

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

**International Centre for
Settlement of Investment Disputes**

Washington, D.C.

between

RWE AG
RWE Eemshaven Holding II BV
(Claimants)

and

The Kingdom of the Netherlands
(Respondent)

REQUEST FOR ARBITRATION

20 January 2021

Luther.

Luther Rechtsanwaltsgesellschaft mbH
Gänsemarkt 45, 20354 Hamburg, Germany

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ABBREVIATIONS

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

REQUEST FOR ARBITRATION

- 1 In accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”)¹, the German company RWE AG (“**RWE AG**” or, when referring to the RWE group of companies, “**RWE**”) and its Dutch subsidiary RWE Eemshaven Holding II BV (“**RWE Eemshaven**” or, collectively with RWE AG, “**Claimants**”) hereby respectfully submit this Request for Arbitration (the “**Request**”) to the International Centre for Settlement of Investment Disputes (“**ICSID**”), and respectfully request the Secretary-General to register this arbitration against the Kingdom of the Netherlands (“**the Netherlands**” or “**Respondent**”).

- 2 The dispute arises out of Respondent’s 2019 decision to prohibit the production of electricity by burning coal. It relates to Claimants’ investments in the new coal-fired power plant Eemshaven (“**Eemshaven**”), which started operations only in 2015. The damage caused to Claimants has been provisionally calculated to exceed EUR 1.4 billion, excluding interest.

- 3 This dispute is not about the existence of climate change and its consequences nor about contesting the need to reduce CO2 emissions. It is about the very basic question who should bear the financial consequence after a fundamental change of policy:
 - the State, who claims to act for the public benefit and achieves CO2 reduction at no cost, or
 - the investor, who has relied on promises, policy statements, and permits when deciding to invest billions in one of the most modern coal fired power plants in Europe, if not on the planet?

- 4 This is not a political, but a purely legal issue. Claimants do not ask this Tribunal to create law, but merely to apply it. If a State unexpectedly forces an investor to sacrifice its lawful investment for the public benefit, then the State has to pay compensation. This is a tenet not only of the Energy Charter Treaty (the “**ECT**”), but of investment protection in general. And Respondent has not complied with that principle.

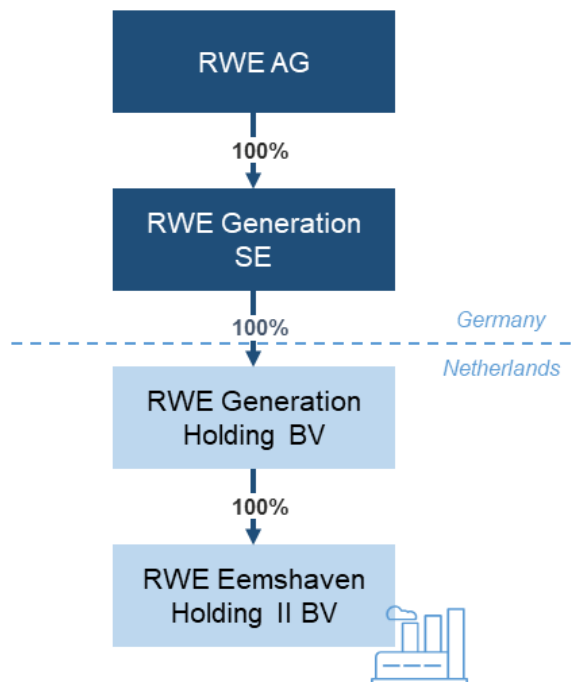
¹ ICSID Convention (**Exhibit CL-0001**).

- 5 The Request is structured as follows: In Section **A**, Claimants describe the parties to the dispute. Section **B** contains a brief summary of the facts underlying the dispute and the claims pursued in this arbitration. ICSID's jurisdiction is addressed in Section **C**. In Section **D**, Claimants give a preliminary indication of the relief sought. Section **E** addresses the constitution of the Tribunal.

A. THE PARTIES

I. Claimants

- 6 RWE AG is a German joint stock company (*Aktiengesellschaft*), organised under the laws of Germany and with its place of incorporation in Essen, Germany.² RWE is a large power generation company in the European Union (“EU”) with over 20,000 employees, and a leading player in the field of renewable energy.
- 7 RWE’s conventional energy business in the Netherlands is conducted through a chain of two wholly-owned subsidiaries, the German RWE Generation SE and the latter’s 100 % Dutch subsidiary RWE Generation Holding BV. RWE Generation Holding BV, in turn owns 100 % of the shares in RWE Eemshaven.³ RWE Eemshaven is a Dutch limited liability company (*Besloten vennootschap met beperkte aansprakelijkheid*) with its seat in Geertruidenberg, the Netherlands, and is the direct owner and operating company of the Eemshaven plant.⁴



² Excerpt from the Commercial Register for RWE AG (**Exhibit C-0001**).

³ See list of participations in RWE 2019 Annual Report (**Exhibit C-0002**), p. 180.

⁴ RWE Eemshaven’s Excerpt of the Chamber of Commerce (**Exhibit C-0003**).

