". This was likewise echoed, inter alia, by the tribunal in **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award; **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010; **Exhibit RL-0176**, Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 08 June 2009.

1146 **Exhibit CL-0031**, AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, paras. 10.3.7-10.3.9; **Exhibit CL-0026**, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, para. 385.

1147 See above Chapter 7 and **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 2-3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). The Coal Act aims to achieve significant

970. The adoption of the Coal Act was also proportionate to the aim of preventing dangerous climate change (**Section 16.4.2**).

16.4.1 The Coal Act is reasonably connected to the aim pursued

971. First, the aim of the Coal Act is to address a public interest.

972. The aim of the Coal Act is to achieve a "*significant reduction in CO2 emissions*"[1148] in order to address dangerous global warming. This aim is based on International, EU and Dutch consensus.

973. The Coal Act has a reasonable relationship to that public interest. Coal-fuelled energy production continues to be "*one of the most CO2-intensive methods of electricity production".*[1149] There is no 'clean coal' alternative available or foreseeable in the near future. Compliance with emission targets so as to prevent dangerous global warming therefore requires the removal of coal from the energy mix by 2030. Accordingly, it was the assessment of the Dutch legislator that "*the importance of phasing out coal as a fuel in electricity production from a climate perspective is evident*".[1150]

974. Claimants agree that the Coal Act pursued the rational policy aim of CO2 emissions reduction: [1151]

CO2 emission cuts, as required by the Netherlands' commitment under the Paris Agreement to reduce CO2 emissions by 49%. Thinktank Climate Analytics has signalled that Paris goals require a phase-out by 2030 at European level: **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, Executive Summary, p. VI.

1148 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1149 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1150 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 3 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1151 Memorial, para. 431.

"*Claimants fully appreciate and support the goal of CO2-reduction. With the Coal Ban Law, Respondent pursued a rational policy objective.*"

975. Second, the aim pursued by the Coal Act – together with the other reasons for adopting the Coal Act – was logically explained (in detail) by the legislator in the Explanatory Memorandum as well as other Parliamentary documents, including by reference to the following:

- Based on statements of prior cabinets and parliaments, measures further limiting CO2 emissions were foreseeable.[1152] As early as 2005, private parties were put on notice that investments in the energy sector would be subject to climate policy, and that CO2 emissions would need to reach zero during the lifetime of coal plants.[1153] This was likewise emphasised in 2007[1154] and in 2008,[1155] and further transpires from earlier legislative proposals specifically targeting coal plants.[1156] Unabated use of coal could not be expected to continue without any further regulation, which was also

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1152 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 5-6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1153 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1154 **Exhibit R-0031-EN**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007 (**Exhibit R-0031-NL**, Letter from the Minister for Housing, Spatial Planning and the Environment, Parliamentary papers II 2006/07, 28 240, no. 77, 28 June 2007). In the letter of 2008 June 2007 the Minister indicated that the Netherlands' climate ambitions would not be without consequences for fossil fuels and that energy operators would need to take into account changes in market conditions.

1155 **Exhibit R-0157-EN**, Answers from Minister of Economic Affairs, Parliamentary papers II 2008/09, 31 510, no. 2, 29 September 2008, p. 13 (**Exhibit R-0157-NL**, Answers from Minister of Economic Affairs, Parliamentary papers II 2008/09, 31 510, no. 2, 29 September 2008); **Exhibit R-0158-EN**, Letter from the Minister of Housing, Spatial Planning and Environment to Parliament, Parliamentary papers II 2008/09, 31 209, no. 42, 27 October 2008, p. 22 (**Exhibit R-0158-NL**, Letter from the Minister of Housing, Spatial Planning and Environment to Parliament, Parliamentary papers II 2008/09, 31 209, no. 42, 27 October 2008).

1156 Referred to in **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 5-6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

reflected in the fact that the permits of the coal plants provide for the use of alternative fuels such as biomass, biodiesel, hydrogen, gas or ammonia.[1157] The permits were likewise premised on the expectation that coal plant operators would lift commercial CCS off the ground in the short term.[1158] In other words, the expectation was that the plants would soon operate with significantly reduced CO2 emissions, which the coal plant operators would need to "***fully*** [i.e., down to zero] *reduce*" during the lifetime of the plants.[1159] As the Explanatory Memorandum put it, given that this expectation did not materialise, "*the phasing out of coal is the most obvious*" in order to achieve the reduction in CO2 emissions which remained necessary.[1160]

- The Coal Act prohibits the use of coal, but does not affect the use of other means of electricity generation listed in the operators' permits, such as biomass, hydrogen, iron powder, and ammonia.[1161] Energy plants in Denmark, Belgium and Canada have achieved a transition to alternative fuels in the

1157 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1158 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1159 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 5 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1160 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1161 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

period 2013 to 2017.[1162] Under the Coal Act, the coal plants' transition will take place nearly two decades after these developments, allowing for further technological developments to take place. The energy producers in the Netherlands have also long been developing alternatives to coal – and will have received EUR 3.6 billion in subsidies from the Government for biomass alone[1163] (of which EUR 2.5 billion will be received by RWE[1164]). RWE has also stated in the media that it wants to run its plants entirely on biomass with the aim of making them CO2-neutral.[1165]

- For plants such as Eemshaven, the prohibition to use coal to generate electricity only enters into force as of 1 January 2030. This is 10 years after the enactment of the Coal Act, and decades after energy producers were put on notice that the continued use of coal would be conditional on CO2 emission reduction. The duration of the transitional period until 2030 is the result of a balancing exercise between different considerations. First, based on a scientific report by Climate Analytics, all remaining coal-fired power plants in the EU should be phased out by 2030 to keep global warming below 2ºC and in line with commitments under the Paris Agreement. Second, conversion to alternative fuels is already technically feasible and further renewable alternatives are on the rapid

1162 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1163 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1164 **Exhibit R-0159-EN**, RWE, 'Biomass and the energy transition' (https://benelux.rwe.com/innovatie-en-toekomst/biomassa) accessed 2 September 2022 (**Exhibit R-0159-NL**, RWE, 'Biomass and the energy transition' (https://benelux.rwe.com/innovatie-en-toekomst/biomassa) accessed 2 September 2022).

1165 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 10 and 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019). See also, Section 9.1.

rise. The transitional period gives sufficient opportunity to convert. Taking current biomass capacities as an example, the Explanatory Memorandum noted that the transitional period is twice as long as required for a full conversion, which is technically possible today.[1166] Moreover, until 2030 the owners of more efficient coal plants can continue operating by using coal, so as to recoup their investment in part. Third, the transitional period is in line with the expected development of CO2 'leakage' due to relocation of electricity production abroad. As noted in the Explanatory Memorandum, research indicates that after 2030, the percentage of CO2 'leaked' will be significantly less than in 2020.[1167]

- Under the PPP, the costs of reducing environmental damages should lie with the polluter.[1168] The coal plants are causing damage to the environment, so it is in principle justified that they bear the loss they may incur as a result of the measures to limit this damage.[1169] However, the cost of environmental damage mitigation has not been, in fact, placed solely with the polluter.[1170] As of 2027, the State will have provided energy

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1166 The Government accounted for the following: "*For the subsidising of co-firing of biomass in coalfired power plants, a period of three years is used to implement co-firing. A full conversion to 100% biomass requires similar technical modifications, and in principle a period of three years is therefore also reasonable for this. In addition to technical modifications, other operational changes may also be needed, such as applying for permits, additional purchase of (sustainable) biomass and adjusting and optimising the power plant*".

1167 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1168 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1169 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1170 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

operators with more than EUR 3.6 billion in biomass subsidies,[1171] a part of which will have been used for the conversion of coal plants to alternative energy sources.[1172]

976. Third, Claimants' suggestion that the Netherlands did not review whether the transition period was adequate[1173] is incorrect. As noted, the transition period was set so as to be more than sufficient to allow a conversion to an alternative fuel sources (which, in the case of biomass, would currently take three years and was projected to be lower as technology progressed), as well as to allow the coal plants to continue to recoup their investment by burning coal.[1174] The purpose of the transition period was not for the coal plants to earn their full investment back during the transitional period, as Claimants incorrectly suggest.

977. Fourth, Claimants' suggestion that the feasibility of a conversion to biomass was not assessed[1175] is also incorrect. At the time of the enactment, several conversions to biomass had taken place.[1176] Moreover, RWE had publicly announced its intention to convert to full biomass usage (from the 30% biomass that it may currently use),[1177]

1171 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, Section 4.2 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1172 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 6 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1173 Memorial, para. 432.

1174 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 11-12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1175 Memorial, para. 432.

1176 As mentioned in the Explanatory Memorandum, conversions had taken place in for example the United Kingdom, Denmark, Canada and Belgium: **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 10 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1177 See Section 9.1. RWE's position was referenced in the Explanatory Memorandum: **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019,

and Claimants do not contest that Eemshaven can be technically converted into biomass.

978. Claimants further suggest that the Netherlands should have verified that Eemshaven, once converted, could be profitably run in 2030 and beyond.[1178] This is equally incorrect. The business risk of running Eemshaven, whether run on coal and biomass (as will be the case until 2030) or solely on biomass (possibly from 2030) falls on RWE, and not on the Netherlands. What matters is that there was a possibility that Eemshaven could be run profitably from 2030 on based on alternative fuels. The existence of this possibility was evident from the fact that RWE had indicated before the adoption of the Coal Act that it intended to convert to 100% biomass. Indeed, assuming the correctness of the analysis of Claimants' expert Brattle, in the vast majority of cases where Eemshaven is still in business by 2030, the plant can profitably be run on biomass only.[1179] This is based on an assessment as of 2017, rather than in 2030 when the prospect of biomass may be very different from the prospect in 2017. Moreover, this is leaving aside other alternative fuels that may become available in the period until 2030.

16.4.2 The Coal Act is not disproportionate to the aim pursued

979. Tribunals that have reviewed the proportionality of a State measure have done so in a deferential manner. An overly invasive test of proportionality of the measure (*stricto sensu*) may result in a "*value judgment*" replacing the State's assessment on whether the importance of impacting investor interests outweighs the importance of achieving the public interest pursued.[1180]

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pp. 10 and 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1178 Memorial, para. 432.

1179 See Section 13.2.

1180 As noted by legal commentary. See **Exhibit RL-0177**, Gebhard Bücheler, 'Chapter 3: Proportionality as a General Principle of Law' in G. Bücheler, Proportionality in Investor-State Arbitration, OUP (2015), pp. 63-65. Buchler cautioned against the 'dark sides' of proportionality, e.g., the *stricto sensu* test, that can result in unwanted side effects such as judicial lawmaking, arbitrariness, and a threat to the rule of law. **Exhibit RL-0178**, Caroline Henckels, '§3.5: Proportionality stricto sensu: Weighing

980. The test applied – as articulated in *Eskosol v. Italy* – is whether a State has "*impos*[ed] *burdens on foreign investment that went* ***far beyond*** *what was reasonably necessary to achieve good faith public interest goals.*"[1181] In light of the deference mentioned above, in cases where particularly strong public interests goals such as the environment and public health are concerned, they guide the assessment of what is "*far beyond what was reasonably necessary*",[1182] or in the words of the tribunal in *Phillip Morris v. Uruguay*, whether the measure is "*wholly disproportionate*". The adoption of the Coal Act does not go far beyond what was reasonably necessary nor is wholly disproportionate.

981. First, it is not disputed that the goal of the Coal Act is to achieve CO2 emission reduction.[1183] The Coal Act is therefore a suitable measure to achieve CO2 emission reduction, because coal-fired power plants are among the largest emitters of CO2 in the Netherlands.[1184]

982. Claimants' arguments pertaining to the waterbed and leakage effects are incorrect and do not alter the conclusion. Research conducted by the Government indicated that the percentage of CO2 'leaked' substantially decreases after 2030. The assessment was that this allows CO2 savings of at least 8 Mt at European level.[1185] This

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and Balancing the Competing Interest' in C. Henckels, Proportionality and Deference in Investor-State Arbitration, Cambridge University Press (2015)62.

1181 **Exhibit CL-0026**, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, para 410.

1182 As noted above, tribunals have afforded an especially high degree of deference to decisions informed by public health and environmental considerations *inter alia* in **Exhibit RL-0144**, Chemtura Corporation v. Government of Canada (formerly Crompton Corporation v. Government of Canada), UNCITRAL, Award, 02 August 2010, para. 266; **Exhibit RL-0163**, David R. Aven and Others v. Republic of Costa Rica, Case No. UNCT/15/3, Award, 18 September 2018, 734; **Exhibit CL-0036**, Philip Morris Brand Sàrl (Switzerland), et al v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, paras. 418-419; **Exhibit RL-0113**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016, para. 594; **Exhibit RL-0179**, Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, 03 November 2015, para. 382.

1183 "*With the Coal* [Act]*, Respondent pursued a rational policy objective*." Memorial, para. 431.

1184 **Exhibit R-0019-EN**, NOS.nl, 'Ten companies emit large part of entire Dutch business industry', 27 November 2018 (**Exhibit R-0019-NL**, NOS.nl, 'Ten companies emit large part of entire Dutch business industry', 27 November 2018).

1185 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 2-3 and 12 (**Exhibit R-0017-NL**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

conclusion assumed that the ETS will not be adjusted. If it is, then there will be more savings.

983. Second, the Coal Act is also a necessary means to achieve CO2 emission reduction. The Explanatory Memorandum to the Coal Act explains that meeting the goals of the Paris Agreement requires the closure of the largest emitters of coal plants by 2030. This follows from an analysis performed by Climate Analytics that is also referenced in the Explanatory Memorandum. Climate Analytics examines two possible future scenarios to achieve the goals of the Paris Agreement. In both cases coal plants must be closed:[1186]

> "*The long-term temperature goal adopted under the Paris Agreement of holding temperature increase to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels"* ***requires a rapid decarbonisation of the global power sector and the phase-out of the last unabated coal-fired power plant in the EU by around 2030****.*"

984. Third, Claimants refer to alleged "*less drastic but more cost-efficient measures to achieve effective CO2 emission reductions*".[1187] In this context, Claimants advance a mandatory implementation of CCS and strengthening of ETS as an alternative which would be at least as effective and/or less onerous for Claimants. This is incorrect.

985. The legislator explained that "[a]*lternative instruments* […] *have been researched earlier and judged to be less effective, cost-effective and/or legally untenable*". One of the options taken into consideration was a mandatory implementation of CCS – which was excluded on account of it not being legally possible, given that CCS technology had not yet been developed by the sector.[1188] ETS is an instrument of EU

1186 **Exhibit R-0023**, Climate Analytics, 'A stress test for coal in Europe under the Paris Agreement' dated February 2017, Executive Summary, p. VI.

1187 Memorial, para. 445.

1188 **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, pp. 2-3: "*Alternative instruments, such as tightening the efficiency requirements for these plants, the removal of ETS allowances from the market, or the obligatory introduction of carbon capture and storage (CCS) have been researched earlier and judged to be less effective, cost-effective and/or legally untenable* […] *reference is made to the earlier mentioned letter of 19 January 2017 and to the* [advice of the Council of State on the Efficiency Bills]" (**Exhibit R-0017-NL**, Explanatory

law that is not within the Government's control. Moreover, the policy of the Government has been throughout that it takes its own responsibility to achieve CO2 emission reduction, using domestic policy instruments next to the EU-controlled ETS.

986. Fourth, the effect of the Coal Act on Claimants is not excessive. The Coal Act prohibits the burning of coal to generate electricity as of 2030. It does not prohibit Eemshaven from operating. Claimants' plant is permitted and built not just to fire coal but also biomass. It already does so and has received permits to fire up to 30% biomass.[1189] As noted, RWE has confirmed that it intends to convert the Eemshaven plant to operate fully on biomass.[1190] Claimants' other pant in the Netherlands, the Amer plant, is already running on 80% biomass

987. This forms part of Claimants' announcement that RWE would become a "*carbon neutral company by 2040*" prior to the enactment of the Coal Act and indicates that the effect of the Coal Act on Claimants, if any, was not excessive. Claimants have until 2030 to convert their plants to alternative usage – at least twice the amount needed for a conversion with technology as it stood in 2019 – and can use the remainder of the transition period to recoup part of their investment.

988. Moreover, under the PPP referenced in Article 19 ECT, the costs of environmental pollution is in principle to be borne by the polluter. Since the coal plants are in principle to bear the costs of their own CO2 emissions, the Coal Act cannot be disproportionate for potentially imposing only a part of that cost on the coal plants.

989. Furthermore, Article 4 of the Coal Act provides that if, years after its enactment, and contrary to what is expected,[1191] the Coal Act imposes

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Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1189 See Sub-section 9.1.

1190 **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019. See also **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 3. See also Chapter 9.1.

1191 As explained in the Explanatory Memorandum, the Coal Act is in line with the requirements of the European Convention on Human Rights. **Exhibit R-0017-EN**, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019, p. 13 (**Exhibit R-**

an individual and excessive burden on one of the coal plant owners, the Minister of Economic Affairs and Climate has the power to award compensation to the affected parties.

990. In *Muszynianka v. Slovakia,* claims arose out of a constitutional amendment forbidding cross-border bulk transportation of drinking and mineral water derived from Slovak water sources, with the aim of environmental conservation and protection of public health. The claimant alleged that the rejection of their mineral water extraction permit frustrated their business of extracting and transporting water to a town in Poland. In finding that the measure was proportional, the tribunal noted:[1192]

> "*On this backdrop, the Tribunal considers that it cannot forego this review, but in performing it,* ***the Tribunal must exercise restraint.*** *Consequently, proportionality stricto sensu would be lacking when a measure imposes an excessive burden on an investor's rights in relation to the aim of the measure.*
>
> *Whatever the standard, the present case is clear-cut. The public purposes that prompted and were reasonably connected with the Constitutional Amendment, namely,* ***environmental conservation, public health, and the regulation of natural resources, are far from negligible****, as are the specific objectives they advanced: the protection and rational use of water.* ***The vital importance of this non-renewable resource cannot be overstated, especially in an era of alarming climate change****. By contrast, while the Claimant may have had a commercial interest in the (cross-border) exploitation of the Legnava Sources, it held no right or even a legitimate expectation to that effect.* ***No relevant private interest at issue therefore seems remotely capable of outweighing the public interests involved in the adoption of the Constitutional Amendment****.*"

991. The same applies here. The public interest in the Coal Act is protecting the environment and reducing CO2 emissions, in the interest of preventing dangerous climate change. This is a public interest that in any event cannot be outweighed by private interests.

0017-NL, Explanatory Memorandum regarding Act prohibition coal for electricity production, Parliamentary papers II 2018/19, 35 167, no. 3, 19 March 2019).

1192 **Exhibit RL-0162**, Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic, PCA Case No. 2017-08, Award, 07 October 2020, paras. 574-575.

992. The Coal Act is a proportionate measure, and not "*wholly disproportionate*" such as to violate Article 10(1) ECT.

16.5 The Netherlands did not breach the Umbrella Clause in the fifth sentence of Article 10(1) ECT

993. The fifth and final sentence of Article 10(1) ECT requires an ECT Contracting Party to "*observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*". The Netherlands complied with this provision, also known as the Umbrella Clause.

994. Claimants' suggestion that the Netherlands breached the Umbrella Clause on account of not complying with the 2008 Sector Agreement is without merit. Claimants allegations do not fall within the scope of the Umbrella Clause (**Sub-section 16.5.1**) and the Netherlands has observed the 2008 Sector Agreement (**Subsection 16.5.2**).

16.5.1 The claim does not fall within the scope of the Umbrella Clause

995. To fall within the Umbrella Clause, an investor must show a specific obligation made to that investor.

996. The tribunal in *BayWa v. Spain* held that "*the umbrella clause in the last sentence of Article 10.1 of the ECT only applies to obligations **specifically entered into by the host State with the investor or the investment***."[1193] There must be "*a degree of specificity*"[1194] to the alleged obligation. Further, the obligations must have been "*assumed specifically in respect of a particular individual or legal person.*"[1195]

997. Similarly, in the words of the tribunal in *SICAR v. Spain*, "*the application of the umbrella clauses requires that the host State either concluded with the investor a specific contract or made to the investor*

1193 **Exhibit RL-0085**, BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 02 December 2019, para. 442.

1194 **Exhibit RL-0165**, Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para. 792.

1195 **Exhibit CL-0061**, Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, para. 380.

a specific personal promise."[1196] No such specific contract or personal promise was made to Claimants.

998. The 2008 Sector Agreement does not contain a personal promise to Claimants. The provisions in the 2008 Sector Agreement are directed towards the energy sector at large, a group made up of various energy companies and network operators active in the field.