- 8 Claimants have duly authorised the institution of these proceedings⁵ and appointed Luther Rechtsanwaltsgesellschaft mbH as their legal representatives.⁶ They will be represented in this arbitration by:

Luther Rechtsanwaltsgesellschaft mbH
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II. Respondent

- 9 The Kingdom of the Netherlands is Respondent in this arbitration. To the best of Claimants' knowledge, this Request may be served on Respondent on the following addresses:

Ministry of Economic Affairs and Climate Policy
Attn: His Excellency Minister of Economic Affairs and Climate Policy
Bezuidenhoutseweg 73
2594 AC Den Haag
THE NETHERLANDS

De Brauw Blackstone Westbroek N.V.
Attn: Mr Albert Marsman and Mr Bommel van der Bend
Claude Debussylaan 80
1082 MD Amsterdam
THE NETHERLANDS
Telephone: +31 20 577 1771, Telefax: +31 20 577 1775
E-mail: albert.marsman@debrauw.com & bommel.vanderbend@debrauw.com

⁵ Authorisation of Proceedings by RWE AG and RWE Eemshaven (**Exhibits C-0004a and C-0004b**).

⁶ Powers of Attorney by RWE AG and RWE Eemshaven for Claimants' Counsel (**Exhibits C-0005a and C-0005b**).

B. SUMMARY OF THE DISPUTE

I. Introduction

- 10 This dispute relates to Claimants' investment in the construction of the 1,560 MW coal-fired power plant Eemshaven. It is a state-of-the-art power plant situated in the port of Eemshaven near the city of Groningen in the Netherlands. With an electrical efficiency of up to 46 %, the ability to co-fire biomass, and built ready for carbon capture and storage ("**CCS**" and "**CSS-ready**", respectively)⁷, it is one of the most modern plants in the world.



- 11 At the time Claimants were planning their investment in the late 2000s, the Netherlands actively and openly called for investments in coal-fired power plants. It wanted to improve the competitiveness of Dutch businesses by reducing electricity costs and to ensure the security of energy supply by reducing the Netherlands' dependency on gas imports from and through politically unstable states (II). In an agreement concluded in 2008, Respondent even promised not to regulate the number or type of (coal) power stations. On the basis of the foregoing, and once they had obtained all necessary permits, Claimants invested over EUR 3 billion in the construction of Eemshaven (III). Throughout the construction phase, the Netherlands continued to reaffirm its need and desire for coal-fired power plants, that such long-term investments need stable

⁷ CCS is a technique where CO₂ emissions are captured at the source (i.e. the power plant) and then transported (e.g. through pipelines) to a storage side (usually, underground formations such as empty gas fields).

investment conditions, and that CO2 emissions would be regulated exclusively by the European Union's ("EU") emissions trading system ("ETS") (IV).

- 12 Yet, only shortly after Eemshaven started commercial operations in 2015, the new Dutch government – in its 2017 Coalition Agreement – decided to ban coal-fired power generation (V). This was implemented by the Law on the Prohibition of Using Coal in the Electricity Production (*Wet verbod op kolen bij elektriciteitsproductie*, Staatsblad 2019, No. 493, "**Coal Ban Law**")⁸ which entered into force on 20 December 2019. By doing so, the Netherlands's CO2 reduction measure singles out an industry sub-sector entirely in the hands of foreign investors. Moreover, given that CO2 emissions are regulated at the EU level, reducing CO2 emissions in one country only is ineffective.
- 13 Moreover, despite fundamentally changing the framework for coal-fired power generation (by prohibiting it) and being contrary to Claimants' unlimited and irrevocable permits, the Netherlands adopted this measure without providing financial compensation (VI). Even the most modern and highly efficient power plants like Eemshaven are only offered a transitional period of 10 years, i.e. until 1 January 2030. Granting a 10-year transitional period is, however, nowhere close to adequately compensate Claimants for losing at least 35 years of its remaining lifetime.
- 14 Nevertheless, the Netherlands considers it to be Claimants' problem what to do with their power plant after 2030. It tries to justify this lack of compensation by alleging that Claimants could convert Eemshaven to run on alternative fuels. This, however, is pure speculation and plainly unrealistic. Moreover, despite prohibiting Eemshaven's licenced activity (i.e. generation of electricity by burning coal), the Netherlands expects Claimants to convert the plant at their own costs and to assume all technical, legal, and economic risk for the conversion. It neither offers financial support to ensure the economic viability of the operation post-2029 nor does it guarantee that Eemshaven's permit can be changed to using only other fuels. Therefore, Claimants will have to shut down Eemshaven in 2030, i.e. 25 years prior to the end of its expected minimal lifetime, without financial compensation.

⁸ Coal Ban Law (**Exhibit C-0006**).

- 15 The Coal Ban Law therefore breaches the Netherlands' obligations under Articles 13 and 10(1) of the ECT (**VII**) by
- indirectly expropriating Claimants' investments without paying compensation;
 - failing to observe obligations entered into with Claimants' investments;
 - acting unfairly, inequitably, discriminatory, and unreasonably; and
 - not providing the most constant protection and security.
- 16 It caused Claimants damages preliminarily calculated to be **in excess of EUR 1.4 billion**.
- 17 In the following, Claimants will set out the factual and legal background of the dispute in more detail.

II. When Claimants planned their investment, the Netherlands wanted and encouraged investors to build new coal-fired power plants

- 18 In the 2000's, the Netherlands were concerned about the security of its energy supply. At the time, the Dutch electricity generation market was dominated by gas-fired power plants which had a share of about 60 %. Consequently, a particular concern was the high dependency on natural gas since this was increasingly imported from and through politically unstable states, resulting in interrupted and/or insecure supply. Moreover, gas was expensive and the resulting high electricity prices affected the competitiveness of Dutch businesses.
- 19 Therefore, in the 2005 edition of its regular Energy Report,⁹ the Dutch government called for a greater diversification of the Dutch energy supply, placing a particular focus on new coal-fired generation capacity. Moreover, in the report, the government promised, where possible, to remove obstacles for the construction of such plants and acknowledged that reliable investment conditions must be provided for such investments.¹⁰ The Dutch Energy Reports are mandatory reports which set out and

⁹ 2005 Energy Report (**Exhibit C-0007**), pp. 12-13, 18, 26-27.

¹⁰ 2005 Energy Report (**Exhibit C-0007**), pp. 42-43.

directs the Dutch energy policy. They are presented to parliament and announced in the Government Gazette.

- 20 The government consistently maintained its position also in the following years. In 2008, the government explicitly reaffirmed that the EU Commission's Climate and Energy Package did not change its position on coal-fired power plants:

In June 2007, the Government informed the House of Representatives of its position on the construction of new coal-fired power plants. The climate and energy package published by the Commission does not require the Government to change its position. The possible construction of new coal-fired power plants in the Netherlands fits within the Government's climate ambitions, because the emissions of new coal-fired power plants are encompassed within the European ceiling for emission allowances.¹¹

- 21 The government's position that CO₂ emissions would only be regulated through the ETS was also reflected in the 2008 Energy Report.¹² The government expected coal-fired power plants to continue to play an important role in the Dutch and European energy market for the coming decades and also to be part of the energy mix in 2050. It specifically referred to five planned coal-fired plants (which included Eemshaven) with a total additional capacity of 3,250 MW.¹³

- 22 The 2008 Energy Report also again emphasised the importance of “[e]nsur[ing] a good and stable investment climate for all energy options, through clear framework conditions and procedures”.¹⁴ In the government's understanding this meant:

A good and stable investment climate is first and foremost about clear rules for all energy options that do not change every time, so that investors can make a realistic assessment of the risks they run during the service life of those energy options. These rules should not make investment in certain techniques impossible, but should ensure that any negative (environmental) effects are minimised. In practice, this means that - in line with European rules - strict

¹¹ Letter to the Second Chamber by the Minister of Economic Affairs, 7 February 2008, (Exhibit C-0008).

¹² 2008 Energy Report (Exhibit C-0009), p. 86.

¹³ 2008 Energy Report (Exhibit C-0009), p. 85.

¹⁴ 2008 Energy Report (Exhibit C-0009), p. 20.

requirements are imposed on the construction of, for example, coal and nuclear power plants.¹⁵

- 23 In line with the above, in October 2008, the Netherlands entered into an agreement with, *inter alia*, the members of Energie-Nederland (including RWE), the Dutch business association of energy companies (“**2008 Energy Agreement**”). With regard to fossil fuels – and, in particular, coal – Annex 1 to this agreement provides in Article 2.2 (emphasis added):

2.2.1 In shaping government policy, the national government will not focus on measures that compulsorily determine the number or type of (coal) power stations; in addition, the national government will offer the market an investment perspective for 2020 and beyond.

2.2.2 The energy sector ensures that new coal-fired power stations are among the cleanest in Europe and that new coal-fired power stations are as efficient as possible in comparison with the current generation of power stations.

2.2.3 The energy sector will be able to reduce old inefficiencies through the construction of new (coal) power stations. [...]

2.2.4 The energy sector and national government will monitor the interaction between the opening of new power stations and the closure of old ones. [...]¹⁶

- 24 In Annex 2 to the agreement, the energy companies described their investment plans. This included RWE and its plans to build the Eemshaven plant.

III. Claimants obtain all necessary permits and decide to construct the Eemshaven coal-fired power plant

- 25 By August 2008, Claimants had applied for and obtained all necessary permits, in particular the Environmental permit and the permit under the Nature Conservation Act. These permits were granted for an indefinite period of time.

- 26 The Nature Conservation Permit was necessary since the Eemshaven plant was situated at the border to the Wadden Sea, which is protected under the EU Habitat

¹⁵ Responses by the Minister of Economic Affairs to questions on the 2008 Energy Report (**Exhibit C-0010**), p. 16 (Question 41) – emphasis added.

¹⁶ 2008 Energy Agreement (**Exhibit C-0011**), Annex 1, Article 2.2.

Directive and as a UNESCO World Natural Heritage. Such a permit can only be issued if there is, *inter alia*, an overriding public interest. That overriding public interest was confirmed in the final permit: the Eemshaven plant would not only ensure security of supply, but also serve environmental protection goals by displacing older, less efficient power plants.

- 27 Against the background of these governmental statements and having obtained all necessary permits, Claimants formally decided to move ahead with their investment in the construction of the Eemshaven power plant on 16 March 2009.