16.5.2 The 2008 Sector Agreement was not violated by the Netherlands

999. In any event, there has been no violation of the 2008 Sector Agreement on the part of the Netherlands.

1000. First, Claimants misrepresent the content of the 2008 Sector Agreement. In the Memorial, Claimants translate Article 2.21 as including an obligation to "***not use measures*** *that would force the number or type of (coal)-fired power plants to be determined*".[1197] An accurate translation is "[i]*n shaping government policy, the national government will* ***not focus on*** *measures that compulsorily determine the number or type of (coal) power stations*".[1198] This is also the translation used by Claimants in prior correspondence[1199] and in their Request for Arbitration.[1200]

1001. On the basis of the ordinary meaning of the provision, the Netherlands made no promises that further measures would not be taken. It simply acknowledged it would in principle not focus on specifying the number of energy plants for the period until 2020. The Netherlands has fully complied with this obligation. The prohibition on the burning of coal does not impact coal plants until 31 December 2024 and Eemshaven specifically until 1 January 2030.[1201]

1196 **Exhibit CL-0010**, Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain, SCC Case No. V2015/063, Final Award, para. 715.
1197 Memorial, paras. 168 and 505.
1198 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 2.2.1 of Annex 1 (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).
1199 **Exhibit C-0017** , Claimants' Notice of Dispute, para. 7.
1200 Request for Arbitration, para. 23.
1201 **Exhibit RL-0180-EN**, Coal Act, 11 December 2019, Article 3(a) (**Exhibit RL-0180-NL**, Coal Act, 11 December 2019).

1002. Second, the 2008 Sector Agreement could be terminated upon 4 months' notice[1202] and in any event expired on 31 December 2020.[1203] Under the Coal Act burning coal for electricity production in Eemshaven is no longer possible as of 1 January 2030.[1204] The Netherlands has not (and cannot have) breached an alleged obligation that terminates 10 years before the Coal Act becoming effective for Claimants.

1003. Third, the 2008 Sector Agreement does not provide for a judicial course of action. The signatories to the 2008 Sector Agreement agree that the aspirations set out therein are unenforceable before a court of law:[1205]

> "***13. Differences of opinion***
> *In the event of differences of opinion about the content of this agreement, the parties do not want to be referred to the courts for resolution. Indeed, that is not the way in which this necessary cooperation can really work.*"

1004. Thus, it was agreed that in the spirit of cooperation parties would not resolve disputes through litigious means and thus the 2008 Sector Agreement did not create a private right of action for industry participants. Claimants are effectively usurping this provision by placing the dispute before an international tribunal.

16.6 The Netherlands did not breach any obligation related to protection and security

1005. Claimants argue that the Netherlands breached its obligation under the third sentence of Article 10(1) ECT to accord Claimants' investment "*most constant protection and security*".[1206] This claim is without merit.

1202 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 11(1) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1203 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 14(2) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1204 **Exhibit RL-0180-EN**, Coal Act, 11 December 2019 Article 3(b) (**Exhibit RL-0180-NL**, Coal Act, 11 December 2019).

1205 **Exhibit R-0033-EN**, 2008 Sector Agreement, 28 October 2008, Article 13(1) (**Exhibit R-0033-NL**, 2008 Sector Agreement, 28 October 2008).

1206 Memorial, paras. 536-537.

1006. Contrary to Claimants' assertion, the protection and security standard in Article 10(1) ECT only covers physical security and does not extend to legal security (Sub-section 16.5.1). Even assuming that Article 10(1) ECT covers legal security, it does not protect against a State's *bona fide* regulation exercised within the State's right to regulate (Sub-section 16.5.2). In any event, the Netherlands has acted consistently with Article 10(1) ECT regardless of its scope (Sub-section 16.5.3).

16.6.1 The protection and security standard in the ECT does not extend to legal security

1007. Article 10(1) ECT does not extend to legal security, as follows from the wording of the provision and arbitral case law.

1008. First, there is nothing in the wording of Article 10(1) ECT that could expand the scope of "*protection and security*" beyond physical security. As held by the tribunal in *IMFA v. Indonesia*, "[u]*nless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security*".[1207] Article 10(1) ECT makes no reference to legal security. This is unlike, for example, the Argentina-Germany BIT of 1991 which provides that "[i]*nvestments by nationals or companies of either Contracting Party shall enjoy full protection as well as* ***legal security*** *in the territory of the other Contracting Party*".[1208]

1207 **Exhibit RL-0181**, Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40, Final Award, 29 March 2019, para. 267

1208 **Exhibit RL-0182**, Argentina-Germany BIT of 1991, 09 April 1991, Article 4(1). See also **Exhibit RL-0183-EN**, Algeria-Italy BIT of 1991, 18 May 1991, Article 4(1)-(2), which stipulates: "*Investments made by nationals and juridical persons of one of the Contracting States shall enjoy in the territory of the other Contracting State constant, full and complete protection and security, excluding any unjustified or discriminatory measure that may harm, in fact* ***or in law****, their operation, maintenance, use, enjoyment, transformation or liquidation, subject to measures necessary for the preservation of public order.*" (**Exhibit RL-0183-IT**, Algeria-Italy BIT of 1991, 18 May 1991) This likewise allowed the *Consutel* tribunal to held that the protection and security in the treaty refers not just to physical security, but also legal security. **Exhibit RL-0184-EN**, Consutel v. Algeria, PCA Case No. 2017-33, Final Award, 03 February 2020, para. 413 (**Exhibit RL-0184-FR**, Consutel v. Algeria, PCA Case No. 2017-33, Final Award, 03 February 2020).

1009. Second, this interpretation is widely accepted by arbitral tribunals.[1209] In *Saluka*, the tribunal stated that "*the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force*." [1210]

1010. Applying the ECT, the tribunal in *Liman Caspian v. Kazakhstan* mirrored the *Saluka* tribunal in finding that Article 10(1) ECT relates to physical security only.[1211]

> "*With regard to the standard of most constant protection and security,* […] *this provision, which must have a meaning beyond, and distinct from, the standard of fair and equitable treatment, provides a standard* […] *whose* ***purpose is rather to protect the integrity of an investment against interference by the use of force and particularly physical damage****.*"

1011. Third, this interpretation has been confirmed by the Contracting Parties to the ECT. As part of the ECT modernisation the Contracting Parties opted not to amend the standard but rather to clarify "*that the*

1209 **Exhibit RL-0181**, Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40, Final Award, 29 March 2019, para. 267; **Exhibit CL-0072**, Asian Agricultural Products Ltd. v Republic of Sri Lanka, ICSID Case No. ARB/8/73, Award, paras. 48-49; **Exhibit RL-0185**, American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 57; **Exhibit RL-0186**, Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, 08 December 2000, para. 84; **Exhibit CL-0163**, Eastern Sugar v. Czech Republic, SCC Case No. 088/2004, Partial Award, para. 203; **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, para. 484; **Exhibit CL-0144**, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 167; **Exhibit RL-0187**, Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 668; **Exhibit CL-0098**, Gold Reserve Inc v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF/)09/1, Award, paras. 622-623; **Exhibit CL-0046**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, para. 182; **Exhibit RL-0151**, PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 257-259.

1210 **Exhibit CL-0032**, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, paras. 483-484.

1211 **Exhibit RL-0188**, Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award, 22 June 2010, para. 289. See also **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, paras. 558-565.

provision concerns the physical security of Investors and Investments".[1212]

1012. Claimants refer to academic publications from Professor Wälde[1213] and Professor Schreuer,[1214] but neither state that Article 10(1) ECT pertains to legal security. Likewise, Claimants' reliance on *AAPL v. Sri Lanka* is unfounded,[1215] as they rely on a passage of the award that does not discuss whether legal security was included in the applicable treaty provision's scope. In sum, despite citing a number of sources, Claimants do not provide authority to support that Article 10(1) ECT covers legal security.

16.6.2 In any event, the Netherlands has acted consistently with the protection and security standard in the ECT

1013. The Netherlands submits that its conduct complies with the "*most constant protection and security*" standard in Article 10(1) ECT regardless of its scope.

1014. Claimants submit that the Netherlands did not provide protection and security to their investment because the Coal Act interfered with the Environmental Permit without providing compensation.[1216] Claimants' argument under the most constant security and protection standard is essentially a rehash of their claim that the Coal Act frustrated their expectations by interfering with the Environmental Permit,[1217] and is bound to fail for the reasons already discussed in Section 16.3.[1218]

1015. Further, the Environmental Permit was granted under the then existing regulatory regime. The issuance of a permit under existing law does not constitute a commitment or guarantee that that the framework will not be amended. Moreover, the law governing the Environmental Permit specifically provides for the possibility and, where applicable,

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1212 **Exhibit RL-0038**, Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022.
1213 **Exhibit C-0077**, Letter from Ministry of Economy to RWE dated 2 July 2014.
1214 **Exhibit C-0078**, Essent Letter from [redacted] Essent, to the Ministry of Economic Affairs dated 24 July 2014.
1215 Memorial, para. 539.
1216 See Memorial, paras. 537.
1217 See Memorial, paras. 529-534.
1218 See Memorial, paras. 529-534.

the obligation to amend or revoke permits in the interest of protecting the environment.[1219] Claimants have not substantiated on what basis they would be entitled to compensation in such cases. In fact, such right to compensation is not a given in Dutch law.

1016. In any event, by submitting essentially the same claim under two different headings, Claimants fail to acknowledge the specificities of the protection and security standard, which does not coincide with the fair and equitable treatment standard. As Professor Schreuer's academic article (an authority submitted by Claimants) notes:[1220]

> "*As a matter of substance, **the content of the two standards is distinguishable**. The FET standard consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable. By contrast, by assuming **the obligation of full protection and security** the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs. In particular, this **requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights***."

1017. Claimants do not argue that the Netherlands failed to create legal remedies against adverse action concerning its investment, or to create mechanisms to defend against such adverse action. Rather, the contrary applies. The Coal Act specifically provides for a mechanism that offers financial compensation in the event of individual hardship.[1221]

1018. Moreover, Claimants have resorted to court proceedings in the Netherlands, which essentially address the same matters as the ones presently before the Tribunal.[1222] Claimants are therefore not deprived of an adequate legal framework, due process, legal remedies for the

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1219 See Sub-section 4.2.

1220 **Exhibit CL-0078**, Christoph Schreuer, Full Protection and Security, Journal of International Dispute Settlement (2010) , p. 14.

1221 **Exhibit RL-0180-EN**, Coal Act, 11 December 2019, Article 4 (**Exhibit RL-0180-NL**, Coal Act, 11 December 2019).

1222 See Chapter 19.

protection and security of their investments, and the enforcement of their allegedly violated rights.[1223]

[1223] **Exhibit RL-0109**, Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 360.

PART I: CLAIMANTS ARE NOT ENTITLED TO COMPENSATION

1019. Claimants are claiming EUR [redacted] (tax-free and to be increased with interest)[1224] for the future inability to use a fuel source that is fast on its way to become obsolete. Moreover, Claimants are claiming this compensation for a coal plant that, among other things, (i) had such a poor financial outlook that [redacted] of Claimants' investment in it was written off before it had started operations, and had a [redacted] chance of being still in business by 2030;[1225] (ii) was no longer compatible with Claimants' pre-existing carbon neutrality plans[1226] and (iii) was in any event going to be converted to alternative use.[1227]

1020. In support of its claim for damages, Claimants have instructed Brattle to prepare a damages valuation report (the "**Brattle Report**", dated 18 December 2021). Claimants have also instructed NERA to prepare a report with an economic assessment of a conversion of Eemshaven to full biomass use (the "**NERA Report**", also dated 18 December 2021). The Brattle Report and the NERA Report were prepared on the basis of instructions provided by Claimants, which will be discussed more in detail below.

1021. The Netherlands has engaged Compass to review Claimants' evidence on quantum and prepare an independent expert report including their assessment (the "**Compass Report**"). The Compass Report is dated 5 September 2022.

1022. In Chapter 17, the Netherlands sets out that Claimants have not demonstrated that it has suffered any losses as a result of the Coal Act. In Chapter 18, the Netherlands explains why Claimants' assessment of the losses it allegedly suffered – if any – is any event flawed.

1224 Memorial, Chapter E.
1225 See Sub-section 4.3.2.
1226 See Chapter 8 above.
1227 See Chapter 9 above.

17 CLAIMANTS HAVE NOT DEMONSTRATED A CAUSAL LINK BETWEEN THEIR ALLEGED LOSSES AND THE COAL ACT

1023. Claimants must demonstrate a causal link between their alleged loss and the Coal Act. In order to do so, Claimants must show that the Coal Act has caused them to lose profits that they would have otherwise secured (**Section 17.1**). Claimants have failed to do so.

1024. Claimants have not shown that they would have made profits from 2030 onwards, when they would no longer be allowed to fire coal: according to Brattle, it is [redacted] that Eemshaven would cease operations for economic reasons before that time (**Section** 17.2).

1025. Moreover, Claimants have failed to demonstrate that Eemshaven would still be firing coal in and after 2030, despite their company-wide coal phase-out announcement, as part of Claimants' carbon neutrality plans in furtherance of the Paris Agreement goals, which pre-date the Coal Act (**Section 17.3**).

1026. In fact, Claimants have declared that they will have converted Eemshaven to biomass by 2030 and took and continue to take steps in pursuit of this conversion, regardless of the Coal Act (**Section 17.4**).

17.1 Claimants must establish a causal link between the alleged wrongful conduct and their alleged loss

1027. A claimant must establish a causal link between the wrongful act and the alleged loss. In other words, a claimant must demonstrate that the respondent caused claimants' alleged injury. [1228]

1028. In *Chórzow Factory*, it was held that reparation (in the form of monetary compensation or restitution in kind) is meant to "*re-establish the situation which would, **in all probability**, have existed if that act*

[1228] See e.g., **Exhibit CL-0074**, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 778: "*it is well settled that one key requirement of any claim for compensation (whether for unlawful expropriation or any other breach of Treaty) is the element of causation.*"

had not been committed".[1229] Similarly, in the *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case before the ICJ, it was held that a "*sufficiently direct and certain causal nexus*" between a wrongful act and injury suffered could only be established if it can be concluded "***with a sufficient degree of certainty***" that the injury would have been averted absent the wrongful act.[1230]

1029. In line with the dictum in the *Chorzow* Factory case, the ILC Articles on State Responsibility (in particular, Draft Articles 31 and 34) define injury susceptible to reparation as including damage caused by the internationally wrongful act (Article 31(2)). A claimant must establish an "*injury caused*" and that a claim must be limited to "*damage actually suffered as a result of the internationally wrongful act*", expressly excluding "*damage which is indirect or remote*".[1231]

1030. In investment arbitration jurisprudence, the tribunal in *SD Myers v. Canada* described the requirement of establishing a sufficient causal link as follows:[1232]

> "*compensation is payable only in respect of* ***harm that is proved to have a sufficient causal link with the specific*** **[treaty]** ***provision that has been breached****; the economic losses claimed by [the claimant]* ***must be proved to be those that have arisen from a breach of the*** **[treaty]*****, and not from other causes***."

1031. Similarly, the tribunal in *Lemire v. Ukraine* explained that the burden of proving the existence of a causal link between the harm and the

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1229 **Exhibit CL-0091**, Factory at Chórzow (Merits), 1928 PCIJ Series A No 17, p. 47; See also **Exhibit RL-0111**, Ioan Micula and Others v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 917.

1230 **Exhibit RL-0189**, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment, 26 February 2007 para. 462. The *Genocide* standard has been referred to and applied by tribunals in investment cases, see among others **Exhibit CL-0117**, Deutsche Telekom v. Republic of India, PCA Case No. 2014-10, Final Award, 20 May 2020, paras. 121 and 124; and **Exhibit CL-0122**, William Richard Clayton et al. v. Canada, PCA Case No. 2009-04, Award on Damages, para. 168.

1231 **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries Article 31(1) and Article 34, paras. 5. See also para. 10 of the commentary on Article 31: "*Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the* ***exclusion of injury that is too "remote" or "consequential"*** *to be the subject of reparation*."

1232 **Exhibit CL-0090**, SD Myers Inc v. Canada, UNCITRAL, First Partial Award, para. 316.

alleged wrongful act lies with the claimant. It further noted that the claimant bears the burden of proof with respect to the claimed loss and that this causal link must be sufficiently close:[1233]

> "*it is a general principle of international law that injured* ***claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct****, and that the* ***causal relationship is sufficiently close*** *(i.e. not "too remote")*."

1032. In dealing with a claim for lost profits, the tribunal in *Micula v. Romania* applied the "*sufficient certainty standard*"[1234] and stressed that to claim for lost profits a claimant "*must have been deprived of profits that would have actually been earned but for the internationally wrongful act.*" Accordingly, the tribunal found "*the Claimants must first prove that they would have actually suffered lost profits, i.e., that they have been deprived of profits that would have actually been earned*".[1235]

1033. In summary, for Claimants' claim for alleged losses to be considered, Claimants must first prove with a sufficient degree of certainty − namely "*in all probability*" – that the Coal Act will cause them to lose profits that they would have achieved absent the Coal Act and that it is sufficiently certain that they would have earned the profits allegedly lost. They have not met this burden of proof.

17.2 Claimants have not demonstrated that Eemshaven will still be in operation by the time the Coal Act precludes firing coal

1034. Rather than proving that, absent the Coal Act, Eemshaven would "*in all probability*" have been profit-making beyond 2030, Claimants' evidence suggests the opposite.

1233 **Exhibit CL-0096**, Joseph C Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, para. 155. *See* also **Exhibit CL-0074**, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 787: "*The Arbitral Tribunal considers that in order to succeed in its claim for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value*."

1234 **Exhibit RL-0111**, Ioan Micula and Others v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 1110.

1235 **Exhibit RL-0111**, Ioan Micula and Others v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 1009 (emphasis in the original).

1035. As discussed earlier in this brief, Claimants' investment was tainted by profitability issues from the start. RWE decided to pursue a project that was not expected to be profitable, according to documents discussed by RWE AG's and RWE Power AG's boards in March 2009 when it allegedly took the decision to invest.[1236]

1036. Those problems remained a constant feature of Eemshaven after construction started, leading to significant impairments, as recorded in 2012, 2013 and 2016, due to increasingly unfavourable market conditions, [1237] which also caused RWE to partially abandon a twin project in Germany.[1238] Once Eemshaven started operations, it ran at a loss and continued to do so every year until the adoption of the Coal Act.[1239]

1037. Brattle's analysis confirms that Eemshaven's prospects going forward remain bleak. It shows that on Brattle's chosen valuation date of 9 October 2017, the expectation was that Eemshaven would have [redacted] closed in or before 2030, regardless of the Coal Act.

1038. As discussed in Section 13.2 above, Brattle's probabilistic analysis simulating market developments reveals that in [redacted] of the 100 possible outcomes (each outcome being, according to Brattle, "*equally likely to occur*"[1240]), Claimants will incur *no* damages, or *negative* damages due to the Coal Act, because market conditions will render the burning of coal loss-making before 2030. Brattle illustrates these results in the figure below:[1241]

1236 See Section 4.3.1.
1237 See Section 4.3.2.
1238 See Section 4.3.2.
1239 See Section 4.3.2.
1240 **Exhibit CER-0002**, Brattle Expert Report, paras. 14 and 228.
1241 **Exhibit CER-0002**, Brattle Expert Report, Figure 15.

1039. This will, in turn, lead to Eemshaven ceasing operations before 2030 to avoid further losses in [redacted] of the outcomes.[1242]

1040. According to Claimants' experts' own modelling and assumptions, it is therefore [redacted] that Eemshaven will have ceased its operations of burning coal before 2030, prior to and for reasons unrelated to the Coal Act becoming effective for Eemshaven. Accordingly, Claimants have not demonstrated that they will "*in all probability*" suffer losses as a result of the Coal Act.

1242 **Exhibit CER-0002**, Brattle Expert Report, Harris-Hesmondhalgh Workpapers, Tables H, Tab H2. See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 68. This is established based on the "shut-down rule" used by Brattle, according to which, Eemshaven will close after two years of cash losses in the but-for case if it expects that it will also make losses in the next year. In the actual scenario, Brattle shortened the shut-down rule by one year. That is, if Eemshaven makes losses in one year and expects to make losses in the next year, it closes. **Exhibit CER-0002**, Brattle Expert Report, paras. 194-198. See also **Exhibit R-0245**, Dan Harris and Serena Hesmondhalgh, Expert Report: Damage Caused to Eemshaven by the Coal Ban, Brattle First Eemshaven Report (Dutch Proceedings), Brattle Group, 19 February 2021, para. 207.

17.3 Claimants have not demonstrated that despite their own coal phase-out goals, Eemshaven would still fire coal in and after 2030

1041. As set out in Section 8.1 above, in early 2018 RWE began a transformation process that would lead – in September 2019, i.e., prior to the enactment of the Coal Act in December 2019 – to the beginning of a "*new era*" and the launch of a "*new RWE*".[1243] As part of its planned transformation into one of the world largest providers of renewable energy, RWE informed its investors that it would reduce emissions by 70%[1244] (later raising this target to 75%)[1245] and would decommission essentially all of its coal plants by 2030.[1246] Additionally, by 2040 RWE would reach carbon neutrality.[1247]

1042. According to RWE's declarations, this company-wide repositioning in the energy market was dictated in particular by RWE's assumption of responsibility for the fight against climate change. Among other things, RWE declared it was committed to global climate goals,[1248] including the Paris Agreement targets, [1249] and obtained independent certification that its strategy was in line with the goals of the Paris Agreement.[1250] As RWE explained, in order to achieve its own climate targets, "*the phaseout of electricity generation from coal will play a central role*".[1251]

1043. Additionally, RWE's declarations suggest that it sought to satisfy a changing society (and its customers) wishing for carbon neutral power

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1243 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 1. See also **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019

1244 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 3.

1245 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020, p. 14.

1246 **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020, p. 13. As explained in Chapter 8 above, RWE plans to phase out coal from all of its operations by 2030, with the exception of 4.3 GW of German coal, which it plans to phase out by 2038.

1247 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 3.

1248 **Exhibit R-0165**, RWE Presentation, 'Our energy for a sustainable life', 01 November 2019, slides 8 and 12.

1249 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021, p. 14.

1250 See **Exhibit R-0170**, RWE, 'Responsibility and sustainability (https://www.rwe.com/en/responsibility-and-sustainability) accessed 29 August 2022; see also **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021

1251 **Exhibit R-0160**, RWE, Response to CDP on Climate Change 2021, p. 12.

production,[1252] as well as to increasing financial concerns raised by banks, insurers and investors related to the poor prospects for coal-fuelled electricity generation.[1253]

1044. Coal ban laws enacted in several European jurisdictions were not the driving factor of RWE's decision to reposition itself as a renewable energy company and to phase out coal generation by 2030. Rather, RWE has declared that it did not intend to operate coal-fired plants, regardless of any coal phase-out legislation.[1254]

1045. RWE's business decisions, communicated well before the adoption of the Coal Act, rather than the Coal Act, are the reason that coal will no longer be fired in Eemshaven on and after 2030.

1046. Claimants have not demonstrated – and cannot reasonably demonstrate – that absent the Coal Act, despite their company-wide announcements and their certified commitment to meet the Paris Agreement targets, they would have continued to fire coal to generate electricity in Eemshaven on and after 2030. On this basis too, Claimants have failed to establish the existence of a causal link between the alleged losses and the Coal Act.

17.4 Claimants have not demonstrated that absent the Coal Act Eemshaven would not be converted to alternative use

1047. As set out in Chapter 7 above, the Coal Act does not mandate the closure of Eemshaven. Rather, it precludes generating electricity by firing coal. Eemshaven will only be precluded from doing so as of 2030. From that year onwards, Claimants may continue to operate

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1252 **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 19.

1253 **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 10; **Exhibit R-0040**, RWE Presentation, Capital Market Day, 12 March 2020, p. 7, 39; **Exhibit R-0172**, Bloomberg, 'Activist Investor Urges Germany's RWE To Exit Coal Quicker' (Energy Connects, 2021) (https://www.energyconnects.com/news/utilities/2021/september-1/activist-investor-urges-germany-s-rwe-to-exit-coal-quicker/) accessed 29 August 2022, 09 September 2021.

1254 **Exhibit R-0041**, Transcript RWE declarations at ABC 'Climate in the Courtroom Part 2: A fossil fuel company is sued. Now it speaks', 12 July 2020.

Eemshaven in another manner, for example for biomass-fuelled energy generation.

1048. RWE has repeatedly declared – including well before the enactment of the Coal Act – that it intends to convert Eemshaven to fire 100% biomass before 2030. For instance, in early July 2017 (before the 2017 Coalition Agreement), Eemshaven's plant manager stated in an interview titled "*RWE wants to run the plant in Eemshaven entirely on biomass*" that RWE intended to make Eemshaven 100% CO2 neutral by using biomass (see para. 497 above).[1255] As described in Section 9.1, RWE continued making declarations to this effect in the subsequent years, both before and after the enactment of the Coal Act.[1256]

1049. RWE's conversion of Eemshaven to increased biomass use is underway. As explained in Sub-section 3.2.2 and Section 9.1 above, by 2016, RWE had obtained all necessary permits as well as a subsidy to co-fire up to 15% (800kt). Shortly after, in 2017, RWE announced that it would request a revision of its permit to increase the use of biomass to 30% (1600kt), at a time that it was clear that such increase would not come with additional subsidies. RWE continued to pursue this increase after the 2017 Coalition Agreement and obtained the revised permit in 2021.

1050. The fact that RWE declared that it was planning to convert Eemshaven already before the 2017 Coalition Agreement confirms that this plan was not conceived as a result of an imminent coal phase-out. RWE would have also pursued conversion of Eemshaven in the but-for scenario. The phase-out of coal at Eemshaven is accordingly not a result of the Coal Act, but of RWE's pre-existing plans. Claimants have not demonstrated otherwise. They have failed to show the existence of a causal link between the Coal Act and alleged losses due to the future inability to fire coal.

1255 **Exhibit R-0025-NL**, Eemskrant, 'RWE Wants to Run Plant in Eemshaven Entirely on Biomass', 01 July 2017 (**Exhibit R-0025-NL**, Eemskrant, 'RWE Wants to Run Plant in Eemshaven Entirely on Biomass', 01 July 2017).

1256 These declarations are also in line with RWE's statements described in Section 8.1.

18 CLAIMANTS' POSITION ON QUANTUM IS FLAWED

1051. Claimants are required to prove their alleged losses. This burden of proof forms a well-established principle under international law, as explained by the *9REN v. Spain* tribunal:[1257]

> "***In this respect, the Claimant bears the legal burden of proving its case on compensation. This general principle is well established under international law****: onus probandi actori incumbit. If and to the extent that the Claimant does not prove its case on the assessment of compensation, it follows that its claim for compensation must be reduced or, where no loss is established, altogether dismissed by the Tribunal.*"

1052. Similarly, the tribunal in *SD Myers* agreed with the respondent that the burden was on Claimants "*to prove the quantum of the losses in respect of which it puts forward its claims*".[1258]

1053. The alleged loss must be sufficiently certain, and not merely speculative or indeterminate. As explained by the *Amoco v. Iran* tribunal, no reparation for speculative or uncertain losses can be awarded. [1259] The commentaries to the ILC Articles on State Responsibility similarly observe that "*lost profits have not been as commonly awarded in practice*" and that "[t]*ribunals have been*

1257 **Exhibit RL-0190**, 9REN Holdings S.à.r.l. v the Kingdom of Spain, ICSID Case No. ARB/15/15, Award, 01 May 2019, para. 405.

1258 **Exhibit CL-0090**, SD Myers Inc v. Canada, UNCITRAL, First Partial Award, para. 316. See also **Exhibit RL-0191**, ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Award, 08 March 2019, para. 272; **Exhibit CL-0065**, SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, para. 478.

1259 **Exhibit RL-0192**, Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, Iran-US Claims Tribunal Case No. 56, Partial Award, 14 August 1987, paras. 238-239: "*One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of the damage and of its effect as well.* […] *It does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain. The element of speculation in a short-term projection is rather limited, although unexpected events can make it turn out to be wrong. The speculative element rapidly increases with the number of years to which a projection relates. It is well known, and certainly taken into account by investors, that if it applies to a rather distant future a projection is almost purely speculative* […] [Such projections] *certainly cannot be used by a tribunal as the measure of a fair compensation.*"

reluctant to provide compensation for claims with inherently speculative elements."[1260]

1054. These principles similarly apply when estimating future damages. In *South American Silver v. Bolivia*, after noting that "*an accepted principle for assigning the burden of proof is that the party which alleges damage should establish its quantum*", the tribunal held that:[1261]

> "*when it comes to estimating future damages*, […] *what the Tribunal requires is* ***evidence that establishes with a particular degree of certainty that****, on the one hand****, the variables on which a calculation is based have a solid foundation and a reasonable probability of occurrence****, and****, on the other hand,* ***that the combination of such variables yields a high level of probability that the result would actually correspond to the damage suffered*** *by the investor.*"

1055. Claimants' requested compensation in the amount of approximately EUR [redacted] (tax-free and to be increased by interest)[1262] is based on an assessment by Brattle, who have estimated the value of Eemshaven in the actual scenario (i.e., with the Coal Act in place) and the but-for scenario (i.e., absent the Coal Act).[1263] Brattle have done so by applying the discounted cash flow ("**DCF**") method to 100 "*equally likely*" projections of cash flows of Eemshaven, each derived as part of a so-called Monte Carlo simulation which projects several variables, such as commodity prices and electricity prices, decades into the future.[1264]

1056. Claimants have failed to sufficiently substantiate their damages claim. Their position on quantum is founded on an incorrect determination of the date of valuation of the alleged losses (**Section 18.1**) and on inappropriate "But-For" and "Actual" scenarios (**Section 18.2**). Brattle's analysis, on which Claimants rely, is flawed and does not

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1260 **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries Article 36, para. 27.
1261 **Exhibit RL-0193**, South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia, PCA Case No. 2013-15, Award, 22 November 2018, para. 824.
1262 Memorial, Chapter E.
1263 Memorial, para. 574.
1264 Memorial, para. 575; **Exhibit CER-0002**, Brattle Expert Report, paras. 10-14.

present an accurate picture of any alleged losses suffered by Claimants (**Section 18.3**). Compass show that resolving the flaws in Brattle's calculations reduce their damages estimate to nil (**Section 18.4**).

1057. Even if Claimants would have been able to establish any losses (quod non), Claimants can be expected to convert Eemshaven to alternative use in order to mitigate any losses. A failure to do so should result in a reduction of compensation (**Section 18.5**). Claimants should bear part of their losses on account of contributory fault (**Section 18.6**).

1058. Further, Claimants' claims with respect to interest (**Section 18.7**) and a tax gross-up (**Section 18.8**) must be dismissed.

1059. Lastly, Claimants have claimed compensation for the same alleged losses in proceedings before the Dutch court. Double recovery of any losses pursuant to awards in parallel proceedings must be prevented (**Section 18.9**).

18.1 Claimants' position on the date of valuation is untenable

1060. Article 13(1) ECT stipulates that in cases of expropriation, compensation is to 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*".[1265]

1061. For indirect expropriations, this provision entails that a valuation date cannot be set before a measure "*having **effect** equivalent to* […] *expropriation*" has "*bec*[o]*me known*".

1062. The ECT is silent as to the valuation date to be applied in case of breaches of Article 10(1).[1266] In the practice of ECT tribunals, the valuation date has been identified on the date when the breach

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1265 **Exhibit CL-0002**, Energy Charter Treaty, Article 13(1).

1266 See e.g., **Exhibit CL-0027**, Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, para. 678. Claimants appear to agree – see Memorial, paras. 568-569.

crystallised or ripened into an irreversible deprivation, or in actual and permanent damage, rather than the beginning date of the events.[1267]

1063. In *Stati v. Kazakhstan*, the tribunal found that the appropriate valuation date was the moment in which actual and permanent losses could be identified for the investments:[1268]

> "*1496.* […] *Though the President's Order in October* [2008] *almost immediately caused various government actions against Claimants' investment, which were the beginning of a continuing breach of the FET-standard of the ECT,* […] ***the effects of these breaches*** *damaging the investments only* ***started in December 2008****.*
> *1497. The Tribunal considers that* ***only by 30 April 2009, when the State sequestration of Claimants'*** *KPM and TNG* ***shares and assets occurred, actual, and permanent damages could be identified*** *for the investments.* […]
> *1499. Therefore, in its following considerations on the quantum of damages,* ***the Tribunal will rely on 30 April 2009 as the determinative valuation date****.*"

1064. In *Watkins v. Spain*, the tribunal found that the valuation date should be the date at which claimants "*could ascertain the extent of the impact of the* [measure] *on the value of their investment*":[1269]

> "***While it is true that Claimants were aware much earlier that the regime in Spain was changing, it was only on 20 June 2014 that they could ascertain the extent of the***

1267 See for instance **Exhibit RL-0155**, InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award, 02 August 2019, para. 576: "*the new remuneration standards did not come into effect until June 2014. The Tribunal is satisfied that the breach of the ECT crystallized in June 2014, and that this is the appropriate moment at which to value Claimants' losses.*" **Exhibit CL-0016**, Masdar v. Spain, ICSID Case No. ARB/14/1, Award, para. 605, referring in turn to the "*irreversible deprivation test*" as developed *inter alia* in **Exhibit RL-0194**, International Technical Products Corporation and ITP Export Corporation v. The Government of the Islamic Republic of Iran, IUSCT Case No. 302, Final Award, 28 October 1985, para. 120; **Exhibit CL-0103**, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, para. 405.

1268 **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, paras. 1496-1499.

1269 **Exhibit CL-0027**, Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, para. 680. See also **Exhibit RL-0149**, Renergy S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 790. The tribunal also noted that it found "*additional comfort in the fact that most other tribunals faced with comparable claims against the Respondent likewise chose a valuation date in June 2014*", referring to a vast array of case law dealing with the amendments to the Spanish incentive scheme for renewable energy.

> ***impact*** *of the New Regime on the value of their investment. Consequently, the Tribunal finds that 20 June 2014 is the appropriate valuation date.*"

1065. Similarly, the tribunal in *Masdar v. Spain*, dealing with the same contested measure, found that the appropriate valuation date was 20 June 2014, noting that this approach allowed to use "*historical experience*" until the measure took effect, while the alternative valuation date proposed (31 December 2012), would have required "*departing from a pure ex ante approach by resorting to hindsight for certain parameters, including those relative to the new regime and to regulatory risk*."[1270]

1066. When the above standards are applied, both Claimants' valuation date (9 October 2017), as adopted by Brattle,[1271] and a valuation date immediately prior to the adoption of the Coal Act in December 2019 (a date used in Brattle's calculations in their second report in the Dutch proceedings),[1272] are incorrect.

1067. First, the publication of the 2017 Coalition Agreement on 10 October 2017 did not entail or announce the (indirect) expropriation of Eemshaven. Similarly, at the time of publication of the Coalition Agreement, the alleged breach had not crystallised or ripened into an irreversible deprivation, or resulted in actual losses.

1068. The Coalition Agreement expressed an intention to close coal plants at the latest by 2030. No further details clarifying the scope or effects of the future measure were provided.[1273] This is also confirmed by Claimants' contemporaneous position, as expressed in RWE's 2017 Annual Report:[1274]

> "[a]*t present,* ***it is impossible to predict*** *the ramifications of the coalition agreement for the energy sector*."

1270 **Exhibit CL-0016**, Masdar v. Spain, ICSID Case No. ARB/14/1, Award, paras. 606-607.

1271 **Exhibit CER-0002**, Brattle Expert Report, para. 2(a).

1272 **Exhibit R-0250**, Serena Hesmondhalgh and Dan Harris, Reply Report: Damage Caused to Eemshaven and Amer 9 by the Coal Ban, Brattle Dutch Proceedings Reply Report, Brattle Group, 28 April 2022.

1273 See Section 7.1 above.

1274 **Exhibit BR-28**, RWE, Annual Report 2017, p. 36.

Ultimately a phase out of the use of coal for electricity production was introduced rather than closure of coal plants.

1069. Moreover, one year later, the scope and effects of the announced measure remained unclear. RWE's 2018 Annual Report took note of the draft Coal Act presented by the Government in May 2018[1275] (which, differently from the 2017 Coalition Agreement, did not entail a coal plant phase-out, but only proposed a phase-out of the use of coal for electricity production, giving claimants the possibility to convert their coal plants to alternative fuels[1276] – as RWE was planning to do anyway). It recognised that following a public consultation in the summer of 2018, the Government had revised the draft law and submitted an "*as yet unpublished new version*"[1277] to the Dutch Council of State for advice, which would be subjected to debate in Parliament in the spring of 2019.

1070. Based on the information available, the effects of the draft law were not deemed expropriatory at that time, according to RWE's documents. The Annual Report stated that according to the May 2018 draft, "*power would no longer be produced from coal starting in 2030*",[1278] but that this did not entail the automatic closure of Amer 9 and Eemshaven, the two coal and biomass plants owned by RWE:[1279]

> "*Amer 9 and* ***Eemshaven would have to be shut down or operated only using alternative fuel. Both stations are being retrofitted for co-firing biomass***."

1071. Moreover, as noted by Compass, there is no contemporaneous market evidence reflecting any impact of the 2017 Coalition Agreement on the value of Eemshaven or RWE's stock, let alone an impact of the size

1275 **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 32.
1276 **Exhibit R-0154-EN**, Overheid.nl, Consultation Act prohibition of coal for electricity production (https://www.internetconsultatie.nl/kolencentrales) accessed 3 September 2022 (**Exhibit R-0154-NL**, Overheid.nl, Consultation Act prohibition of coal for electricity production (https://www.internetconsultatie.nl/kolencentrales) accessed 3 September 2022).
1277 **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 34.
1278 **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 34.
1279 **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 34.

estimated by Brattle.[1280] Similarly, Brattle have not presented any economic or financial analysis to support their conclusions.[1281]

1072. Finally, Claimants' choice of valuation date is also at odds with the instructions given to Brattle.

1073. Brattle have been asked to "*quantify the loss in value of Eemshaven taking into account the Coal Ban as approved by the Dutch Parliament*".[1282] However, Parliament only approved the Coal Act in December 2019, over two years after the publication of the Coalition Agreement and Claimants' proposed valuation date.

1074. Claimants' instruction is indicative of the fact that any date prior to the adoption of the Coal Act itself on 19 December 2019 would be illogical, as they would require to use hindsight as to the scope of the Coal Act itself.

1075. Second, the Netherlands submits that a valuation date immediately prior to the adoption of the Coal Act is not correct either.

1076. While the Coal Act was published on 20 December 2019 and became therefore known on that date, its alleged expropriatory effects with respect to Eemshaven were not known then, and had not crystallised then (or today).

1077. The Coal Act will only have effect on Eemshaven's operations starting on 1 January 2030. Claimants continue to collect cash flows for their coal-fired electricity generation business. As Brattle's analysis also confirms, there will be no material impact (if any) of the Coal Act on Eemshaven's cash flows until at least 2030.[1283]

1280 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 161.

1281 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 161.

1282 **Exhibit CER-0002**, Brattle Expert Report, para. 2(b).

1283 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, footnote 48: "*As noted by Brattle, in the outcomes of their modeling up to 2030 "[t]here is very little difference between the monthly baseload electricity prices in the actual and but-for cases." See Brattle report, ¶341. Thus, there would be minimal differences in cash flows between the Actual and But-for scenarios until 2030.*"

1078. Additionally, the Coal Act allows to continue electricity production with alternative fuels. Before the adoption of the Coal Act, RWE confirmed that RWE's Dutch plants were being converted to biomass:[1284]

> "***RWE is in the process of converting the plants in Eemshaven*** *and Amer* ***to fire biomass****.* ***The objective is to*** *transform electricity generation from fossil fuel in order to* ***achieve carbon neutral production****.*"

1079. Only several years from now, after the conclusion of this arbitration, will it be clear whether Eemshaven will continue to operate using a different fuel, such as biomass (in line with Claimants' plans and announcements up until this day)[1285] in or after 2030, or will in fact close down.

1080. Accordingly, any allegedly expropriatory effect of the Coal Act – assuming that Eemshaven will not shut down or phase out coal before 2030, in which case there will be no effect at all; see Chapter 17 – will only be clear in or around 2030. Similarly, the impact and size of the breach of Article 10(1) ECT alleged by Claimants has not yet "*crystallised*", and as of today the alleged breach has not resulted in an "*irreversible deprivation*" or in "*actual, and permanent damages*" (see para. 1063). As argued in Section 13.2 of this Counter-Memorial, any damage assessment at this stage will require the Tribunal to perform an unnecessarily speculative exercise.

1081. Claimants' incorrect choice of valuation date has significant implications for its quantum case. According to Brattle, by shifting the valuation date by only two years, from October 2017 to December 2019, the alleged damages to Eemshaven would decrease by [redacted].[1286] As Compass notes, more recent market developments taking place after December 2019, such as a significant increase in CO2 prices, as well as additional regulatory initiatives to reduce emissions at the EU

1284 **Exhibit R-0038**, RWE Press Release: 'The new RWE: carbon neutral by 2040 and one of the world's leading renewable energy companies', 30 September 2019. See also **Exhibit R-0039**, Written Transcript RWE Press Conference, 30 September 2019, p. 3. See also Section 9.1, where RWE's declarations with respect to the full conversion of Eemshaven to biomass are described.

1285 See Section 9.1.

1286 **Exhibit R-0250**, Serena Hesmondhalgh and Dan Harris, Reply Report: Damage Caused to Eemshaven and Amer 9 by the Coal Ban, Brattle Dutch Proceedings Reply Report, Brattle Group, 28 April 2022, para. 52.

level, are expected to further deteriorate Eemshaven's profitability prospects, especially after 2030.[1287]

18.2 Claimants' "But-For" case and "Actual" case are based on incorrect premises

1082. Claimants explain that Brattle's calculation of Claimants' losses is based on a comparison between the fair market value of Eemshaven with the Coal Act in place, their so-called "Actual" case, and without the Coal Act, their so-called "But-For" case.[1288] Both the "But-For" case and the "Actual" case underlying Claimants' case on quantum is inappropriate.