IV. Throughout the construction phase, the Netherlands reaffirmed its need and support for coal-fired power plants

- 28 Also in the following years, the Netherlands reaffirmed its need and support for coal-fired power plants despite the growing share of renewables capacity. Accordingly, after 2005 and 2008 also the 2011 Energy Report emphasised that Europe would remain dependent on fossil fuels with a substantial part coming from coal-fired power plants. It also again highlighted the need for stable, long-term investment conditions.¹⁷
- 29 In 2013, the government, various NGO's and business associations, including Energie-Nederland (which had also concluded the 2008 agreement) concluded a further agreement ("**2013 Energy Agreement**"). With regard to coal fired-power plants, it noted that fossil fuels would continue to be an important part of energy consumption in the period up to 2050. With the new coal-fired power plants due to start operation in the next years, the energy companies active in the Dutch market (including RWE) therefore agreed to the early closure of five coal-fired power plants build in the 1980s by 2016/2017.¹⁸

¹⁷ 2011 Energy Report (**Exhibit C-0012**), pp. 30, 35.

¹⁸ 2013 Energy Agreement (**Exhibit C-0013**), pp. 20-21, 97-98.

V. After Eemshaven had started operations, the Netherlands reversed its policy and ultimately prohibited coal-fired power plants

30 The two blocks of Eemshaven power plant started commercial operations on 31 January 2015 and 6 May 2015, respectively. As explained above, it reaches an energy efficiency of 46 % and features the latest technology, including modern filter systems, making it one of the cleanest coal-fired power plants on the planet. Eemshaven has also been built ready for carbon capture and storage ("**CCS-ready**", and "**CCS**" respectively) as agreed as part of the permitting process.

31 Moreover, RWE had also prepared the Eemshaven plant to co-fire 15 % biomass if and when this would be economically viable. These investments were made in light of the possibility to obtain financial support for the co-firing of biomass from the Dutch government. The financial support Eemshaven received allows it to economically co-fire 15 % biomass only until 2027.

32 Yet, shortly after this long investment process conducted in close alignment with the Dutch authorities and only months after Claimants' state-of-the-art power plant had started commercial operations, a process began which finally led to the fundamental reversal of the Netherlands' position on coal-fired power plants.

33 On 26 November 2015, the Dutch parliament adopted a motion calling on the government to phase out Dutch coal-fired power stations and to draw up a plan with the sector to this end ("**2015 Motion**"). This did not yet lead to any changes. Rather, still in a letter dated 19 January 2017, then-Minister for Economic Affairs Kamp informed the Dutch parliament about the government's conclusion that the closure of coal-fired power plants raised many objections and would not be necessary. The Government still considered that the European emissions trading system would regulate the problem of CO2 emissions.

34 Changes only became foreseeable after a general election and lengthy negotiations for a new government. On 10 October 2017, the new Dutch government published its Coalition Agreement, in which it had agreed that coal-fired power stations would be closed by 2030 at the latest. At the same time, the government announced that it would abrogate the necessary support for biomass co-firing. Moreover, while also this document announced that the government would at least agree the precise time table

with the sector in a National Climate and Energy Agreement. However, this never happened.

35 Only about half a year later, on 18 May 2018, the Government published a draft of the Coal Ban Law for public consultation via internet. Despite receiving many critical comments on the draft – not only from Claimants but also from the Council of State – the draft was submitted (largely) unchanged to parliament on 18 March 2019. The law was approved by the two chambers of the Dutch Parliament on 4 July 2019 and 10 December 2019, respectively. It entered into force on 20 December 2019.

36 In its Article 2, the Coal Ban Law provides for an outright prohibition to burn coal in coal-fired power plants:

It is forbidden to generate electricity in a production installation using coal.¹⁹

37 This prohibition only affects foreign energy companies since all coal-fired power plants still in operation at the time were owned by four foreign energy companies:

- Claimants, which operate the plants Amer 9 and Eemshaven;
- Uniper, which operates Maasvlakte 3,
- Riverstone, which operates the former Engie plant in Maasvlakte; and
- Vattenfall, which operates Hemweg.

38 Hemweg was shut down with immediate effect on 1 January 2020, Amer 9 may not burn coal from 2025 onwards, and the remaining three plants from 2030 onwards.

VI. The Netherlands fails to provide full compensation

39 With the exception of Hemweg, no financial compensation is offered. Instead, in a sleigh of hands, the Netherlands offers Claimants for Eemshaven 10 years of the original remaining minimum 35 years of lifetime as “transitory period”.