1083. Claimants' "But-For" case assumes that Eemshaven would have been able to keep operating without any further restrictions until 2054. As such, Claimants ignore that the Coal Act was a means to achieve a goal: reduction of CO2 emissions. Also absent the Coal Act, Eemshaven would have eventually been forced to reduce CO2 emissions in accordance with this goal. It would thus not be able to continue unrestricted coal-fired operations until 2054. For example, as explained in Section 2.4.1, once the Fit for 55 legislative package has been implemented, no more emission rights are expected to be available under ETS. This would require Eemshaven to close or become CO2 neutral, for example by investing in CCS. As a result, the value of the plant's coal-fired operations would be lower in the appropriate "But-For" case than assumed by Claimants and Brattle. Ignoring this need of CO2 reductions renders Claimants' "But-For" case implausible and inflates its damages estimate.

1084. Further, the "But-For" case assumes a too wide scope of the alleged breach.

1085. As explained in Sub-sections 15.1.2 and 16.3.2 above, the Coal Act is proportionate. Should the Tribunal disagree and find a breach of the ECT, this breach would only cover the extent to which the Coal Act is found to be disproportionate. Conversely, to the extent that the Coal

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1287 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 195.

1288 Memorial, para. 574.

Act is proportionate, it does not constitute a breach of the ECT. Losses are only eligible for compensation to the extent that they result from a breach. Thus, Claimants can only pursue compensation of losses resulting from the Coal Act to the extent that it will have been found to be disproportionate, not for the Coal Act in its entirety.

1086. In the "But-For" case, Brattle calculate the fair market value of Eemshaven absent the Coal Act. On that basis, they determine the value impact of the Coal Act as a whole (rather than only the part of the Coal Act that constitutes a breach, if any) for the purposes of calculating Claimants' alleged losses. They thus in fact assume that the Coal Act constitutes a breach in its entirety. As explained above, this is incorrect. As a result, Brattle overstate the fair market value in the "But-For" case and, consequently, Claimants' alleged losses.

1087. The "Actual" case, too, is inappropriate. RWE instructed Brattle to "*assume that Eemshaven will only burn coal since co-firing biomass is not economically viable without the SDE+ support scheme, which will no longer be available after 2027*".[1289] As explained in Sub-section 15.2.2, this assumption is incorrect. As a result, the "Actual" case disregards the significant value of the possibility of converting to biomass. Brattle thus understate the fair market value in the "Actual" case and, consequently, overstate Claimants' alleged losses, as explained in more detail in Sub-section 18.3.4 below.

18.3 Brattle's assessment is flawed

1088. Claimants rely on the Brattle Report to substantiate their damages claim. Brattle's calculation of losses is flawed on a number of counts. The Netherlands highlights the most striking flaws in this Section 18.3. For a further description of these and other flaws, the Netherlands refers to the Compass Report.

1089. First, the methodology chosen by Brattle – the so-called Monte Carlo approach – and its application to determine fair market values are inappropriate and unusual (**Sub-section 18.3.1**). Second, Brattle do not use appropriate sets of data to project how several relevant

1289 **Exhibit CER-0002**, Brattle Expert Report, para. 2.c.

variables will develop over time (**Sub-section 18.3.2**). Third, Brattle's discount rate is too low and does not reflect the increasing risks faced by Eemshaven (**Sub-section 18.3.3**). Fourth, Brattle fail to account for the value of the possibility of converting Eemshaven to alternative use (**Sub-section 18.3.4**). Fifth, Brattle fail to perform proper reasonability checks with respect to the result of its valuation exercise (**Sub-section 18.3.5**).

18.3.1 Brattle's use of the Monte Carlo approach is not appropriate

1090. As explained in Section 13.3 above, Brattle have conducted a probabilistic analysis based on 100 simulations of the future development of commodity prices, such as fuel prices and CO2 prices, using the so-called Monte Carlo technique ("**Monte Carlo**").[1290] As explained by Compass, "*Brattle start from the 'central' tendencies of a chosen scenario* […] *and build a distribution of 100 simulations around such central tendency.*"[1291]

1091. Brattle use each simulation to create a pair of free cash flow paths, with each pair "*consisting of one set of cash flows for the actual case (with the Coal Ban) and one for the but-for case (without the Coal Ban)*".[1292] Based on these 100 pairs of free cash flow paths, Brattle calculate 100 pairs of fair market values on their chosen date of valuation.[1293] The differences within the pairs represent "*100 estimates of loss in value that Eemshaven has suffered due to the Coal Ban*".[1294]

1092. Brattle's methodology is incorrect on at least three counts. Brattle's choice to use Monte Carlo is not in line with market practice (**Sub-section 18.3.1.1**). Brattle do not assess the reasonableness of the scenarios on which they base their calculation (**Sub-section 18.3.1.2**). Further, Brattle fail to correctly deal with the extreme scenarios in order to account for risk aversion of investors (**Sub-section 18.3.1.3**).

1290 **Exhibit CER-0002**, Brattle Expert Report, para. 11. See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 137.
1291 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 137.
1292 **Exhibit CER-0002**, Brattle Expert Report, para. 12.
1293 **Exhibit CER-0002**, Brattle Expert Report, para. 12.
1294 **Exhibit CER-0002**, Brattle Expert Report, para. 13.

18.3.1.1 Brattle have not shown that it is common to use Monte Carlo to determine fair market value

1093. As explained by Compass, "*Brattle fail to provide any evidence that from a practical point of view Monte Carlo simulations are commonly used in real-life acquisitions of companies, where investors would rely on a valuation averaged from random simulations, and that such an approach is actually preferred by investors to using a "central" or "scenario-based" cash flow forecast*".[1295]

1094. On the contrary, equity analysts covering RWE have based their valuations on a single scenario, rather than a wide set of simulations as contemplated pursuant to the Monte Carlo approach.[1296] Similarly, RWE's board appears to have assessed its investment decision with respect to Eemshaven on the basis of one single base case with sensitivity analyses, rather than by applying the Monte Carlo approach.[1297] RWE's forecasts of Eemshaven's likely revenue and costs in its periodic "Station Contribution Outlook" reports, too, forecast a central scenario.[1298]

1095. As explained by Compass, "*the common approach investors use to implement the DCF method to determine FMV of a company is to rely on a central scenario of cash flows, or at most a handful of reasoned scenarios (i.e., the scenario-based approach)*", rather than to rely on a set of random simulations.[1299] Brattle acknowledge that this approach is commonly used.[1300]

1295 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 138.

1296 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 139.b.

1297 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 139.a, referring to **Exhibit C-0061**, RWE Power AG Decision Paper, Board Meeting dated 16 March 2009, pp. 17-26 (pdf).

1298 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 139.c.

1299 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 190. See also para. 138.

1300 **Exhibit CER-0002**, Brattle Expert Report, para. 81. See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 140.

18.3.1.2 Brattle fail to account for circumstances negatively impacting Eemshaven's value in "extremely favourable" scenarios

1096. Brattle explain that some of the 100 scenarios forming part of the Monte Carlo approach are "*extremely favourable to Eemshaven*".[1301] As explained by Compass, these "*extremely favourable*" scenarios follow from the accumulation of the volatilities of commodity prices over a very long period of time.[1302] These scenarios heavily inflate Brattle's damages calculation.

1097. The twenty highest valuations result from scenarios with high electricity prices and high numbers of running hours.[1303] In these scenarios, the regulatory risks increase, as described by Compass:

1098. If electricity prices increase to the degree that they create affordability concerns for end users, regulators may take measures to mitigate these concerns.[1304] This risk is already materialising in several jurisdictions in Europe and has been recognised by RWE.[1305]

1099. Moreover, if coal plants run for many hours, they will produce high CO2 emissions. This goes against decarbonisation goals and could trigger regulatory measures to reduce CO2 emissions (for example by reducing the number of available emission rights under ETS or by mandating CCS).[1306]

1100. The IEA recognised this in its 2017 World Energy Outlook. It explained that policy constituted "*one major uncertainty*", pointing to potential

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1301 **Exhibit CER-0002**, Brattle Expert Report, para. 230.
1302 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 142.
1303 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 143.
1304 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 144.
1305 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 146.
1306 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 144.

policy shifts serving to mitigate increases of energy prices or to temper rising emissions.[1307]

1101. Moreover, in those "*extremely favourable*" scenarios where coal-fuelled energy generation would allegedly be very profitable, other energy sources (such as gas, biomass and renewables) would also be relatively more profitable. As a result, the capacity of such energy sources could be increased, leading to lower electricity prices and more competition for coal plants.[1308]

1102. As explained by Compass, each of the one hundred simulations modelled by Brattle should be subjected to a reasonableness assessment and adjusted where necessary to account for the risks described above. However, Brattle fail to make any corrections or otherwise take these risks into account and instead simply rely on these "*extremely favourable*" scenarios as part of its valuation.[1309]

18.3.1.3 Brattle fail to correctly account for risk aversion of investors

1103. Brattle estimate a fair market value for Eemshaven of EUR [redacted] in the but-for scenario.[1310] This is the average of 90 of its simulations, after removal of the five highest results and the five lowest results. Brattle claim to make this adjustment "*to avoid a situation where a few price paths have a very large effect on the damages*".[1311]

1104. Some of the scenarios taken into account by Brattle result in a fair market value of [redacted] and many – in fact, [redacted] – of which result in a fair market value of close to [redacted]:[1312]

1307 **Exhibit R-0251**, International Energy Agency, World Energy Outlook 2017, 14 November 2017, p. 40; see also **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 88 and 145.

1308 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 147.

1309 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 148-149.

1310 **Exhibit CER-0002**, Brattle Expert Report, para. 14.b.

1311 **Exhibit CER-0002**, Brattle Expert Report, paras. 14 and 231.

1312 **Exhibit CER-0002**, Brattle Expert Report, Figure 13 and para. 232. The fact that Brattle can identify 100 widely dispersed scenarios (with outcomes ranging from over EUR 16 billion to below EUR 0) which they each consider "*equally likely*" (see para. 228) underlines that RWE's case on damages is very speculative.

1105. Brattle assume that a willing buyer would pay EUR [redacted] to acquire Eemshaven absent the Coal Act.[1313] As explained by Compass, Brattle's calculation implies that a buyer is indifferent to whether the distribution of fair market values in the one hundred scenarios is widely dispersed or whether there is a 100% probability of Eemshaven having a value of EUR [redacted]. Brattle in fact assume that a willing buyer is risk-neutral.[1314]

1106. This assumption is not correct. Compass explain that there is "*wide consensus in economic literature that rational investors are not risk-neutral, but that they are risk-averse*" and that "*a risk averse willing buyer would pay less than the simple average of widely dispersed potential values*".[1315]

1107. Compass shows that a buyer paying EUR [redacted] on the basis of Brattle's modelling would indeed face significant risks of not recovering its investment. Of the relevant simulations, [redacted] result in a fair market value that is lower than EUR [redacted]. That means that the buyer would be aware that there was a [redacted] chance that the value

1313 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 129.
1314 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 130.
1315 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 133.

of the plant would be lower than the purchase price.[1316] Moreover, in [redacted] of the relevant simulations, the fair market value is [redacted]. This means that the buyer would knowingly face the risk that, with a [redacted] chance, after paying the EUR [redacted] purchase price it would in fact need to close the plant and even absorb additional losses on top of the purchase price.[1317]

1108. Compass explain that there is a range of methodologies to account for risk aversion of a potential buyer when considering the distribution of investment returns. One of these methodologies, so-called Conditional Variance at Risk ("**CVaR**") method, concerns the elimination of the highest estimated values, often the highest 5%.[1318]

1109. Brattle do eliminate the highest 5% of their calculated values, but they also eliminate the lowest 5% of values, as explained above. They allegedly do so to correct for outliers, but this cannot be deemed a correction for investors' risk aversion, as explained by Compass.[1319] Applying the CVaR method instead reduces Brattle's estimate of damages by EUR [redacted] on a stand-alone basis.[1320]

18.3.2 Brattle use inappropriate sets of data for their calculations

1110. Eemshaven's valuation largely depends on the inputs used to model the electricity market. Compass explain that the inputs used by Brattle are inappropriate:[1321]

> "*It is paramount that the inputs used in the computation of damages be reasonable and fully reflective of market conditions expected as of the date of valuation. Brattle's chosen inputs are not, as demand and installed capacity are significantly outdated as of Brattle's date of valuation and, together with the commodity price forecasts, based on*

1316 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 131.

1317 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 132.

1318 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 135.

1319 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 134.

1320 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 136.

1321 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 75.

scenarios that assume the EU would not attempt to comply with its climate commitments, contrary to the market expectations of additional policies on climate change."

1111. The inappropriate inputs used by Brattle concern commodity prices, such as fuel prices and CO2 prices (**Sub-section 18.3.2.1**), and electricity demand and installed capacity (**Sub-section 18.3.2.2**). This issue is summarised in this Sub-section 18.3.2 and described in more detail in Section IV.1 of the Compass Report.

18.3.2.1 Commodity prices

1112. As described by Compass, to forecast commodity prices in the long term, Brattle rely on the 2016 World Energy Outlook ("**2016 WEO**") published by the IEA.

1113. The 2016 WEO presents three different scenarios, each with different commodity prices: the Current Policies scenario, the New Policies scenario and the 450 scenario. The Current Policies scenario and the New Policies scenario do not assume significant tightening of emission reductions over time to achieve the long-term EU targets and comply with the Paris Agreement. The 450 scenario, on the other hand, demonstrates a pathway to limit long-term global warming to 2°C, with only a 50% chance of success.[1322]

1114. Brattle rely mainly on the New Policies scenario.[1323] This scenario takes into account policies and measures which are already in place and "*in full or in part, the aims, targets and intentions that had been announced by the governments*".[1324] The New Policies scenario is not compliant with the commitments of the Paris Agreement, although Brattle claims otherwise.[1325]

1322 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 78-80.

1323 **Exhibit CER-0002**, Brattle Expert Report, paras. 92, 100 and 305-306. For their projections of coal and gas prices, Brattle "*have selected the New Policies scenario*": para. 92. For their modelling of CO2 prices, Brattle explain that they "*construct a log-normal distribution such that 97.5% of all draws from this distribution lie below the 450 scenario value and the mean of the distribution is equal to New Policies scenario value*": para. 305. See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022 para. 17.a.

1324 **Exhibit BR-32**, International Energy Agency, World Energy Outlook, 2016, p. 33.

1325 **Exhibit CER-0002**, Brattle Expert Report, para. 93.

1115. The Paris Agreement envisages that the Contracting Parties will regularly update or enhance their NDCs, resulting in a constant tightening of climate policies (see Section 2.6). The New Policies scenario takes into account the NDCs which were announced at the time of the 2016 WEO. While these NDCs did reflect short-term efforts, it was already clear at the time that these NDCs were not sufficient to meet the long-term goals of the Paris Agreement.[1326] This was explained by the IEA in the 2016 WEO:[1327]

> "*Differences between the New Policies Scenario and the 450 Scenario highlight the extent to which **the pledges made as part of the Paris Agreement fall short of the long-term ambition** to limit global temperature rises to below 2 degrees Celsius (°C).*"

1116. As explained by Compass, subsequent tightening of climate policies under future NDCs to pursue the Paris Agreement's goals were therefore already expected at the time.[1328] This, too, was noted by the IEA in the 2016 WEO:[1329]

> "*The **expectation that commitments to more intensive action will be made over time** is a critical element of the Paris Agreement, as the initial NDCs, submitted before Paris, fall short of what is needed.*"

1117. For this reason, according to the IEA, the New Policies scenario "*would not be a sensible way to approach forecasting*", because there would "*undoubtedly be additional policy shifts between now and 2040, beyond those already announced by governments around the*

1326 See **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 83: "*In other words, while the "New Policies" scenario may factor in the pledges for short-term efforts to fulfil the Paris Agreement's goals, it does not assume significant tightening of emission reductions so as to achieve the long-term EU targets under the Paris Agreement.*"

1327 **Exhibit BR-32**, International Energy Agency, World Energy Outlook, 2016, p. 111.

1328 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 84-85. For the sake of completeness, it is noted that climate policy indeed tightened further after the Paris Agreement (see Sections 2.6 and 2.7).

1329 **Exhibit BR-32**, International Energy Agency, World Energy Outlook, 2016, p. 314. See also p. 326: "*More stringent climate targets than those implied by current NDCs are not only conceivable, but are seen as an essential element of the next stage of the Paris Agreement's implementation.*"

world". [1330] Brattle nevertheless use this scenario to forecast commodity prices.

1118. By relying on the New Policies scenario, Brattle assume that emission restrictions would fall short of the goals of the Paris Agreement and that there would not be any additional efforts to try to achieve those goals. Brattle thus effectively ignore the effects of existing expectations of tightening climate policies on commodity prices (notably including CO2 prices) on Brattle's chosen valuation date.[1331] This results in an overstatement of Brattle's estimate of Claimants' alleged losses (to the extent Claimants have suffered any losses).

18.3.2.2 Electricity demand and installed capacity

1119. Brattle rely on the EU Reference Scenario 2016 ("**EU Reference Scenario**") for the purpose of forecasting electricity demand and installed capacity.[1332]

1120. The EU Reference Scenario explains that it does not provide a forecast, that it is a projection of where *current* policies will lead the EU (i.e., not projecting the impact of expected future policies) and that it only takes into account policies agreed until December 2014:[1333]

> "***This report focuses on trend projections – not forecasts. It does not predict how the EU energy, transport and climate landscape will actually change in the future, but merely provides a model-derived simulation of one of its possible future states given certain conditions.*** *It starts from the assumption that the legally binding GHG and RES targets for 2020 will be achieved and that the* ***policies agreed at EU and Member State level until December 2014*** *will be implemented. Following this approach, the Reference Scenario can help inform the debate on* ***where currently adopted policies might lead the EU*** *and whether further policy development, including for the longer term, is needed.*"

1330 **Exhibit C-0033**, International Energy Agency, Energy Policies of IEA, Countries the Netherlands 2000 Review, 2000, p. 40.

1331 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 89-90.

1332 **Exhibit CER-0002**, Brattle Expert Report, para. 109.

1333 **Exhibit BR-37**, European Commission, EU Reference Scenario, p. 14. See also, on the same page: "*The Reference Scenario acts as a benchmark of current policy and market trends. As such, it can help to inform future policy debate and policy making.*"

1121. As a result of this approach, the EU Reference Scenario does not take into account the Paris Agreement, which is dated after December 2014, and the climate policies adopted on the basis of the Paris Agreement.[1334] The inputs derived from the EU Reference Scenario were thus already outdated on Brattle's chosen valuation date.

1122. The developments which the EU Reference Scenario ignores have an impact on the projection of electricity demand and capacity. For instance, as explained by Compass, the EU Reference Scenario does not envisage any additions to renewable capacity between 2020 and 2040 in the Netherlands. Other contemporaneous forecasts demonstrate, however, that the renewable capacity will likely increase during this period.[1335] This would be a logical development in light of the Paris Agreement and tightening climate policies. Indeed, renewable capacity has increased as expected[1336] and will likely increase further going forward.[1337]

1123. Brattle explain that "*a high level of renewable generation capacity may limit the ability of Eemshaven to generate electricity and will reduce electricity prices, to Eemshaven's detriment*".[1338] Thus, by relying on the EU Reference Scenario and its understated renewable capacity projection, Brattle underestimate the challenges that Eemshaven's coal operations would face.

18.3.3 Brattle's discount rate is too low and does not properly reflect the risks faced by coal plants

1124. Compass explain that "*as of October 2017 the European energy market was at the early stages of decarbonization, expected to accelerate in the subsequent years, for instance with the shift away*

1334 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 92.

1335 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 94.

1336 **Exhibit R-0252**, Statista, 'Renewable energy capacity in Europe from 2008 to 2021', 29 August 2022.

1337 For example, the European Commission proposed to increase the EU's renewable capacity targets for 2030 from 32% to 38-40%: **Exhibit R-0253**, Wind Europe, 'It's official: The EU Commission wants 30 GW a year of new wind up to 2030, 14 July 2021.

1338 **Exhibit CER-0002**, Brattle Expert Report, para. 255.

from fossil fuels to low-carbon technologies".[1339] On Brattle's chosen valuation date, it was clear that coal plants would be facing significant risks in the future as a result of this energy transition.[1340]

1125. Such risks can be incorporated in a valuation by adjusting the cash flows or via the discount rate.[1341] Brattle account for risks relating to Eemshaven through the latter approach: it applies a discount rate that is higher than the risk-free rate and includes a premium for risks.[1342] However, Brattle's discount rate, estimated at 3.85% as of October 2017,[1343] ignores the risks faced by Eemshaven with respect to the energy transition and is therefore too low. Brattle thus overstate the value of the plant.[1344]

1126. One of the parameters within Brattle's calculation of the discount rate, the beta, reflects the systematic risks relating to Eemshaven. Brattle calculate the beta on the basis of historical betas of six sample companies between September 2012 and September 2017. However, as explained by Compass, the risks faced by these sample companies in that period were "*significantly different than those expected to be faced by coal-fired power plants, including Eemshaven, going forward, and in particular beyond 2030*".[1345] Brattle do not take into account relevant information, such as industry characteristics (including the increasing risks relating to the energy transition).[1346]

1339 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 109.

1340 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 111.

1341 The discount rate is the rate that is applied to calculate the value of future cash flows as at the valuation date. The rate reflects the time value of money of the cash flows and the risks they are exposed to. The higher the discount rate, the lower the value of the cash flows as at the valuation date.

1342 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 114.

1343 **Exhibit CER-0002**, Brattle Expert Report, para. 220.

1344 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 119, 125 and 128.

1345 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 117. For instance, Compass signal that the sample companies were exposed to very little pressure on their profit margins due to CO2 costs. Also, most of the 2012-2017 period preceded the Paris Agreement.

1346 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Section IV.3.1.

1127. Brattle's discount rate is also not in line with benchmarks contemporaneous to their valuation date. Brattle's discount rate is 3 to 4 percentage points below discount rates used by analysts, including a 6.9% discount rate published by Morgan Stanley in October 2017, at the same time as Brattle's chosen valuation date.[1347]

1128. Further, the discount rate calculated by Brattle is much lower than the discount rate used by Germany when establishing the compensation scheme for the German coal phase-out. Germany applied a 7.5% discount rate to future profits on the basis of "*the uncertainties surrounding the future market developments*".[1348] Additionally, when assessing the envisaged compensation to ensure that it would not constitute state aid, the European Commission seemed to think this discount rate was still on the low side, stating that it was "*questionable whether this discount rate is adequate*" with reference to the high risk and uncertainties related to the forecasts of future profits.[1349]

1129. In summary, Brattle's discount rate is too low because it does not reflect the risks faced by Eemshaven in light of the energy transition. Compass calculate that an adjusted discount rate of 8.01%,[1350] not taking into account any other corrections to Brattle's calculations, would reduce Brattle's damages calculation by EUR [redacted] (from EUR [redacted] to EUR [redacted]) as of October 2017.[1351]

18.3.4 Brattle fail to account for the possibility of conversion to alternative use

1130. The value of the possibility of operating Eemshaven on biomass must be taken into account when calculating the losses suffered by RWE.

1347 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 120-125.

1348 See **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 126.

1349 See **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 126.

1350 Compass base this discount rate on the 7.5% discount rate used by Germany plus 0.51%, because "[a]*ccording to Brattle, WACC rates were 0.51 percentage points higher in October 2017 than in December 2019 (a date contemporaneous to Germany's use of the 7.5% WACC).*" See **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 128.

1351 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 128.

However, pursuant to RWE's instructions, Brattle do not account for this value, despite the fact that their modelling shows that this value exists.

1131. RWE's position largely hinges on the assertions that there is "*no viable alternative to closing Eemshaven in 2030*"[1352] and 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.*"[1353] In the same vein, for the purposes of quantifying its alleged losses, RWE has instructed Brattle to "*assume that Eemshaven will only burn coal since co-firing biomass is not economically viable without the SDE+ support scheme, which will no longer be available after 2027*".[1354]

1132. Brattle confirm that they find this instruction reasonable.[1355] Accordingly, Brattle assume that Eemshaven will only fire coal after 2027 and that it will close by the end of 2029.[1356] In other words: for the purposes of calculating the damages, Brattle dismiss the possibility that Eemshaven could run on biomass – or be converted to any other use – by 2030, without assessing whether Eemshaven could be converted to use alternative fuels.

1133. Based on the assumption that Eemshaven will only operate until 2030, Brattle calculate that the Coal Act causes RWE to lose more than [redacted] of the value that Eemshaven would have without the Coal Act.[1357] However, this assumption remains unproven.

1352 Memorial, para. 57.

1353 Memorial, para. 634.

1354 **Exhibit CER-0002**, Brattle Expert Report, para. 2.c.

1355 **Exhibit CER-0002**, Brattle Expert Report, para. 136. See also para. 250, where Brattle make a similar statement about the conclusions in the NERA Report along the lines of the instruction.

1356 **Exhibit CER-0002**, Brattle Expert Report, para. 2.c.

1357 Memorial, paras. 467-468: "*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. Claimants thus loose* [sic] *already now more than* [redacted] *of the value which the plant would have without the coal ban.*" See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 157, where Compass explain that "*Brattle assign only* [redacted] *of Eemshaven's value to the operations up to 2029, with the remaining* [redacted] *of their assessment of Eemshaven's value arising from 25 years of potential operations between 2030 and 2054*" and that this "*large allocation of value towards the later part*

1134. The Coal Act only prohibits the use of coal for electricity generation. Eemshaven could continue to operate from 2030 onwards if it were converted to alternative (coal-free) use, such as biomass-fuelled electricity generation. If Eemshaven is converted to run on biomass by 2030, it will be able to generate cash flows until well after 2030. This means that there is value in the possibility that Eemshaven can be converted to biomass by 2030.

1135. This value is not taken into account by RWE and Brattle.[1358] By not attributing any value to the possibility to convert, it is in fact assumed that there was a 0% chance that conversion to Eemshaven would become viable. However, as explained in Sub-section 15.2.2 above, RWE has not demonstrated that converting Eemshaven to fire 100% biomass is impossible.

1136. Brattle's modelling, too, shows that value should be attributed to the possibility to convert. As explained by Compass, "*had Brattle performed an analysis of the viability of biomass operation in a fashion consistent with their valuation of Eemshaven (with 100 simulations of possible paths for electricity and commodity prices), Brattle would have obtained several simulations in which conversion and operation with unsubsidized biomass would be profitable*".[1359] Compass show that in several of the 100 scenarios calculated by Brattle, "*electricity prices exceed the cost of generating electricity with unsubsidized biomass*" and that "[f]*or* [redacted] *of these simulations, the profits from generating with biomass would be sufficient to make it profitable for Eemshaven to convert to biomass in 2030*".[1360]

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of Eemshaven's useful life contrasts with the market commentaries of further deterioration in the economics of coal power plants".

1358 Brattle also ignore the value of the possibility to fire biomass in 2027-2029. However, since Eemshaven will still be allowed to fire coal in that period, the implications of the value of biomass operations in that period on the total value of Eemshaven may be more limited than in the period from 2030 onwards, when coal is no longer an option.

1359 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 20. See also para. 103.

1360 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 105. Compass explain that for the purpose of this assessment, "[g]*iven that the possibility to convert Eemshaven to burn biomass would mean that the plant could run until 2054, for this sensitivity we assume in the Actual scenario the same closure decision criteria than Brattle do in the But-for scenario, and the corresponding impact of the closure decision on additional modelling assumptions*": **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, footnote 95.

1137. As described in paras. 668-671 above, Brattle's calculations show that Eemshaven's coal operations would only be viable in a total of [redacted] scenarios. In [redacted] of [redacted] scenarios in which coal operations would be viable, biomass-fuelled energy generation would *also* be profitable:[1361]

[redacted]

1138. This shows that, following Brattle's own methodology, there is indeed value in the possibility to convert to biomass and that the chance that conversion will be viable by 2030 is not 0%. Brattle could have accounted for this value, but failed to assess whether the instruction provided by Claimants was reasonable based on its own modelling.

1139. In addition to the possibility of converting Eemshaven to fire 100% biomass, RWE and Brattle ignore the possibility of conversion to any other alternative use, even though such possibility may exist (as demonstrated by the examples of conversions to other alternative uses in Section 9.2).[1362]

1361 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Figure V and para. 108.

1362 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, footnote 90.

1140. By ignoring the value of conversion opportunities, RWE and Brattle overstate the losses suffered by RWE. Compass explain that including the possibility of conversion – without any other correction as described in this Section 18.3 – reduces Brattle's loss estimate by EUR [redacted] (from EUR [redacted] to EUR [redacted]) as of 9 October 2017.[1363]

18.3.5 Brattle's calculation does not pass reasonability checks

1141. Compass explain that "[w]*henever feasible, it is best practice to conduct a reasonableness check when performing a valuation, especially when using the income approach*". Brattle considered alternative valuation methods for Eemshaven, but ultimately dismissed all of them.[1364]

1142. Brattle for example dismiss a review of RWE AG's share price as an alternative valuation method. Its grounds for doing so are invalid (**Sub-section 18.3.5.1**). Moreover, Brattle fail to adequately explain why its losses calculation cannot be reconciled with the compensation paid by the German government for the closure of two coal plants (**Sub-section 18.3.5.2**). Brattle instead only compare their damages calculation to costs of "*avoided carbon*",[1365] but this comparison does not validate its damages calculation (**Sub-section 18.3.5.3**).

18.3.5.1 RWE AG's share price

1143. Brattle mention that one could look at price movements of the shares of RWE AG, which are publicly traded, around Brattle's chosen valuation date.

1144. Brattle's view is that the value of Eemshaven was impacted in October 2017 by EUR [redacted]. This alleged loss would represent [redacted] of RWE AG's market capitalisation in October 2017.[1366] Compass explain that they "*would expect to find contemporaneous market indications*

1363 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 107.

1364 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 158. See also: **Exhibit CER-0002**, Brattle Expert Report, Section III.D.

1365 **Exhibit CER-0002**, Brattle Expert Report, para. 15.

1366 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 163 and 170.

reflecting such impact on the value of the Eemshaven plant or RWE's stock, either as an additional impairment recorded in the financial accounts, or in contemporaneous commentary of analysts covering RWE's stock".[1367] However, no such indications appear in the form of impairments in contemporaneous financial reports [1368] or commentaries in analyst reports,[1369] nor are they apparent from share price movements.[1370] If such an alleged value impact on RWE AG's assets would have taken place, it would be reflected in contemporaneous reports or the share price.[1371]

1145. Brattle discard a review of RWE AG's share price movements as an alternative valuation method.[1372]

1146. To this effect, Brattle allege that the Coal Act's impact on RWE's share price gradually increased between October 2017 and the end of 2019 and that it is impossible to isolate the impact of the Coal Act on the share price over such an extended period of time.[1373] This reasoning demonstrates that Brattle's damages calculation as of October 2017 is widely overstated. As explained by Compass, "*Brattle's reasoning that the effect of the Coal Ban increased gradually over time highlights that the Coal Ban did not have full impact on October 2017 (as Brattle's* € [redacted] *damages valuation assumes).*"[1374] Compass further note that "*Brattle implicitly acknowledge that as of October 2017 the*

1367 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 161.

1368 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 164. On the contrary, rather than reflecting a certain value loss on account of the 2017 Coalition Agreement (which is the basis for Brattle's chosen valuation date), the financial report of 2017 stated that "[a]*t present, **it is impossible to predict** the ramifications of the coalition agreement for the energy sector*": **Exhibit BR-28**, RWE, Annual Report 2017, p. 36.

1369 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 162 and 171.

1370 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 163.

1371 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 163 and 170-171.

1372 **Exhibit CER-0002**, Brattle Expert Report, para. 43.

1373 **Exhibit CER-0002**, Brattle Expert Report, para. 43. In the same vein, they point out that RWE's share price does not only represent the value of Eemshaven, but also the value of RWE's other businesses (see para. 44).

1374 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 169.

impact of the Coal Ban on the value of coal-fired plants was still uncertain."[1375]

18.3.5.2 German compensation

1147. Brattle refer to the fact that "*RWE AG accepted compensation from the German government for the expected early closure of the Westfalen and Ibbenbüren power plants in Germany*".[1376] As explained in Section 8.2 above, RWE announced in 2020 that it would receive EUR 216 million for both plants (with a capacity of 800 MW each) – equivalent to EUR 135,000 per MW[1377] – to stop electricity production as of 1 January 2021 (meaning the plants could not continue to operate until 2030 as in the Netherlands).

1148. While Brattle concede that the Westfalen plant (this is Block E of the Hamm plant referred to in Sub-sections 4.3.3 and 8.2 above) is comparable to Eemshaven in design and construction date, they note that the Ibbenbüren plant is "*significantly older than either Eemshaven or Westfalen*".[1378] Even if the entire compensation were attributed only to the Westfalen plant, which RWE considered to be "*virtually identical*"[1379] to Eemshaven and which was built around the same time, the compensation would be EUR 270,000 per MW of lost capacity.[1380] Given that Eemshaven would be able to operate for more than twelve years after Brattle's chosen valuation date, while the Westfalen plant was not granted such a transition period, the compensation for Eemshaven should be lower than the compensation for the Westfalen plant. For Eemshaven, however, Brattle calculate damages of EUR [redacted] per MW.[1381]

1375 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 165.

1376 **Exhibit CER-0002**, Brattle Expert Report, para. 49.

1377 EUR 216,000,000 / 1,600 MW = EUR 135,000 per MW.

1378 **Exhibit CER-0002**, Brattle Expert Report, para. 49.

1379 **Exhibit R-0115**, RWE, 2014 Annual Report, p. 37.

1380 EUR 216,000,000 / 800 MW = EUR 270,000 per MW. Attributing the entire compensation to Westfalen and none to Ibbenbüren is not realistic: according to the German grid regulator, there was a "*maximum price set of €165,000 per MW*": **Exhibit R-0254**, Budesnetzagentur, press release 'Results of first tendering process to reduce the production of electricity from coal', 01 December 2020.

1381 Brattle estimate the value decrease of Eemshaven at EUR [redacted]: **Exhibit CER-0002**, Brattle Expert Report, para. 14.c. EUR [redacted] / 1,560 MW = EUR [redacted] per MW.

1149. In an attempt to dismiss a reconciliation between these two amounts, Brattle state that the compensation paid by the German government only relates to the period of [redacted].[1382] This does not mean, however, that the two amounts cannot be compared. RWE stated that the EUR 216 million it would receive constituted "*adequate compensation for the loss of the future value of our power plants*".[1383] Apparently it did not consider that the awarded amount failed to compensate for a large value to be realised through decades of post-[redacted] operations. Perhaps Claimants did not see much value in the post-[redacted] value of their coal operations such as the operations of the two German plants, as suggested by Compass and contemporaneous analyst reports. This contradicts Claimants' and Brattle's position that there would be significant value in Eemshaven's post-2030 operations.[1384]

1150. As explained by Compass, Brattle's other arguments against using the German compensation as an indication for the reasonability of Brattle's loss estimate are also invalid.[1385] Compass conclude that "*contrary to Brattle's statement, the evidence in relation to the German coal ban can provide useful indications of the reasonability of Brattle's calculations*".[1386]

18.3.5.3 Avoided carbon costs

1151. The only reasonability check that Brattle seem to find acceptable is a comparison of RWE's damages claim to the ETS price of the carbon emissions that are avoided by closing Eemshaven at the end of 2029. They explain that "*the claim is equivalent to the Netherlands paying around €16 for each tonne of avoided carbon*", which is "*lower than*

1382 **Exhibit CER-0002**, Brattle Expert Report, para. 52.
1383 **Exhibit R-0163**, RWE Press Release: 'Compensation allocated at hard coal phase-out auction, RWE closes power stations in Hamm and Ibbenbüren', 01 December 2020.
1384 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 174.
1385 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, footnote 190.
1386 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 174.

the CO2 price has been since mid-2018", and that the claim thus represents a "*reasonable cost for reducing carbon emissions*".[1387]

1152. The ETS price for carbon emissions avoided are not a reflection of the value of Eemshaven: Eemshaven's value is reflected by its ability to generate profits, whereas the ETS price for carbon emissions is a reflection of policy choices about the amount of emissions deemed permissible under the ETS.[1388] Moreover, this approach goes directly against the PPP, pursuant to which the polluter – i.e., RWE, not the Netherlands – bears the costs of emission reductions (see Sub-section 14.3.3).[1389]

18.4 Resolving the flaws in Brattle's calculation reduces their damages estimate to nil

1153. As explained in Section 18.3 of this Counter-Memorial and Chapter IV of the Compass Report, Brattle's calculation of Claimants' losses is tainted with flaws. Compass explain that resolving the main flaws in Brattle's calculation significantly lowers the loss estimate.[1390]

1154. To illustrate the overstatement resulting from the flaws, Compass modify Brattle's Monte Carlo-based calculation by making the following adjustments:[1391]

- changing the source for commodity and capacity forecasts to one dated closer to Brattle's chosen date of valuation;
- using forecast scenarios that comply with the EU climate change commitments (i.e., the Paris Agreement goals);

1387 **Exhibit CER-0002**, Brattle Expert Report, para. 15.

1388 See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Section IV.5.4.

1389 This principle is laid down in for example the Rio Declaration, Principle 16 (see para. 739).

1390 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Section V.

1391 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 180. In para. 181, Compass explain that they "*forecast commodity price scenarios using Brattle's approach and assumptions regarding volatilities and correlations*" and "*deviate from Brattle's approach (in respect of electricity modeling) on the source of forecasts for commodity prices*".

- incorporating the possibility of converting Eemshaven to biomass after the Coal Act;
- accounting for the contemporaneous assessment of risk in the cost of capital (i.e., the discount rate or WACC);
- taking into account investors' risk aversion; and
- eliminating Commercial Asset Optimisation revenues.[1392]

1155. On this basis, Compass find that Brattle's calculation of RWE's losses as of October 2017 on the basis of the Monte Carlo method would be nil.[1393] Implementing a scenario-based approach and making the same adjustments mentioned above also decreases Brattle's damages estimate to nil.[1394]

18.5 Claimants can be expected to convert Eemshaven to 100% biomass to mitigate losses, if any

1156. A claimant should take reasonable measures to mitigate its losses, if any. Failure to take such measures reduces any compensation by the same amount. This is reflected in paragraph 11 of the commentary on Article 31 of the ILC Articles on State Responsibility:[1395]

> "*A further element affecting the scope of reparation is the question of mitigation of damage.* ***Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury.*** *Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that* ***a failure to mitigate by the injured party may preclude recovery to that extent****.*"

1392 See **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Section IV.4.4 for a description of Commercial Asset Optimisation revenues and an explanation as to why such revenues must be eliminated from the calculation, contrary to Brattle's approach.

1393 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 188. For a detailed explanation of the calculation, see **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, Section V.1.

1394 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 191.

1395 **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries, Article 31, para. 11.

1157. Investment tribunals have consistently accepted the duty to mitigate damages. For example, in the case of *EDFI and others v. Argentina*, the tribunal stated that "[t]*he duty to mitigate damages is a well-established principle in investment arbitration*".[1396] Similarly, the tribunal in *Middle East Cement v. Egypt* held that the duty to mitigate damages

> "*can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention.*"[1397]

1158. The *Hrvatska Elektroprivreda v. Slovenia* tribunal, ruling on an ECT claim, also accepted that a duty to mitigate exists, explaining that "*general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses*".[1398] Similarly, the *CME v. Czech Republic* tribunal held that "[o]*ne of the established general principles in arbitral case law is the duty of the party to mitigate its losses*".[1399] In *Clayton/Bilcon v. Canada*, the tribunal confirmed that "*a duty of mitigation of damages can arise in public international law*".[1400]

1396 **Exhibit RL-0143-EN**, SAUR International S.A. v. Republique Argentine, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 06 June 2012, para. 1302 (**Exhibit RL-0143-FR**, SAUR International S.A. v Republique Argentine, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 06 June 2012). Similarly, the tribunal in **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, para. 10.6.4, established that the principle of mitigation of damage was "*frequently applied by international arbitral tribunals when dealing with issues of international law*".

1397 **Exhibit CL-0044**, Middle Eastern Cement v. Egypt, ICSID Case ARB/99/6, Award, para. 167.

1398 **Exhibit CL-0130**, Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Award, para. 215.

1399 **Exhibit CL-0042**, CME Czech Republic B.V. v. Czech Republic, Final Award, para. 482.

1400 **Exhibit CL-0122**, William Richard Clayton et al. v. Canada, PCA Case No. 2009-04, Award on Damages, para. 203. In paras. 204-205, the tribunal describes the duty to mitigate in more detail: "*By its nature, the duty to mitigate is a restriction on compensatory damages. The rationale of the duty to mitigate damages is to encourage efficiency and to minimize the consequences of unlawful conduct (such as a breach of treaty). The duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty. The first limb of the mitigation principle concerns the unreasonable failure by the claimant to act subsequent to a breach of treaty, where it could have reduced the damages arising (including by incurring certain*

1159. Accordingly, Claimants should take reasonable measures in order to mitigate the losses it allegedly suffers from the Coal Act.

1160. Such reasonable measures include the continuation of operations of Eemshaven with alternative fuels. While the Coal Act precludes Eemshaven from firing coal from 2030 onwards, nothing prevents Claimants from exploiting Eemshaven for decades afterwards through conversion to an alternative fuel, such as biomass.

1161. As explained in Section 8.1, RWE has announced that its strategy includes a phasing out of coal by 2030 in any case. Further, as explained in Section 9.1, RWE has consistently declared that it plans to fully convert Eemshaven (and the Amer plant) to fire biomass[1401] and continues to pursue such conversions. Conversion of coal plants to biomass plants fits RWE's overall strategy of becoming carbon-neutral (see Section 8.1). It is reasonable to expect that RWE continues to pursue the strategy that it has been executing for years, since before the Coal Act (and before the 2017 Coalition Agreement).