40 In the Explanatory Memorandum to the Coal Ban Law, Respondent acknowledges that the transitional period itself was not even sufficient to allow a power plant to fully recoup

¹⁹ Article 2 of the Coal Ban Law (**Exhibit C-0006**).

its investment costs. However, it considered this not necessary as the transitional period was intended to allow conversion of the plants to be operated with other fuels from 2030 onwards.²⁰

41 Yet, although the possibility to operate a power plant like Eemshaven solely with biomass (or other fuels) is central to the government's justification of its measure, it provides no support – and does not even seem to have investigated – whether the conversion to biomass (or other fuels) is legally permissible and economically viable. Investors such as Claimants are left alone with the legal, technical and financial risk to convert the plants. And the risks are considerable:

- First, to operate on other fuels than coal, a power plant like Eemshaven would need to be able to have its permit changed accordingly. In particular, it would need to be able to comply with the respective emissions limits when burning solely fuels other than coal.
- Second, operating Eemshaven with alternative fuels would need to be economically viable. Considering the investments needed to convert a power plant for the use of other fuels (CAPEX) and the higher costs of such fuels (OPEX) (while being less efficient than coal, i.e. producing less electricity), an operation with alternative fuels would require subsidies. Today, Eemshaven is able to co-fire up to 15 % of biomass only because it receives subsidies for using this fuel from renewable sources. However, after 2027 no more subsidies will be available since the government, in its 2017 Coalition Agreement, decided to no longer subsidise biomass co-firing.
- Third, as of 16 October 2020, the Government even informed the Dutch parliament about its intention to discontinue the use of biomass for electricity production, with the exception of sewage sludge. After having prohibited the use of coal, the Government will now also phase out the use of biomass for electricity production

42 Claimants have addressed this issue during the settlement discussions – to no avail.

43 As a result of the Coal Ban Law, Claimants are thus forced to shut down Eemshaven by 1 January 2030, i.e. approximately at least 25 years prior to the end of its expected

²⁰ Explanatory Memorandum to the Coal Ban Law (**Exhibit C-0014**), p. 11.

lifetime, causing them **damages** preliminarily calculated to be **in excess of EUR 1.4 billion**.

VII. The Coal Ban Law breaches the ECT

44 The Coal Ban law breaches the Netherlands' obligations under Part III of the ECT.²¹

45 According to its Article 2, the purpose of the ECT is to establish

a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

46 Tribunals have therefore unanimously agreed that the obligations contained in Part III are to be interpreted in the light of this purpose and that stability and transparency are core elements of the protection under the ECT.²² Thus, they guide the interpretation and application of the ECT.

47 Respondent's breaches are summarised in the following:

1. Respondent breached Article 13 of the ECT by expropriating Claimants' investments without prompt, adequate and effective compensation

48 Respondent has breached Article 13(1) of the ECT. Pursuant to this provision, Respondent is not allowed to expropriate, either directly or indirectly, Claimants' investments unless the expropriation is: (i) for a purpose which is in the public interest; (ii) not discriminatory; (iii) carried out under due process of law; and (iv) accompanied by the payment of prompt, adequate and effective compensation.

49 The ECT contains a broad definition of investment, covering not only the Eemshaven power plant (Article 1(6)(a) of the ECT), its operating company RWE Eemshaven and

²¹ Energy Charter Treaty (**Exhibit CL-0002**)

²² See only *Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 (**Exhibit CL-0005**), paras 197-198; *Antin Infrastructure Services Luxembourg Sàrl et al. v. Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (**Exhibit CL-0006**), paras 520-523.

the shares held therein (Article 1(6)(b) of the ECT) but also the permits granted for Eemshaven (Article 1(6)(f) of the ECT).

50 These investments have been indirectly expropriated by the Coal Ban Law. Its Article 2 expressly *“forbid[s] to generate electricity in a production plant using coal.”* It thus prohibits the very essence of Eemshaven’s business activity (i.e. electricity generation by burning coal), depriving Claimants of the use of their aforementioned investments and destroying their value. Neither the permit nor the plant, its operating company or shares therein have any use or value for Claimants without the ability to burn coal.

51 No prompt, adequate and effective compensation for this expropriation has been provided. As the Explanatory Memorandum to the Coal Ban Law makes clear, the purpose of the transitory period is to compensate the operators for the restrictions caused by the law. However, giving only 10 years of operational lifetime in “exchange” for taking 35 years does not correspond to compensation of the fair market value – and Respondent knows this. It therefore presupposes that operators could convert their plants to alternative fuels (in particular biomass) and would use the transitional period to do so at their own cost and risk. Yet, that such a conversion is legally and technically possible and economically viable is speculative at best. Moreover, to obtain this speculative chance to further operate the plants which the state has otherwise rendered useless, operators would need to make considerable additional investments.

52 Furthermore, even if Claimants assumed the considerable risk to convert their plant to biomass, it would be unclear whether they could use their plant. As the Government now declared on 16 October 2020, it now also wants to phase out the use of biomass for electricity generation. It did so although – in terms of availability and from a technical perspective – biomass was and is the only (at least) theoretically conceivable alternative fuel for large scale electricity production. Therefore, the transitional period clearly is no prompt, adequate and effective compensation.

53 In addition to failing to provide adequate compensation, the Coal Ban Law also violates Article 13 of the ECT because it is discriminatory as it affects only power plants owned by foreign investors. From a wealth of possible measures to reduce CO₂ emissions, the Netherlands has singled out and limited its measure to one industry – namely, coal-fired electricity generation – in which only foreign investors and no domestic companies

are active. It has chosen a method of CO2 reduction which puts the burden entirely on foreign investors.