1162. The conversion of a coal plant such as Eemshaven to a biomass plant requires relatively limited adjustments. According to RWE, a conversion would only require that a plant "*be **adapted** to make* [it] *technically suitable for a new fuel*".[1402] Similarly, in its annual report for 2019, RWE describes the adaptation of Eemshaven as "*retrofitting measures*".[1403] RWE's position in this arbitration that converting Eemshaven would require it to "*tear down an existing power plant*" and "*build a new one*"[1404] is contradicted by its public declarations and the

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additional expenses). The second limb, conversely, concerns the unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim."

1401 With respect to the Amer plant, see: **Exhibit R-0180-EN**, Duurzaam Gebouwd 'Amer power plant to run entirely on biomass by 2030' (**Exhibit R-0180-NL**, Duurzaam Gebouwd 'Amer power plant to run entirely on biomass by 2030').

1402 RWE explains this on its website specially dedicated to Belgium, the Netherlands and Luxembourg, in an article which focuses solely on RWE's Dutch biomass business: **Exhibit R-0159-EN**, RWE, 'Biomass and the energy transition' (https://benelux.rwe.com/innovatie-en-toekomst/biomassa) accessed 2 September 2022 (**Exhibit R-0159-NL**, RWE, 'Biomass and the energy transition' (https://benelux.rwe.com/innovatie-en-toekomst/biomassa) accessed 2 September 2022).

1403 **Exhibit C-0002**, RWE Annual Report 2019, p. 44.

1404 Memorial, para. 657. See also para. 488: "*The plant that was build and permitted* […] *would no longer exist.*"

fact that it has already almost completely converted the Amer plant to a biomass plant. It is also otherwise unsupported.

1163. The capex required to convert Eemshaven to fire 100% biomass would be limited. Referring to the NERA Report, RWE states that it "*would need to make substantial additional investments*" amounting to "*roughly EUR [redacted] to 457 million*" for converting Eemshaven to a fully biomass-fuelled power plant.[1405] As explained in 835 above, this capex estimate is overstated. Moreover, even if the estimate were correct and assuming the correctness of RWE's claim that it invested EUR 3.2 billion in the construction of Eemshaven,[1406] a conversion to biomass would only amount to an [redacted] – 14.3% increase in total invested costs. In reality, after correction of NERA's overstated capex estimate, this percentage should likely be lower.

1164. A conversion to biomass would not change the nature of RWE's investment. Eemshaven would still be generating electricity, as it was before. It would do so by firing biomass, rather than biomass and coal – a development that was always planned and that RWE started pursuing well before the Coal Act.

1165. For these reasons, RWE's argument that conversion to biomass is "*conceptually beyond the scope of damage mitigation*" fails.[1407] The conversion cannot be considered a *"new investment*", nor can it be said that RWE is "*oblig*[ed] […] *to develop new business activities*", as RWE claims.[1408]

1166. Similarly, RWE's statement that "*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*" is incorrect.[1409]

1167. RWE's position in this arbitration that a conversion to biomass would not be economical is untenable. It is contradicted by evidence on the

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1405 Memorial, para. 657.
1406 See e.g., **Exhibit CER-0002**, Brattle Expert Report, para. 59.
1407 Memorial, para. 655. RWE states that the duty to mitigate damages does not require a claimant to "*make alternative investments*" or to "*change its business activity*": Memorial, para. 652.
1408 Memorial, para. 957. See also paras. 651-652.
1409 Memorial, para. 654.

record, including Brattle's modelling (as described in Sub-section 18.3.4) and RWE's own actions and declarations with respect to the full conversion of Eemshaven (and the Amer plant)[1410] to biomass (see Section 9.1), and it is not validly supported by the NERA Report (see Sub-section 835-836 and the Appendix).

1168. Further, RWE's suggestion that it is "*unclear whether* [conversion] *would be legally feasible*" is unsupported. RWE's feigned concerns about whether or not it would be able to obtain a permit are unsupported[1411] and its suggestion that the Netherlands plans to phase out biomass is misguided.[1412]

18.6 Claimants should in any event bear part of the losses allegedly incurred

1169. The principle of contributory fault is well established in international law and is recorded in Article 39 ILC Articles on State Responsibility.[1413]

> "*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*"

1410 **Exhibit R-0180-NL**, Duurzaam Gebouwd 'Amer power plant to run entirely on biomass by 2030' (**Exhibit R-0180-NL**, Duurzaam Gebouwd 'Amer power plant to run entirely on biomass by 2030'). RWE has been taking steps to convert the Amer plant further towards 100% also after the 2017 Coalition – and after it became clear that biomass would no longer be subsidised – for example by putting into operation a "*brand new biomass logistic facility*" in 2020, which has "*made it possible to switch the unit almost completely to biomass*": **Exhibit R-0255**, RWE, 'Amer power plant' (https://benelux.rwe.com/en/locations/amer-power-plant) accessed 29 August 2022.

1411 RWE claims "*that it is already unclear whether they could obtain a permit to convert Eemshaven to biomass or other alternative fuels*": Memorial, para. 659. RWE has already requested and obtained a permit to fire 15% biomass at Eemshaven as well as a revised permit to double the biomass percentage to 30% (see Chapter 9). Also, it is already allowed to fire 80% biomass at the Amer plant. Moreover, given its own declarations regarding the full conversion of both plants to fire 100% biomass (see Section 9.1 above), RWE does not appear to be concerned that it will not receive the permits required to complete these conversions.

1412 RWE alleges that it "*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*", referring to "*the current debate in the Netherlands on phasing out biomass for electricity generation purposes*": Memorial, para. 659. See also paras. 13 and 347-354. As explained in Section 11.1 above, these statements are based on misconceptions. The Netherlands has not indicated that it plans to phase out the use of biomass altogether.

1413 **Exhibit CL-0084**, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Article 39.

1170. It provides that in cases when a claimant's conduct contributed to the losses incurred, a tribunal may take that into account and limit the amount of compensation that the claimant is allowed to recover.[1414]

1171. This is consistent with "*the principle that full reparation is due for the injury – but nothing more – arising in consequence of the internationally wrongful act*", as well as with "*fairness as between the responsible State and the victim of the breach*".[1415]

1172. The Commentary to the ILC Articles on State Responsibility refers *inter alia* to the *Delagoa Bay Railway* case, in which the tribunal found that:[1416]

> "[a]*ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government* ***mitigate the latter's liability and warrant*** [...] ***a reduction in reparation***."

1173. More recently, the tribunal in *Stati v. Kazakhstan* held that:[1417]

> "*Art. 39 ILC Articles requires that the Claimants' conduct be taken into account in determining compensation. Indeed,* ***in investment cases, Tribunals have reduced damages by a percentage reflecting the investor's role in the events leading to a loss***."

1174. Similarly, in *MTD v. Chile*, the tribunal found that while Chile had breached its obligations under the applicable BIT, the claimants had contributed to their own loss as they "*had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the*

1414 See **Exhibit RL-0195**, MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on the Application for Annulment, 21 March 2007, para. 101, noting that "*the role of the two parties contributing to the loss* [is] […] *only with difficulty commensurable and the Tribunal* [has] *a corresponding margin of estimation*."

1415 **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries, Article 39, para. 2.

1416 See **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries, Article 39, footnote 625.

1417 **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, para. 1331.

Claimants."[1418] The tribunal quantified the share of the damages suffered that should be borne by the claimants at 50%.[1419]

1175. Likewise, the tribunal in *Copper Mesa Mining v. Ecuador* noted Article 39 ILC Articles on State Responsibility "*as being declaratory of international law*" and concluded that "*the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions*".[1420]

1176. In the present case, with their conduct, Claimants' contributed to the losses they allege to have suffered. As discussed in Section 7.1, the Coal Act was adopted in order to achieve a "*significant reduction of the CO2 emissions in the Netherlands*" in line with the 49% CO2 emission reduction target undertaken following the Paris Agreement.[1421] As coal electricity producers, including Claimants, failed to develop CCS, a ban on coal from electricity production was enacted to substantially reduce CO2 emissions of electricity producers.

1177. Prior to their investment, Claimants had committed to the development of CCS, in line with the "*clean fossil*" policy promoted by the Government.[1422] Nevertheless, RWE abandoned its CCS project as early as 2011, and failed to resume it at any point thereafter. RWE was aware that the use of fossil fuels would be dependent on CO2 emission reduction, and that if CCS were not implemented, emission reduction would need to be obtained through other means.[1423] RWE

1418 **Exhibit CL-0092**, MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID Case No ARB/01/7, Award, para. 242.

1419 This principle was also applied by the ECT tribunal's three awards in the Yukos cases, stating that "*In the view of the Tribunal, Claimants should pay a price for their abuse* […] *which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation*." See **Exhibit CL-0109**, Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-03 AA226, Final Award, para. 1634; **Exhibit RL-0196**, Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, UNCITRAL, Final Award, 18 July 2014, para. 1634; **Exhibit RL-0197**, Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 228, UNCITRAL, Final Award, 18 July 2014, para. 1634.

1420 **Exhibit RL-0198**, Copper Mesa Mining Corporation v. The Republic of Ecuador, PCA CASE No. 2012-2, UNCITRAL, Award, 15 March 2016, paras. 6.91 and 6.97.

1421 **Exhibit C-0028**, Coalition Agreement 2017-2021, Confidence in the future, 10 October 2017 (Official EN), p. 41.

1422 See Section 4.4.1.

1423 See Section 4.1.

was ultimately unwilling to make the necessary investments and therefore failed to assume its responsibility for achieving the emission reduction necessary in the fight against climate change.[1424]

1178. For these reasons, the Netherlands submits that – only if the Tribunal were to find that the Coal Act constituted a breach of the ECT – Claimants have contributed to any alleged losses. Accordingly, the Tribunal should limit the amount of compensation that Claimants are allowed to recover.

18.7 Claimants' interest claim is incorrect

1179. Claimants claim that it is entitled to a compound pre- and post-award interest from the date of valuation at 12-month EURIBOR rate plus two percentage points.[1425] This claim is incorrect. No interest is due (**Section 18.7.1**) and even if it were, Claimants apply an incorrect interest rate (**Section 18.7.2**).

18.7.1 No interest is due

1180. The ECT contains no provisions on the award of interest. To determine whether an award of interest is due, the general rules of international law on interest are thus applicable.

1181. Article 38(1) ILC Articles on State Responsibility states that interest on any principal sum "*shall be payable **when necessary** in order to ensure full reparation*".[1426] The commentary on this article notes that interest is "*not an autonomous form of reparation, nor is it a necessary part of compensation in every case*"[1427] and that there is "*no automatic entitlement to the payment of interest. The awarding of interest*

1424 See Section 4.4.2.

1425 Memorial, para. 644.

1426 **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.*"

1427 **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries, Article 38, para. 1.

depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation".[1428]

1182. Referring to this rule in the ILC Articles on State Responsibility, Marboe explains that "*the principle of full reparation requires a determination of the **concrete damage** caused by the delay from the perspective of the injured party.*"[1429] In other words, the presence of concrete, not hypothetical of speculative, damage is required for the award of interest to be even considered.

1183. Moreover, Marboe explains that the goal of interest is to compensate for the fact that money is withheld from the creditor, while the debtor gains an advantage from withholding the money.[1430] This was elaborated on in *Reynolds Tobacco v. Iran*, where the tribunal explained that interest serves to compensate the claimant for being deprived of its money during a certain period, while the respondent has been unjustly enriched by having had the use of that money during that period:[1431]

> "*An item of consequential injury which any claimant may suffer is the loss of the use of money which rightfully belongs to that claimant during the period between the accrual of the claim and the award. Indeed, the **respondent in such cases has been unjustly enriched by having wrongfully had the use of the claimant's money during that period**. Interest on the amount of the claim is the standard measurement of claimant's damage for being wrongfully deprived of its money.*"

1184. The obligation to pay interest cannot arise earlier than the damage. This is undisputed by Claimants.[1432] In the context of establishing a

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1428 **Exhibit CL-0102**, ILC Draft Articles State Responsibility 2001 with Commentaries, Article 38, para. 7.

1429 **Exhibit RL-0199**, Irmgard Marboe, 'Chapter 6: Interest' in I. Marboe, Calculation of Compensation and Damages in International Investment Law (2nd edn), Oxford International Arbitration Series, OUP (2017), para. 6.23.

1430 **Exhibit RL-0199**, Irmgard Marboe, 'Chapter 6: Interest' in I. Marboe, Calculation of Compensation and Damages in International Investment Law (2nd edn), Oxford International Arbitration Series, OUP (2017), para. 6.09.

1431 **Exhibit RL-0200**, R. J. Reynolds Tobacco Company v. Iran, IUTSCT Case No. 35, Award, 01 March 1985, para. 22.

1432 Memorial, para. 641: "*Interest accrues from the moment the damage is caused* […]."

starting point for the accrual of interest in expropriation cases, the tribunal in *Siemens v. Argentina* held that:[1433]

> "*For purposes of erasing the effects of the expropriation, interest should accrue **from the date** the Tribunal has found that **expropriation occurred**.*"

1185. Similarly, the tribunal in *Venezuela Holdings v. Venezuela* noted that:[1434]

> "*in order to ensure full compensation, such interest generally accrues from the **date of the expropriation**.*"

1186. With respect to a breach of an FET standard, the tribunal in *Arif v. Moldova* held that:[1435]

> "*there is no single date when the breach of Claimant's legitimate expectations occurred or was manifested; rather the breach was the result of a combination of factors over a period of time. Further, **Claimant's damages**, including the moral damages, **were not capable of quantification until the Hearing**. In these circumstances, the Tribunal considers that the **obligation to pay interest only arises from the date of the award**.*"

1187. The date of the occurrence (and possible quantification) of damage – and not Claimants' date of valuation – should, therefore, be the earliest possible date interest could possibly start to accrue.[1436]

1188. First, as discussed in Section 18.1 above Claimants' valuation date (9 October 2017), as adopted by Brattle, and a valuation date immediately prior to the adoption of the Coal Act in December 2019 (a

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1433 **Exhibit CL-0081**, Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, para. 397.

1434 **Exhibit RL-0158**, Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 09 October 2014, para. 397.

1435 **Exhibit CL-0095**, Franck Charles Arif v. Republic of Moldova, ICSID Case No ARB/11/23, Award, para. 618.

1436 **Exhibit RL-0199**, Irmgard Marboe, 'Chapter 6: Interest' in I. Marboe, Calculation of Compensation and Damages in International Investment Law (2nd edn), Oxford International Arbitration Series, OUP (2017), para. 6.187.

date used in Brattle's calculations in their second report in the Dutch proceedings),[1437] are incorrect.

1189. Second, if the Tribunal found that the valuation date had already occurred, no interest accrues over any amounts awarded to compensate for a value decrease of Eemshaven for the period until 2030.

1190. In the present case, there is no "*concrete damage*" suffered by Claimants, nor has the Netherlands been unjustly enriched by having had the use of Claimants' money, as no money is even owed to Claimants at this point in time (if ever). Consequently, interest is not "*necessary in order to ensure full reparation*".

1191. As explained above, the Coal Act does not have any impact on the operations of Eemshaven until 2030. Any value decrease relates only to the alleged impact of the Coal Act on the operations and profitability of Eemshaven from 2030 on, even if it is assumed that the value decrease occurred on a date of valuation in the past. In the period up to 2030, RWE remains equally capable to yield returns with Eemshaven. Given the lack of any loss of yield in the period up to 2030, there is thus no reason for interest to accrue during that period over any awarded amount serving to compensate for a value decrease.

1192. If such interest were awarded, RWE would be placed in a better position as a result of the compensation than it would have been absent the Coal Act. With respect to the period before 2030, it would receive yield from Eemshaven *and* interest, whereas in the but-for scenario it would only have received the exact same yield from Eemshaven.

1193. In summary, no interest is due to Claimants. Their claims for interest should therefore be dismissed.

1437 **Exhibit R-0250**, Serena Hesmondhalgh and Dan Harris, Reply Report: Damage Caused to Eemshaven and Amer 9 by the Coal Ban, Brattle Dutch Proceedings Reply Report, Brattle Group, 28 April 2022, Appendix A.

18.7.2 Claimants apply an incorrect interest rate

1194. Even if it were assumed that interest is due, Claimants claim that they are entitled to interest at the 12-month EURIBOR rate plus two percentage points, stating that Brattle determine that this is a "*commercial rate established on a market basis*".[1438]

1195. Brattle state that "*most companies*" borrow at the LIBOR/EURIBOR rate plus a premium and that "*LIBOR/EURIBOR plus two percentage points represents a typical commercial rate of interest*" and that "*LIBOR plus a 2% premium is emerging as a standard for pre-award interest*".[1439] In support of these statements, Brattle do not refer to economic evidence, but only to two sources relating to investment arbitrations: the 2012 *Railroad Development Corporation v. Guatemala* award and the Global Arbitration Review Guide to Damages.[1440] These sources do not support its statements.[1441]

1196. Brattle fail to provide any substantiation for their statement that "*applying a 12 month EURIBOR rate* […] *is reasonable*".[1442] In fact, the *Railroad Development Corporation v. Guatemala* award – the only case law cited by Brattle in the context of the interest rate – concerned a six-month rate.[1443] Brattle's choice for a 12-month rate (which, of all available maturities, typically leads to the highest interest rate) appears arbitrary and entirely opportunistic.

1438 Memorial, paras. 642 and 644.

1439 **Exhibit CER-0002**, Brattle Expert Report, para. 238.

1440 **Exhibit CER-0002**, Brattle Expert Report, para. 238.

1441 The *Railroad Development Corporation v. Guatemala* tribunal only confirmed that six-month LIBOR plus two percentage points was a reasonable commercially reasonable rate in that case: **Exhibit RL-0201**, Railroad Development Corporation (RDC) v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award, 29 June 2012, paras. 278-279. No general rule can be induced from this. Moreover, the award was dispatched in June 2012; a rate that was commercially reasonable ten years ago is not necessarily still commercially reasonable today.
The Guide to Damages in fact shows that in the majority of cases, no premium was applied on top of a base rate: see **Exhibit BR-21**, Global Arbitration Review, The Guide to Damages in International Arbitration, Third Edition, p. 310. The table on this page shows that in only 14 of 60 analysed ICSID cases, the tribunal applied a premium of 2% over a base rate. In 37 of 60 cases, no premium was applied and in 9 of 60 cases, a different premium was applied.

1442 **Exhibit CER-0002**, Brattle Expert Report, para. 241.

1443 **Exhibit RL-0201**, Railroad Development Corporation (RDC) v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award, 29 June 2012, paras. 278-279.

1197. Moreover, Brattle's approach of looking at "*most companies*" to determine a commercial interest rate in the case at hand is incorrect.

1198. Mr Dan Harris (who co-authored the Brattle Report), Mr Richard Caldwell and Mr M. Alexis Maniatis of Brattle confirmed in a publication that the pre-award interest rate depends on the risk associated with a loan to the respondent:[1444]

> "*1. It is the riskiness of borrowers/respondents that determines interest rates. Interest rates compensate lenders for the risks associated with borrower default, not for the risks or costs associated with a lender's own capital raising activities*.
>
> *2. Interest rates reflect the actual risks born by lenders/claimants. Interest rates do not compensate lenders for the returns available to them on hypothetical projects with a different risk profile to the actual borrower.*"

1199. The publication then explains that there are two approaches when awarding pre-award interest:

- Compensating the claimant for the time value of money, which is the case when interest is considered to be a return on a "*risk-free*" asset.[1445]

- Compensating the claimant for not only the time value of money, but also for the risk of respondent default. Under this view, the claimant in effect becomes a "*forced lender*" to the respondent and deserves compensation "*in line with other lenders to the respondent*".[1446] The interest then depends on the creditworthiness of the lender.

1444 **Exhibit RL-0202**, Dan Harris, Richard Caldwell and M. Alexis Maniatis, 'A Subject of Interest: Pre-award Interest Rates in International Arbitration', Brattle Group, 01 October 2017, p. 1. See also p. 4: "*it is the riskiness or creditworthiness of the borrower or respondent that should determine the pre-award interest rate.*"

1445 **Exhibit RL-0202**, Dan Harris, Richard Caldwell and M. Alexis Maniatis, 'A Subject of Interest: Pre-award Interest Rates in International Arbitration', Brattle Group, 01 October 2017, pp. 2 and 4.

1446 **Exhibit RL-0202**, Dan Harris, Richard Caldwell and M. Alexis Maniatis, 'A Subject of Interest: Pre-award Interest Rates in International Arbitration', Brattle Group, 01 October 2017, pp. 2 and 4.

1200. By relying on the fact that "*most companies*" pay a premium, Brattle disregard that states do not have the same risk profile as companies. Instead, according to their own analysis in the aforementioned publication, they should have looked at rates paid by other lenders to the Respondent.

1201. In summary, to the extent that any interest is due, Claimants have not properly substantiated the applicable interest rate.

18.8 RWE has not sufficiently substantiated its tax claim

1202. Claimants claim that they must 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*".[1447]

1203. This claim is insufficiently substantiated to meet the requirement imposed by investment tribunals. For example, the claimants in *Antin v. Spain* claimed a "*tax gross-up since damages are calculated to place the Claimants in the same position they would have been net of tax*", specifying the applicable tax rates.[1448] The tribunal found that the claim was insufficiently substantiated:[1449]

> "*The Tribunal considers that **it is for the Claimants to prove whether or in what amount any tax on compensation determined by a future award may be due. There is no evidence on the record to prove the type and amount of tax that may be due on an award of compensation and whether such tax would be affected by the regime to which the Claimants as taxpayers are subjected in the given jurisdiction(s)**. Under these circumstances, the Tribunal is not in a position to determine whether there would be a specific tax impact that requires a tax gross-up like the one claimed by the Claimants. **Therefore, this portion of the Claimants' damages claim must fail.***"

1204. Similarly, the claimant in *Masdar v. Spain* submitted a similar tax claim. According to the tribunal, it had limited itself to asserting that

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1447 Memorial, para. 635.

1448 **Exhibit CL-0006**, Antin Infrastructure Services Luxembourg Sárl et al. v. Spain, ICSID Case No. ARB/13/31, Award, para. 669.

1449 **Exhibit CL-0006**, Antin Infrastructure Services Luxembourg Sárl et al. v. Spain, ICSID Case No. ARB/13/31, Award, para. 673.

any amounts received would be subject to corporate tax at 25% in the Netherlands and that in order to place claimant in the same position it would have been in but for the wrongful measures, the damages must be increased by a tax gross-up.[1450] This statement was supported by an expert's interpretation of a tax advice. The tribunal rejected the tax claim on the grounds that the tax advice was insufficiently clear on whether taxes would actually be levied:[1451]

> "*The Tribunal concludes that* ***Claimant failed to provide sufficient evidence for an actual future obligation imposed by its home jurisdiction to pay taxes on an award paid by a foreign government****. The "Tax Advice" on which Brattle* [the claimant's expert] *bases the inclusion of a tax gross-up in its calculations* ***does not give a categorical answer to the "question*** […] ***whether an award granted for the loss in value of shares in Torresol might be exempt from Dutch tax under the Dutch participation exemption****.*"

1205. It follows from the above that the claimants in the *Antin v. Spain* and *Masdar v. Spain* cases stated that paid amounts would be subject to taxes, specified the applicable tax rates and, in the *Masdar v. Spain* case, submitted evidence to support the claim. Still, their tax claims were dismissed.

1206. Claimants have done far less to demonstrate its tax claim. It merely states that there is a "***risk*** *of such additional taxes*",[1452] that it is "*likely*"[1453] that paid compensation is taxed again by the competent tax authorities, that "*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*"[1454] and that "*the exact amount of taxes can likely only be determined once tax authorities have assessed taxes after an award in favour of Claimants*

1450 **Exhibit CL-0016**, Masdar v. Spain, ICSID Case No. ARB/14/1, Award, para. 657.
1451 **Exhibit CL-0016**, Masdar v. Spain, ICSID Case No. ARB/14/1, Award, para. 660.
1452 Memorial, para. 636.
1453 Memorial, para. 636, first bullet.
1454 Memorial, para. 636, second bullet.

has been rendered". [1455] Claimants' tax claim is thus purely hypothetical and not backed up by any evidence.[1456]

1207. Accordingly, Claimants have not managed to "*prove*" or "*provide sufficient evidence for*" their tax claim. The claim must therefore be dismissed.

18.9 Double recovery should be prevented

1208. The prohibition of double recovery is a well-established principle of international law.[1457] Simply put, in accordance with this principle, a creditor can only be compensated once for a given harm.[1458]

1209. On 26 February 2021, just over one month after initiating the present arbitration, the second Claimant commenced "*parallel litigation*" [1459]

1455 Memorial, para. 637.

1456 RWE states in a footnote that "*Claimants' request thus significantly differs from claims filed, and denied, in other cases, where investors asked to be awarded specific amounts*": Memorial, footnote 536. It is clear from the wording used by the tribunals in the *Antin v. Spain* and *Masdar v. Spain* cases that the failure to elaborate on its tax claim makes RWE's case weaker – not stronger – than the cases of the claimants in those cases. Additionally, it should be noted that in *RWE Innogy v. Spain*, claimants had similarly – and unsuccessfully – requested the tribunal to order the respondent to "*hold the Claimants harmless from any amount of tax due as a result of the Tribunal's Award*" (para. 122), a request for relief similar to the one advanced by RWE in this arbitration (see Memorial, para. 689(D)). The tribunal noted that "*the position of the Claimants with respect to a tax gross-up has evolved from payment of a specific additional sum to a request for an order of indemnity*", stated that however "*it remains the case that the Claimants have failed adequately to demonstrate that the Award will be subject to tax in Spain as is claimed*" and did not grant claimants' request. (paras. 125-126). See **Exhibit RL-0133**, RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Award, 18 December 2020, paras. 122-126.

1457 See e.g., **Exhibit RL-0158**, Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 09 October 2014, para. 378; Daimler Financial Services AG v. Argentina, ICSID Case No. ARB/05/1, para. 155; **Exhibit RL-0203**, Pan American v. Argentina, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 219; Conocophillips v. Venezuela, ICSID Case No. ARB/07/30, Award, 8 March 2019, para. 965; Busta v. Czech Republic, SCC Case No. V2015/014, Final Award, 10 March 2017, para. 217; *Bayindir Insaat Turzim Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29,Decision on Jurisdiction of 14 November 2005, para. 270; *BP America Production Company and others v. The Argentine Republic,* ICSID Case No. ARB/04/8, Decision on Preliminary Objections of 27 July 2006, para. 219.

1458 **Exhibit RL-0204**, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, 07 February 2017, para. 1083.

1459 Recording of First Session of 30 August 2021, at 24:24, "*There is a parallel litigation pending before the Dutch courts based on the European Convention on Human Rights instituted by claimants, by the Dutch claimants. And there was a so-called writ*

proceedings against the Kingdom of the Netherlands before the District Court of The Hague (the "**Dutch Proceedings**"). A hearing in the Dutch Proceedings took place on 21 and 23 June 2022. The District Court of The Hague is currently expected to render its judgment in November 2022.

1210. As the Netherlands already explained in its Response to Claimants' Request for Provisional Measures,[1460] in the Dutch Proceedings, the Second Claimant is seeking recovery of the same alleged damages (EUR [redacted]), from the same counter-party (the Kingdom of the Netherlands) in connection with the same environmental measures (the Coal Act) and the same purported investment (Eemshaven) as it is seeking from this Tribunal.[1461] In the Dutch Proceedings, the Second Claimant submitted expert reports from Brattle [1462] and NERA, [1463] which are virtually identical to those submitted in the arbitration. Brattle quantifies damages in the Dutch Proceedings in the exact same amount as in this arbitration.[1464]

1211. The danger of double recovery is therefore evident and concrete. However, Claimants do not make any mention of it in the Memorial. The Netherlands submits that the Tribunal should take appropriate measures to ensure that double recovery is avoided.

1212. In particular, in accordance with the principle that a creditor should only be compensated once for a given harm, if the Netherlands wer found liable (which it should not) and Second Claimant is awarded any damages in the Dutch Proceedings, the Tribunal should take that into consideration when assessing Claimants' identical request for

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of summons, which is the equivalent of a statement of claim, and a statement of defence by the Netherlands which was recently filed. We cannot ignore the statement of defence when writing our Memorial. Would violate our duties to our client and our duties also towards this tribunal if we were to ignore the arguments"

1460 The Netherlands' Response to Claimants' Request for Provisional Measures, Section 2.1.

1461 See **Exhibit R-0002-EN**, RWE's Writ of Summons, 26 February 2021 (**Exhibit R-0002-NL**, RWE's Writ of Summons, 26 February 2021).

1462 **Exhibit R-0003**, Redline of first Brattle report submitted in the Dutch Proceedings against the Brattle report submitted in the arbitration, 18 December 2021.

1463 **Exhibit R-0004**, Redline of Nera report submitted in the Dutch Proceedings against the Nera report submitted in the arbitration, 18 December 2021.

1464 **Exhibit R-0250**, Serena Hesmondhalgh and Dan Harris, Reply Report: Damage Caused to Eemshaven and Amer 9 by the Coal Ban, Brattle Dutch Proceedings Reply Report, Brattle Group, 28 April 2022, para. 16.

compensation in this arbitration, so as to avoid any impermissible double-dipping.[1465]

[1465] See in this regard **Exhibit RL-0205**, Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, 03 September 2001, para. 172: "*the amount of damages granted by the second deciding court or arbitral tribunal could take* [the prior award of damages] *into consideration when assessing the final damage*". See also **Exhibit RL-0206**, British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize, PCA Case No. 2010-18, Award, 19 December 2014, para. 190, confirming the reasoning of the Lauder Tribunal.

PART J: THE ADDITIONAL CLAIM HAS NO MERIT

19 THE GERMAN PROCEEDINGS ARE NOT IN BREACH OF THE ICSID CONVENTION

1213. The proceedings before the Higher Court of Cologne (the "**German Proceedings**") have extensively been discussed as part of RWE's request for provisional measures. The Netherlands refers to the submissions [1466] it has made in response to RWE's request for provisional measures for its detailed response to RWE's claims and provides below a brief summary of its position.

1214. The German Proceedings do not violate the ICSID Convention.

1215. First, the issue before the German courts is one of interpretation and application of EU Law (i.e., the EU Treaties themselves and secondary sources of EU law which stem from the EU Treaties). The Tribunal's powers and competence under the ICSID Convention and the ECT are not matters that are before the German courts. Article 41 ICSID Convention does not give the Tribunal exclusive competence to issue a legally binding interpretation of EU law, especially as far as it concerns obligations of EU Member States (and their judiciary) under EU law. This is the purview of the judiciary of the Member States of the EU under the supervision of the CJEU.[1467] However, the Tribunal may take guidance from EU law as interpreted by the national judiciary and the CJEU.[1468]

1216. Similarly, as explained in Chapter 12, Article 26(2)(c) ICSID Convention cannot apply to proceedings that seek to determine the rights and obligations of EU Member States under the EU Treaties, such as the German Proceedings. There can be no "*consent to arbitration*" to decide those matters in this or any other arbitration,

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1466 Response to Request for Provisional Measures dated 31 May 2022 and Rejoinder on the Request for Provisional Measures dated 14 June 2022

1467 Articles 344 and 267 TFEU and Article 19 TEU as interpreted in **Exhibit RL-0003**, Slovak Republic v. Achmea BV, CJEU, Case C-284/16, ECLI:EU:C:2018:158, Judgment, 06 March 2018.

1468 See further Chapter 12.

much less consent to the exclusion of the jurisdiction of the EU courts.[1469]

1217. EU law obliges the Netherlands to ensure that the questions of EU law at issue in the German Proceedings are put before the EU courts, as a recent letter from the European Commission to the Netherlands confirms. With the German Proceedings the Netherlands has sought to ensure its compliance with its obligations under EU law.

1218. Second, the German Proceedings are concerned with a request for declaratory relief. They do not result in an order directed at the Tribunal, much less an order that precludes the Tribunal from taking a decision on its competence. Regardless of the outcome of the German Proceedings, the Tribunal retains the authority to decide on its own competence.[1470] The German Proceedings at hand will result in a declaratory judgment on the EU law question that is before those EU courts. Such a declaratory decision will express what already applies (and has applied) as a matter of EU law.

1219. Third, while Article 41 ICSID Convention grants the Tribunal the authority to decide on its own competence, it does not provide that the Tribunal has the *exclusive* authority to decide on all matters that may be relevant to its decision on competence. This is confirmed by ICSID case law. In *SPP v. Egypt*, the ICSID tribunal found that the question of whether another method of dispute resolution – ICC arbitration – had been agreed on, was a question preliminary to a finding of competence by the ICSID tribunal.[1471] The answer to that question was in that case determinative of whether the ICSID tribunal had jurisdiction.

1469 That the German Proceedings pertain to EU law is recognised by RWE, see Recording of First Session of 30 August 2021, at 06:48, Recording of First Session of 30 August 2021, at 14:15, Claimants' Application for Bifurcation and Expedition dated 28 January 2022, paras. 9 and 24.

1470 The German Proceedings are therefore unlike the provisional measures requested by RWE which, if granted, would actually prevent the German court from deciding whether it is competent to rule on the EU law question before it.

1471 **Exhibit RL-0013**, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1985, paras. 79-86.

1220. Fourth, the relationship between Article 1032(2) ZPO and Article 41 ICSID Convention is one of coexistence, not conflict.[1472] Article 1032(3) ZPO expressly provides that "[w]*here an action or application referred to in subsection 1 or 2 has been brought,* ***arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court***".

1221. Fifth, even if Article 26 ICSID Convention were presumed to be implicated (which it should not), the exclusive remedy clause in Article 26 ICSID Convention does not apply because RWE consented to non-exclusivity and/or a waived exclusivity.

1222. Claimants commenced parallel proceedings on the merits of the dispute before the domestic courts of the Netherlands. In those proceedings, the Second Claimant is seeking the same relief (monetary damages) from the same counterparty (the Kingdom of the Netherlands) in relation to the same regulatory measure (the Coal Act) in respect of the same purported investment (Eemshaven), as they are claiming before this Tribunal. Consequently, Claimants' actions indicate that it cannot be "*deemed*" to have consented to exclusivity pursuant to Article 26 ICSID Convention. Further, even if consent to arbitration was presumed to exist, there would not be consent to such arbitration to the exclusion of proceedings before the Parties' domestic courts. Claimants' conduct of commencing parallel proceedings before the Dutch courts constitutes consent to derogate from ICSID exclusivity as far as proceedings before the Parties' domestic courts are concerned.

1223. For the above reasons, RWE's claim for declaratory relief and reimbursement of costs as a result of the German Proceedings are without merit.

1472 See **Exhibit RL-0014-ENG**, German Federal Court of Justice (III ZB 59/10), SchiedsVZ 2011, 281, 30 June 2011, para. 11 (**Exhibit RL-0014-DE**, German Federal Court of Justice (III ZB 59/10), SchiedsVZ 2011, 281, 30 June 2011).
In that sense also **Exhibit RL-0015**, N. Erk-Kubat, 'Chapter 2: Competence-Competence', in Nadja Erk-Kubat, Parallel Proceedings in International Arbitration: A Comparative European Perspective, International Arbitration Law Library, Volume 30 (Kluwer Law International 2014), 15 May 2014, p. 37.

REQUEST FOR RELIEF

1224. In light of the foregoing, the Netherlands respectfully requests that the Tribunal:

a) declare that it does not have jurisdiction to hear Claimants' claims;

b) further or in the alternative, declare that Claimants' claims are inadmissible;

c) further or in the alternative, dismiss each of Claimants' claims that the Netherlands has breached the ECT;

d) further or in the alternative, dismiss Claimants' claim for damages;

e) further or in the alternative, dismiss Claimants' claim that the Netherlands be ordered to pay Claimants interest;

f) dismiss Claimants' claims that the Netherlands has violated the ISCID Convention, that the Netherlands must withdraw the German proceedings and that the Netherlands must compensate Claimants for damages resulting from this alleged violation;

g) dismiss Claimants' claim that 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;

h) dismiss Claimants' claim that the Netherlands be ordered to pay Claimants the costs and expenses of this arbitration;

i) order Claimants to pay for all of the costs and expenses of this arbitration (including the costs incurred by the Netherlands, including but not limited to the fees and disbursements of the Netherlands' attorneys and experts and the disbursements of its witnesses (if any) and employees incurred in connection with this arbitration) and on a full indemnity basis, to be quantified in the course of these proceedings; and

j) order Claimants to pay interest at a reasonable rate on the amount in para. 1224i) above to be quantified in the course of these proceedings from the date of the Tribunal's award to the date of effective payment in full.

1225. The Netherlands reserves its right to supplement and/or amend its Counter-Memorial, including the request for relief.

Respectfully submitted on behalf of the Kingdom of the Netherlands,

Yours sincerely,
De Brauw Blackstone Westbroek N.V.

[redacted]

Albert Marsman
Partner

p.o. [redacted]

Bommel van der Bend
Partner

APPENDIX – IMPORTANT FLAWS IN NERA'S ANALYSIS

1226. As explained in paras. 834-839 above, Claimants largely rely on the NERA Report to substantiate its argument that a conversion of Eemshaven to fire 100% biomass would not be economically viable.

1227. NERA explain that they do not carry out a technical assessment of any sort. Similarly, Claimants do not present any technical expertise or details.[1473] Moreover, NERA's economic analysis is thoroughly flawed and cannot be relied on for the reasons set out below.

A.1 NERA's reference date is illogical and irrelevant

1228. Claimants have instructed NERA to conduct an assessment whether a full conversion to biomass by 2030[1474] is economically viable based on "*information available or readily foreseeable on 9 October 2017*",[1475] which is the valuation date proposed by Brattle based on RWE's instructions.[1476] As explained by Compass, NERA focus "*on the economics of converting a coal plant to biomass in 2017, or in 2021, but does not perform an economic analysis of such a conversion in 2030.*"[1477]

1229. This approach is unsound and renders NERA's conclusion largely outdated and moot. It is not in dispute between the Parties that RWE did not need to convert the Eemshaven plant to full biomass use on 9 October 2017. RWE will in any case not need to do so – or at least not on account of the Coal Act – before 2030. Consequently, what is relevant for the purposes of these proceedings is whether a full

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1473 Neither Claimants nor NERA have explained why NERA have not included any technical aspects of Eemshaven in its assessment of the economic feasibility of converting Eemshaven. Claimants could have provided NERA (or another expert with technical expertise, on which NERA could have relied) with relevant information about technical aspects of Eemshaven, but apparently did not do so.

1474 **Exhibit CER-0001**, NERA Expert Report, para. 6: "*we have been instructed* […] *to independently assess whether a reasonable and prudent investor would invest in converting a coal-fired plant like Eemshaven to using biomass by 2030 in the absence of biomass support schemes*."

1475 **Exhibit CER-0001**, NERA Expert Report, para. 8: "*We have been instructed to conduct this assessment based on information available or readily foreseeable on 9 October 2017*."

1476 See **Exhibit CER-0002**, Brattle Expert Report, para. 2(a).

1477 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, footnote 89.

conversion to biomass (or any other fuel) will be viable on or around 2030. This is only logical: Eemshaven is currently continuing its operations as a coal and biomass plant. An assessment of conversion opportunities can only take place on or around 2030, or, at the very least, taking 2030 as the relevant reference date and avoiding excessive speculation as to future circumstances (see also Section 13.2 above).

1230. This is also in line with the motivation of the transitional period until 2030 provided for in the Coal Act. When considering the appropriateness of this transitional period, the Minister of Economic Affairs considered, among other things, that energy producers had long been developing alternatives to coal and that developments in the field of energy – including with respect to technology concerning the conversion to and use of alternative fuels – were happening in rapid succession (see para. 453 above). In other words: it was expected that conversion could become a more attractive option before the end of the transitional period, as coal is phased out in various jurisdictions in Europe and other parts of the world.

A.2 Sources relied on by NERA reveal that unsubsidised electricity generation through biomass can be profitable

1231. NERA state that in 2017, investing in biomass-fired power plants was not economically viable and the outlook for electricity generation from unsubsidised biomass was negative.[1478] NERA also "*review whether* [their] *assessment would be different if made from today's perspective*",[1479] i.e., in December 2021 and state that in the period from 9 October 2017 to December 2021, the business case for biomass has deteriorated.[1480] These statements are contradicted by the sources NERA rely on.

1232. The IEA's study on "Projected Costs of Generating Electricity 2015 Edition", on which NERA relies to determine marginal costs of

1478 **Exhibit CER-0001**, NERA Expert Report, paras. 58-59.
1479 **Exhibit CER-0001**, NERA Expert Report, para. 8.
1480 **Exhibit CER-0001**, NERA Expert Report, para. 20. See also Chapter 3 of the NERA Report.

biomass-fuelled energy generation,[1481] explains that the outlook for such energy generation was not so bleak:

> "*Biomass electricity can already be competitive with fossil fuels under favourable circumstances today. Through standardising optimised plant designs and improving efficiencies, biomass electricity generation could become competitive with fossil fuels under a CO2 price regime.*"[1482]

1233. NERA also cite a number of more recent reports from analysts covering the Drax plant, a plant in the United Kingdom that has been converted to fire biomass. These reports either "*include a value for unsubsidised biomass generation*" or "*mention the possibility without assigning any value as of today*".[1483]

1234. [redacted]

1481 **Exhibit CER-0001**, NERA Expert Report, para. 35.

1482 **Exhibit NERA-0002**, International Energy Agency, Nuclear Energy Agency (September 2015), Projected Costs of Generating Electricity 2015 Edition, p. 156.

1483 **Exhibit CER-0001**, NERA Expert Report, para. 87-89.

1484 It should be noted that NERA inaccurately quotes as relevant a passage of the [redacted] analysis which concerns the Drax plant, and not Eemshaven.