2. Respondent breached the ECT's Umbrella Clause by not observing obligations it had entered into

54 Respondent has also breached the ECT's Umbrella Clause in Article 10(1), last sentence, of the ECT. Pursuant to said provision, a "*Contracting Party shall observe any obligations it has entered with an Investor or an Investment*".

55 Respondent has failed to observe its obligation under the 2008 Energy Agreement which it has entered into towards Claimants and their investments.²³ With that agreement, Respondent promised not to "*compulsorily determine the number or type of (coal) power stations*".²⁴ Furthermore, Respondent entered into an obligation by accepting Claimants' applications for permits under the Environmental Management Law and Nature Conservation Act and granting Claimants' permits to operate a coal-fired power plant for an "*indefinite period of time*". Those permits give the holder the right to operate Eemshaven as a coal-fired plant, and oblige the State to tolerate and accept the operation.

56 The Coal Ban Law breached these obligations by prohibiting coal-fired power plants as a type of power plant and depriving Claimants of their right to operate Eemshaven as a coal-fired power plant indefinitely. This constitutes a breach of Article 10(1), last sentence, of the ECT.

3. Respondent breached its obligation to treat Claimants' investments fairly and equitable (Article 10 (1) of the ECT)

57 Respondent has breached its obligation under Article 10(1)(2) of the ECT to treat Claimants' investments fairly and equitably. By enacting the Coal Ban Law, it has frustrated Claimants' legitimate expectations.

²³ The 2008 Energy Agreement was concluded by Energie Nederland on behalf of its members which included RWE.

²⁴ Article 2.2.1 of Annex 1 to the 2008 Energy Agreement (**Exhibit C-0011**).

58 Article 10(1) of the ECT requires Respondent to treat Investments of Investors fairly and equitably. In light of Article 2 of the ECT, which sets out the ECT’s object and purpose and refers to the European Energy Charter, Tribunals have declared that stability and transparency are core elements of the protection offered by the ECT in general and the FET standard in particular.

59 The tribunal in *Antin v. Spain* summarised this as follows:

520. As noted by the tribunal in *Eiser v. Spain*, the ECT’s stated purpose emphasises the Treaty’s role in providing a legal framework that promotes long-term cooperation, suggesting that the ECT is conceived as enhancing the stability required for such cooperation.

521. This is further confirmed by the objectives and principles of the European Energy Charter (the “Charter”), a political declaration that formed the basis of the ECT and to which Article 2 of the ECT expressly refers.

522. Title I of the Charter, labelled “objectives”, provides that the signatories will engage, inter alia, in cooperation in the energy field, which entails the “formulation of stable and transparent legal frameworks creating conditions for the development of energy resources.” Similarly, Title II.4 of the Charter, which specifically deals with the implementation of the Charter’s objectives regarding the promotion and protection of investments, provides as follows:

“In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.

They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes.”

523. These provisions of the Charter thus confirm that the legal framework referred to in Article 2 of the ECT is one that is stable, transparent, and compliant with international legal standards. The Tribunal shall therefore observe the objectives of legal stability and transparency in interpreting the FET standard under the ECT.²⁵”

²⁵ *Antin Infrastructure Services Luxembourg Sàrl et al. v. Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (**Exhibit CL-0006**), paras 520-523, referring to *Eiser Infrastructure Limited et al. v. Spain*, ICSID Case No. ARB13/36, Award, 4 May 2017 (**Exhibit CL-0007**), paras 378-379. See also *Foresight Luxembourg Solar 1 Sàrl et al. v. Spain*, SCC Case No.

- 60 Claimants invested against the background of Respondent's declared desire and policy to have new coal-fired power plants build in the Netherlands in order to guarantee the security of supply and become more independent from gas-exporting states such as Russia. The Netherlands has repeatedly and consistently affirmed that it would not determine the number or type of power stations, that CO₂-emissions will be regulated exclusively by the ETS, and that coal plants would still play a role in 2050. Moreover, before investing, Claimants had obtained all necessary permits which were granted for an unlimited time and expressly confirmed the overriding public interest in the construction of Eemshaven.
- 61 In reliance on that, and fulfilling all political desired extras for coal-fired power plants, Claimants have built a modern, highly efficient coal-fired power plant which is built CCS-ready and able to co-fire biomass. Yet, shortly after Claimants' and the two other modern coal-fired power plants started commercial operations, the Netherlands utterly frustrated Claimants' expectations by deciding to ban coal-fired power generation and requiring Claimants to shut down Eemshaven decades prior to the end of its expected technical and economic lifetime. As also expressly confirmed by the Dutch Council of State on 10 July 2017, this measure was not foreseeable at the time of Claimants' investment.²⁶
- 62 What is more, by enacting the Coal Ban Law, Respondent not only acted contrary to specific representations made but more generally fundamentally changed the legal framework under which Claimants' invested. Completely prohibiting a previously not only permitted but even desired and encouraged economic activity constitutes the most fundamental change imaginable. This is a breach of the most essential guarantee of the ECT, namely the guarantee of stable conditions for investments.

V(2015/150), Final Award, 14 November 2018 (**Exhibit CL-0008**), para. 350; *Vattenfall AB et al. v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 (**Exhibit CL-0005**), paras 197-198.

²⁶ Advisory Division of the Dutch Council of State, Opinion of 10 July 2017 (**Exhibit C-0015**), p. 10.

**4. The Netherlands failed to provide most constant protection and security
(Article 10(1)(3) of the ECT)**

63 Respondent also failed to accord Claimants' investments most constant protection and security in accordance with Article 10(1)(3) of the ECT. The most constant protection and security standard obliges Respondent to provide physical as well as legal protection and security to investments of investors. Article 10(1)(3) of the ECT is breached when a State dismantles the legal basis for the investment. By prohibiting the burning of coal and limited a previously unlimited permit to a time period insufficient to even recover the amount invested, Respondent dismantled that legal basis on which the decision to invest in a coal-fired plant was based.

5. The Coal Ban Law is unreasonable because there is no appropriate correlation between the severe harm caused to Claimants and the aim to be achieved

64 The Coal Ban Law moreover constitutes an unreasonable measure in violation of Article 10(1) of the ECT. It is unreasonable because there is no appropriate correlation between the severe harm caused to the Claimants and the legitimate aim to reduce CO2 emissions pursued by the Coal Ban Law.

65 Firstly, that the appropriate correlation is already lacking is shown by Respondent's own considerations set out in the Explanatory Memorandum to the Coal Ban Law. The government only considered the transitional period to be appropriate compensation because it assumed that coal-fired power plants could be converted and continued to be operated with alternative fuels. Yet, even the Dutch Council of State criticised in its Opinion of 16 January 2019 that this is an unsupported assumption. Moreover, it is disproven by the fact that the Dutch government provides financial support for the co-firing of biomass since the operation with biomass would otherwise be loss-making. Hence, once this support ends in 2027, firing biomass will become economically unviable.

66 Secondly, there is no appropriate correlation between the Coal Ban Law and the aim to reduce CO2 emissions because the Coal Ban Law is ineffective in reducing these emissions. CO2 emissions are regulated on the European level through the ETS. This caps the amount of permitted CO2 emissions within the EU. Any reduction on CO2

emissions can thus be achieved on the European level by limiting the available emission certificates. This would increase prices of emission certificates and thereby make plants with high CO₂ emission unprofitable. Conversely, since emissions are regulated on the European level, shutting down plants in one country only causes emissions to shift elsewhere. It is thus neither necessary nor efficient to shut down individual plants to achieve CO₂ reductions.

67 For the two aforementioned reasons, the Coal Ban Law constitutes an unreasonable measure in breach of the ECT.

6. The Coal Ban Law is discriminatory

68 Last but not least, the Coal Ban Law also breaches the ECT because it is discriminatory by burdening foreign investors only. As to the reasons for this, Claimants refer to their explanations in para. 53 above in the context of the expropriatory nature of the Coal Ban Law.

7. Reservation of rights

69 In accordance with the Institution Rule 2(1)(e), the above is only a first indication of Claimants' claims. Claimants fully reserve their right fully to explain, articulate, and prove their claims once arbitration proceedings before a Tribunal have commenced.

C. JURISDICTION OF ICSID

70 ICSID has jurisdiction over this dispute according to Article 25 of the ICSID Convention, which reads as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

71 As further described below, Germany and the Netherlands are Contracting States to the ICSID Convention (I). Both parties to the dispute have given their written consent to arbitration (II). Claimants are nationals of another Contracting State than the Netherlands (III). There is a legal dispute between Claimants and Respondent which directly arises out of an investment (IV).

I. Germany and the Netherlands are Contracting States to the ICSID Convention

72 Both Germany and the Netherlands are Contracting States of the ICSID Convention.²⁷ Germany deposited its instrument of ratification with the International Bank for Reconstruction and Development (“**World Bank**”) on 18 April 1969. The ICSID Convention entered into force with respect to Germany on 18 May 1969. The Netherlands deposited its instrument of ratification with the World Bank on 14 September 1966. The ICSID Convention entered into force with respect to the Netherlands on 14 October 1966.

²⁷ ICSID, List of Contracting States and Other Signatories of the Convention, 9 June 2020 (Exhibit CL-0003)

II. Claimants and Respondent have consented to submit the dispute to ICSID

73 The written consent of Respondent to refer this dispute to arbitration under the ICSID Convention is set forth in Article 26 of the ECT. Paragraphs (3) and (5) of Article 26 of the ECT provide:

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

[...]

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; [...]

74 Both Germany and the Netherlands are Contracting Parties to the ECT. Both States deposited their respective instruments of ratification with the depositary on 16 December 1997 and the ECT entered into force between them on 16 April 1998. A list of Contracting Parties to the ECT, published by the Energy Charter Secretariat, is attached.²⁸

75 Claimants have given their consent separately in their letter of 16 December 2020.²⁹ By submitting this Request, Claimants reaffirm their consent for this dispute to be submitted to ICSID pursuant to Article 26(4)(a)(i) of the ECT. By virtue of Article 26(3) of the ECT, Respondent has given its unconditional consent to arbitration of this dispute under the ICSID Convention.

²⁸ Energy Charter Secretariat, List of Contracting Parties to the Energy Charter Treaty (**Exhibit CL-0004**).

²⁹ Claimants' Letter consenting to arbitration, 16 December 2020 (**Exhibit C-0016**).