1485 [redacted]

1486 [redacted]

[redacted]

1235. [redacted]

1236. [redacted]

1237. Despite the conclusions of numerous equity analysts, NERA do not change their overall assessment because of two main arguments, both of which are incorrect.

1487 [redacted]

1488 [redacted]

1489 [redacted]

1490 [redacted] While the target of [redacted] has not been reached so far, the share price of Drax did increase to (and has remained) well above the original price target of GBP 5.50 and at times came quite close to the price target, with prices at more than GBP 8.10 in April and May 2022: **Exhibit R-0256**, Drax Group PLC share prices September 2021 (https://londonstockexchange.com) accessed 29 August 2022. Moreover, the difference between the price target and the actual share price could be caused by any other influence than investors' perspective of Drax' biomass operations; such difference does not demonstrate that investors must have disagreed with [redacted] assessment of those operations.

1238. First, NERA consider the rise in gas and electricity prices, which occurred starting in August 2021, to be only temporary.[1491] However, one year later (August 2022), the electricity prices remain at a high level – and higher than they were at the time of the NERA Report.[1492] Further, RWE relies heavily on scenarios where energy prices are consistently high, in support of its damages calculation (see Sub-section 18.3.1.2).[1493] Assuming in a general sense that energy prices would decrease for the purpose of assessing the viability of biomass (as NERA do) while also assuming that they could be consistently high in order to substantiate the claimed damages amount (as Brattle do) is inconsistent.

1239. Second, NERA further submit that "*political support for biomass*" in the Netherlands "*has further eroded*",[1494] which makes it "*highly unlikely that Eemshaven could be operated as a biomass-fired plant from 2030 – 2054.*" [1495] NERA's argument is incorrect. What NERA describe as a deterioration of the government's stand on the future of large-scale power generation from biomass[1496] and the phasing out of woody biomass for electricity production,[1497] is a reference to the expiry of incentives and subsidisation that had served to kickstart the use of biomass, as discussed more extensively in Chapter 5.1. Neither NERA nor RWE point to evidence showing that biomass for electricity generation is precluded or will be precluded; the evidence they do rely on does not support their point, as explained in Section 11.1 above. In fact, NERA recognise that the Netherlands allows the use of woody biomass for electricity generation, subject to sustainability criteria.[1498]

1491 **Exhibit CER-0001**, NERA Expert Report, para. 89.
1492 **Exhibit R-0257-EN**, Rabobank, 'Inflation monitor for the Netherlands - August 2022', 31 August 2022 (**Exhibit R-0257-NL**, Rabobank, 'Inflation monitor for the Netherlands - August 2022', 31 August 2022).
1493 See also: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, paras. 141-149.
1494 **Exhibit CER-0001**, NERA Expert Report, para. 89.
1495 **Exhibit CER-0001**, NERA Expert Report, para. 99.
1496 **Exhibit CER-0001**, NERA Expert Report, para. 90.
1497 **Exhibit CER-0001**, NERA Expert Report, para. 91.
1498 **Exhibit CER-0001**, NERA Expert Report, para. 91.

A.3 NERA's assessment is based on an incorrect estimate of the capital expenditures required to convert Eemshaven to fire 100% biomass

1240. NERA's analysis relies, among other things, on an estimate of the capex required to convert Eemshaven to generate electricity by using only biomass. It explains that its assessment whether a reasonable and prudent investor would invest in converting Eemshaven depends on whether the investor can recoup the capex invested in the conversion:[1499]

> "*Against this background, we have been instructed by Stibbe N.V. and Luther Rechtsanwaltsgesellschaft mbH ("Counsel for Claimant") to independently assess* ***whether a reasonable and prudent investor would invest in converting a coal-fired plant like Eemshaven to using biomass by 2030 in the absence of biomass support schemes. This would only be the case if the investor were to consider such a conversion to be economically viable****, and to be technically and legally feasible.* […] *An investor would only make a conversion investment if he considered it to be profitable.* ***A conversion would be profitable if it allowed the investor to at least recoup his investment costs for the conversion as well as the related cost of capital****.*"

1241. NERA state that the capex for converting Eemshaven to a fully biomass-firing plant would be "*in the range of c. €[redacted] to c. €457 million*".[1500] While the costs of conversion of a coal plant logically depend largely on the technical specifics of the plant, this range is barely substantiated: NERA do not perform any independent technical assessment themselves, nor do they appear to rely on any other technical input that could support their estimate. Instead, they base their estimate on oversimplified calculations and incorrect assumptions. As a result, the capex estimate is overstated.

1499 **Exhibit CER-0001**, NERA Expert Report, paras. 6 and 9. See also para. 77: "*In the absence of subsidies, Dutch plants would only be converted in a hypothetical situation where their marginal costs of generation were competitive relative to other technologies, such that a reasonable and prudent investor could expect to earn back the conversion CAPEX through margins earned by the plant.*"

1500 **Exhibit CER-0001**, NERA Expert Report, para. 23.

1242. NERA explain the lower end of its range as follows:[1501]

> "*The lower estimate of c.€[redacted] is based on RWE Eemshaven's SDE+ application, see Exhibit NERA-0005. There, the CAPEX expectation to convert 255.56 MW to biomass is €[redacted]. Eemshaven has a remaining coal-fired capacity of 1,304.4MW that could theoretically be converted to biomass. This gives the estimate of €[redacted]* $\times \frac{1{,}304.4\ MW}{255.56\ MW} \approx$ €[redacted]."

1243. NERA thus assume that 16.4% (255.56 MW of the total capacity of 1,560 MW) has already been converted and that 83.6% (1,304.4 MW) still needs to be converted. On this basis, NERA in fact simply apply a multiplier of roughly 5.1 (1,304.4 MW divided by 255.56 MW or 83.6% divided by 16.4%) to the initial investment amount in order to calculate the capex for converting the remainder of Eemshaven's capacity. These calculations and assumptions cannot hold. The estimated costs of the initial amount cannot simply be extrapolated linearly to the remaining 1,304.4 MW in the manner that NERA do.

1244. First, the amount of EUR [redacted] itself, too, was an estimate. RWE and NERA have not substantiated what the *actual* costs of the conversion were. This information should be available to RWE, and no explanation has been given as to why it has not been used. In the same vein, NERA do not refer to any capex projections for the conversion of the remainder of Eemshaven. Considering that RWE has been developing and pursuing its plan to fully convert Eemshaven for several years (see Chapter 5 and Section 9.1), such projections would be expected to exist.

1245. Second, NERA assume that capex increase linearly, in other words: that every MW of capacity that is converted requires the same capex and that there are no efficiencies of scale. This assumption is

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1501 **Exhibit CER-0001**, NERA Expert Report, footnote 9. The SDE+ application referred to by NERA have been discussed in Section 3.2.2 above. As part of its subsidy request under the SDE+ Subsidy scheme, RWE indeed informed the competent authority that it estimated the capital expenses for the conversion of around 255.56 MW (out of its total capacity of 1560 MW) at EUR [redacted], as relied on by NERA: **Exhibit R-0258-EN**, Subsidy request, 03 October 2016 (**Exhibit R-0258-NL**, Subsidy request, 03 October 2016).

unsubstantiated and disproven by documents supporting RWE's subsidy request regarding the initial conversion.

1246. For instance, as part of its subsidy request, RWE submitted a budget proposal for the conversion of coal mills.[1502] Following such conversion, two out of Eemshaven's eight coal mills would be able to process biomass as well as coal.[1503] The budget proposal noted that if more coal mills would be converted at the same time, there should be a "*price reduction by synergistic effects, especially in engineering division, but also in delivery in erection*". The conversion costs per coal mill should therefore be lower if six mills are converted at the same time (and following an earlier successful conversion), than they were when only two mills were converted (for the first time).[1504] For instance, costs incurred to engineer the conversion of the first two mills will not need to be made again, in any event not in the same amount, when six similar mills are converted subsequently, and any engineering costs that would be incurred can be spread out over six rather than two mills.

1247. Similarly, with its subsidy request, RWE submitted a budget for the design of a pneumatic ship unloader as part of the initial conversion.[1505] The Environmental Impact Assessment 2019, submitted by RWE as part of its application for an increase of Eemshaven's biomass co-firing allowance from 15% to 30%, states that after the doubling of the biomass co-firing capacity, the supply of biomass to the plant is expected to be realised with the same number of ships on a yearly basis.[1506] If there is no increase in the number of

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1502 **Exhibit R-0259**, Mitsubishi Hitachi Power Systems Europe, Budgetary Cost Estimation for Biomass Co-firing at Eemshaven Power Station, 22 January 2016.

1503 **Exhibit R-0177-EN**, Project description as attached to subsidy request, 03 October 2016 (**Exhibit R-0177-NL**, Project description as attached to subsidy request, 03 October 2016).

1504 **Exhibit R-0259**, Mitsubishi Hitachi Power Systems Europe, Budgetary Cost Estimation for Biomass Co-firing at Eemshaven Power Station, 22 January 2016, p. 26 (pdf).

1505 **Exhibit R-0260**, Budget for construction of pneumatic ship unloader in connection with Eemshaven Co-Firing project, 11 November 2014.

1506 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, pp. S.10, S.13, 3.16, 3.24 and 4.11 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019). For example, on p. S.10: "*RWE expects that the number of ships in the envisaged situation remains the same as the permitted situation (approximately 218 ships/year). This is the consequence of the use of larger*

ships that need to be docked and unloaded, there is no need to incur capex to build an additional ship unloader. Moreover, even if there is such a need, the costs would likely be lower because it would not be necessary to prepare an entirely new design.

1248. Third, NERA assume that the costs of conversion will be the same as the estimates included in the 2015 subsidy application. This assumption is unsupported and implausible.

1249. When the estimates supporting the 2015 subsidy application were made, RWE did not have specific experience with the conversion of Eemshaven yet. Now that it has realised the initial conversion of 255.56 MW of capacity, it possesses know-how that it did not have at the time of the initial conversion. Moreover, RWE has in the meantime obtained additional experience with conversion and the firing of biomass through its Amer plant.[1507] Since 2015, the biomass co-firing percentage of the Amer plant has increased significantly, to 80%.[1508] The Environmental Impact Assessment 2019 highlighted that RWE had "*years of experience with the Amer plant*" on which it relied when reviewing aspects of the intended increase of Eemshaven's biomass co-firing percentage. [1509] The know-how obtained through the conversion of Eemshaven to 30% and Amer to 80% since 2015 decreases the costs of a further conversion of Eemshaven, and means that conversion costs as they applied in 2015 are not a proper benchmark.

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ships for the supply of biomass in the envisaged situation (as compared to the permitted situation)."

1507 Already in 2011, RWE announced that it was planning to initially co-fire 15% biomass and that it expected to subsequently "*grow to higher percentages, making use of what we have learned in the 10 years of co-firing biomass at the Amer plant*": **Exhibit R-0261-EN**, Letter from RWE/Essent to the State Secretary of Economic Affairs, 18 November 2011, p. 6 (**Exhibit R-0261-NL**, Letter from RWE/Essent to the State Secretary of Economic Affairs, 18 November 2011).

1508 **Exhibit R-0262**, Bioenergy International, RWE to retrofit Eemshaven and Amer 9 for biomass co-firing, 14 August 2017; **Exhibit R-0171**, RWE, 2018 Annual Report, 14 March 2019, p. 20; **Exhibit R-0255**, RWE, 'Amer power plant' (https://benelux.rwe.com/en/locations/amer-power-plant) accessed 29 August 2022.

1509 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, pp. S.10, 3.16 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019). See also p. 1.2: "*This ambition has been underlined in a letter to the province of Groningen in which it was also clearly indicated* [that it would] *come to a significant increase of the co-firing percentage of biomass at the Plant in the long run, in line with the experiences at the Amer plant in Geertruidenberg.*"

1250. Fourth, certain parts of the plant have already been converted for more than the roughly 16.4% (being the converted 255.56 MW out of the total capacity of 1,560 MW) that NERA assume to already have been converted in its calculation of the capex required to convert the remainder. As a result, the multiplier of 5.1 used by NERA is too high.

1251. As explained in para. 1246 above, the initial conversion with an estimated cost of EUR [redacted] concerned the retrofitting of two out of eight coal mills of Eemshaven. That means that two of the coal mills (25% rather than 16.4%) have already been converted and that only six coal mills (75% rather than 83.6%) still need to be retrofitted. Even if conversion costs are assumed to be linear and efficiencies in larger or subsequent conversions are ignored, the multiplier to be applied to the costs of converting the remaining six coal mills should thus be 3 at most, not 5.1.

1252. It is possible that like the coal mills, other parts of Eemshaven have also already been converted for more than 16.4%. In the parallel Dutch proceedings between RWE and the Netherlands about the Coal Act,[1510] RWE stated that [redacted] of Eemshaven (as a whole) had already been converted.[1511] A newspaper article of 8 August 2022 states that Eemshaven currently fires 20% biomass.[1512]

1253. NERA have failed to account for this circumstance.

1254. Fifth, NERA fail to account for the possibility that the conversion of the remainder of Eemshaven may be less complex, because Eemshaven will no longer need to be able to fire both coal and biomass after the conversion.

1255. For the initial conversion, RWE insisted that the coal mills should be converted such that they would not only be able to process biomass,

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1510 For a further description of these proceedings, see the Netherlands' Response to request for provisional measures, paras. 12-14.

1511 **Exhibit R-0002-EN**, RWE's Writ of Summons, 26 February 2021, para. 507: "*As already mentioned, the Eemshaven power station is technically suitable for co-firing **some** biomass: about* [redacted]" (**Exhibit R-0002-NL**, RWE's Writ of Summons, 26 February 2021).

1512 **Exhibit R-0186-EN**, Energeia, 'German energy giant RWE invests billions in 'green' hotspot Eemshaven', 08 August 2022, p. 4 (**Exhibit R-0186-NL**, German energy giant RWE invests billions in 'green' hotspot Eemshaven, 08 August 2022).

but that they could also still process coal, to maintain the possibility of having Eemshaven run on coal only.[1513] For the conversion of the remaining capacity of Eemshaven, however, it would no longer be necessary that the converted mills can still also process coal, as coal will be phased out. Therefore, the technical requirements for the six remaining mills to be converted are less complex than they were for the first two mills to be converted. It is likely that the (per-mill) costs of converting the six remaining mills are thus also lower than the costs for converting the first two mills. Similar considerations may apply to other parts of Eemshaven.

1256. NERA fail to take into account the information described above in its calculation of the lower end of its estimated capex range. As a result, the lower end of its capex range is overstated and based on incorrect assumptions.

1257. The higher end of NERA's range suffers from similar issues. NERA justify this higher end as follows:

> " *The higher estimate of c. €457 is based on the "Final advice on base rates SDE+ 2017", a report prepared by ECN and DNV GL from April 2017, which is the basis for calculating subsidies under the SDE+ scheme. The report includes an estimate for "biomass direct co-firing" of €350/kW of capacity. This gives the estimate of €350* $\times$ *1,304.4 MW* $\frac{1{,}000\ MW}{1\ kW} \approx$ *€457m.*"

1258. Like the lower end of NERA's range, this calculation is based on a mere estimate. This estimate is even less reliable than the lower end of NERA's range: it is not tailored to Eemshaven. NERA do not explain why information relating to plants with different specifics should have any added value over information tailored to Eemshaven, which NERA use to calculate the lower end of its range. It is unreasonable to assume on the basis of *less* specific information that capex would be higher than the amount that follows from *more* specific information. Therefore, the higher end of NERA's range should be dismissed.

1513 **Exhibit R-0259**, Mitsubishi Hitachi Power Systems Europe, Budgetary Cost Estimation for Biomass Co-firing at Eemshaven Power Station, 22 January 2016, p. 3 of 26 (p. 4 of the pdf).

1259. Instead, the EUR 350/kW underlying the higher end of NERA's range is based on a reference plant with a capacity of 700 to 1,100 MW, which is significantly lower than Eemshaven's capacity of 1,560 MW.[1514] By applying this number to Eemshaven, NERA assume that the conversion costs per MW of capacity are identical for two different-sized plants. This assumption lacks substantiation and is implausible.

1260. The higher end of NERA's range, too, assumes that costs increase linearly as a larger part of a plant's total capacity is converted, which is an unfounded assumption (see 1245-1247 above).

A.4 Other fundamental assumptions in the NERA Report are incorrect

1261. In addition to the points mentioned above, NERA's analysis is based on a number of other flawed assumptions, as pointed out by Compass.

1262. First, NERA claim that the outlook in 2017 for electricity generation from unsubsidised biomass was negative because of a "*risk of tightened environmental regulations which may lead to heightened sustainability requirements for biomass and increased prices of sustainable biomass or biomass being subjected to the ETS*", which may increase marginal costs for biomass plants "*substantially*".[1515] As explained by Compass, this argument is speculative.[1516] Compass also notes that the 2019 Frontier Economics report, relating to Uniper's MPP3 plant (see 837 above), "*did not raise any concerns regarding the alleged risks of tightening regulation*".[1517]

1263. Moreover, it appears that RWE was not concerned in 2017 that biomass would not be feasible in the future on account of heightened sustainability requirements or the ETS. As explained in Section 9.1, since 2017, RWE requested and obtained a doubling of Eemshaven's biomass co-firing allowance, continued pursuing a full conversion to

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1514 **Exhibit NERA-0003**, ECN, DNV (April 2017), Final advice on base rates SDE+ 2017, p. 53.

1515 **Exhibit CER-0001**, NERA Expert Report, para. 59, first bullet and Section 2.1.

1516 For instance, Compass flags that even if biomass at some point would no longer be considered CO2 neutral and would be subjected to ETS, the costs of CO2 emissions could be reduced by for example CCS: **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 213.

1517 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. 213.

biomass and made repeated public declarations to that effect. It is implausible that it would have made these declarations and efforts if it believed that biomass had no future on account of regulatory risks.

1264. Second, NERA assess the feasibility of conversion to full biomass use taking into account only one specific biomass type: wood pellets (the most expensive biomass type on the market).[1518] As mentioned by Compass, "*NERA do not conduct any analysis of different types of biomass other than wood pellets (such as biowaste) and of the marginal costs of electricity generation from such different biomass types, which may be lower than the estimated marginal costs of using wood pellets*".[1519]

1265. NERA rely heavily on one report published by the IEA in 2016, which indicates that only wood materials are suitable for 100% biomass firing.[1520] It ignores that this report contains an assessment as of 2016. It has no relevance for the question whether the use of other types of biomass would be feasible by 2030, after over a decade of further innovation not taken into account by the IEA.

1266. RWE itself has been using non-woody biomass for electricity generation. Already in its permit application for the construction of Eemshaven in 2006, RWE indicated that in addition to woody biomass, it was also planning to fire sugar cane waste (also known as bagasse):[1521]

> "*RWE particularly wants to co-fire the following categories of biomass:*
> *- prunings (A-grade wood)*
> *- untreated used wood (wood pellets, sawdust)*
> *- sugar cane waste*"

1267. When RWE formally announced its plans to increase Eemshaven's biomass co-firing capacity from 15% to 30%, it noted that it was planning to start firing several new categories of biomass, including

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1518 **Exhibit CER-0001**, NERA Expert Report, para. 59, second bullet and Section 2.2.
1519 **Exhibit RER-0001**, Expert Report of Compass Lexecon, 05 September 2022, para. [210].
1520 **Exhibit CER-0001**, NERA Expert Report, paras. 103-107.
1521 **Exhibit R-0047-EN**, Request for environmental permit, 20 December 2006, p. 15 (**Exhibit R-0047-NL**, Request for environmental permit, 20 December 2006).

non-woody biomass.[1522] In the Environmental Impact Assessment 2019, it was recorded that RWE intended to start co-firing lignin and bentonite (consisting of waste products from, among other things, the food industry).[1523] The permit that was subsequently granted to RWE on 15 September 2021 allowed for the co-firing of lignin and bentonite.[1524]

1268. RWE has been testing the use of sugar cane waste to generate electricity. [redacted], who is [redacted], expects that sugar cane waste as an alternative for woody biomass "*is possibly a game changer*" and "*has great expectations of this new fuel*".[1525]

1269. NERA assume that only woody biomass can be used for electricity generation and ignore indications to the contrary – including declarations made by RWE – despite the fact that if its assumption is invalid, NERA would be overestimating the costs of operating on biomass. NERA's analysis on the basis of this assumption is therefore unreliable.

1270. For a further analysis of and response to the NERA Report, the Netherlands refers to Appendix B of the Compass Report.

1522 **Exhibit R-0179-EN**, RWE, Starting Memorandum, 05 July 2017, pp. 11-12 (**Exhibit R-0179-NL**, RWE, Starting Memorandum, 05 July 2017).

1523 **Exhibit R-0051-EN**, Environmental Impact Assessment 2019, 19 April 2019, pp. S.5 (**Exhibit R-0051-NL**, Environmental Impact Assessment 2019, 19 April 2019).

1524 **Exhibit R-0182-EN**, Revised environmental permit, 15 September 2021, p. 11 (**Exhibit R-0182-NL**, Revised environmental permit, 15 September 2021).

1525 **Exhibit** [redacted]