III. This is a legal dispute arising out of an investment between a Contracting State and Investors of another Contracting State

1. Claimants are nationals of another Contracting State

76 Claimants are nationals of another Contracting State as required by, and for the purpose, of Article 25(1) of the ICSID Convention.

77 RWE AG is a company organised in accordance with the laws of Germany and thus a national of another Contracting State than the Netherlands. RWE Eemshaven is a juridical person established in accordance with Dutch law, but is to be treated as a national of another Contracting State than the Netherlands pursuant to Article 25(2)(b) of the ICSID Convention. This provision reads as follows:

(2) 'National of another Contracting State' means: [...]

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

78 Because of its foreign control, Respondent has agreed to treat RWE Eemshaven as a national of another Contracting State. This follows from Article 26(7) of the ECT, which provides that:

An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" [...]

79 RWE Eemshaven is indirectly controlled by RWE AG. RWE AG operates its business with coal, *inter alia*, through RWE Generation SE. RWE Generation SE owns 100 % of

the shares in RWE Generation Holding BV. RWE Eemshaven in turn is a 100 % owned subsidiary of RWE Generation Holding BV.³⁰

80 Thus, RWE Eemshaven is to be treated as

- (i) a national of another Contracting State than the Netherlands pursuant to Article 25(2)(b) of the ICSID Convention, and
- (ii) an investor of another Contracting Party than the Netherlands pursuant to Article 26(7), (1) of the ECT.

2. This is a legal dispute

81 This dispute submitted to ICSID by Claimants is a legal dispute as required by Article 25(1) of the ICSID Convention. In their Report, the Executive Directors of the World Bank have described this requirement as follows:

26. [...] The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for the breach of a legal obligation.³¹

82 Respondent denied that it has breached its obligations under the ECT. It has also refused to compensate Claimants for its damages.

3. The dispute arises directly out of an investment

83 The dispute arises directly out of Claimants' investments in the Eemshaven power plant. The Coal Ban Law directly interfered with the operation of Claimants' coal-fired power plant and related permits. In particular, it made it impossible to operate the Eemshaven power plant in accordance with its granted permits. Moreover, the Coal Ban Law also affected other protected investments under the ECT, such as RWE Eemshaven and the shares held in this company (Article 1(6)(b) of the ECT).

³⁰ See para. 7 for Claimants' corporate structure.

³¹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, in ICSID Convention, Regulations and Rules (**Exhibit CL-0001**), p. 44, para. 26.

4. Attempts to amicably settle the dispute have failed

84 Despite Claimants' invitation to Respondent to enter into discussions to settle this dispute, this attempt to settle the dispute failed.

85 By letter of 4 September 2020 Claimants notified Respondent of the dispute under the ECT and requested negotiations for an amicable settlement.³² In the three months following this, no settlement could be reached.

5. ICSID's jurisdiction is not affected by the dispute's intra-EU character

86 The jurisdiction of ICSID is also not affected by the circumstance that the Netherlands and Germany are both EU member states.

87 It is uniformly agreed among all tribunals that have dealt with the potential exclusion of arbitration in the background of intra-EU disputes that in particular the impact of the *Achmea* judgment has no effect on the jurisdiction in ECT based proceedings.³³

88 The fact that intra-EU disputes are not affected by the *Achmea* judgment is especially also valid for ICSID proceedings on the basis of the ECT.³⁴

³² Notice of Dispute of 4 September 2020 (**Exhibit C-0017**).

³³ See for example: *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019 (**Exhibit CL-0009**), paras 134-155; *Vattenfall AB and others v. Federal Republic of Germany II*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 (**Exhibit CL-0005**), paras 172-184; *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018 (**Exhibit CL-0010**), paras 454-461; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 (**Exhibit CL-0007**), para. 199; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016 (**Exhibit CL-0011**), para. 448.

³⁴ See only ICSID referred to in previous footnote, namely: *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, 25 February 2019 (**Exhibit CL-0009**), paras 134-155; *Vattenfall AB and others v. Federal Republic of Germany II*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 (**Exhibit CL-0005**), paras 172-184; *Eiser Infrastructure*

D. PRELIMINARY INDICATION OF THE RELIEF SOUGHT

89 As a preliminary indication of the relief sought, Claimants expect to request that the Arbitral Tribunal:

- (i) **DECLARE** that Respondent breached its obligations towards Claimants under Part III of the Energy Charter Treaty;
- (ii) **ORDER** Respondent to pay damages to Claimants in an amount to be further specified (but preliminary calculated to exceed EUR 1.4 billion), together with pre-award and post-award interest at a rate to be determined, as well as in an amount equivalent to any taxes payable on the awarded amount; and
- (iii) **ORDER** Respondent to compensate Claimants for their costs of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone to bear responsibility for the compensation to the Arbitral Tribunal and ICSID.

Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017 (**Exhibit CL-0007**), para. 199.

E. CONSTITUTION OF THE TRIBUNAL

90 The parties have not agreed upon the number of arbitrators, nor have the parties agreed on the method of appointment of the Arbitral Tribunal. The ECT does not set forth any particular provisions in this respect.

91 The ICSID Convention provides, and Claimants request, that a three-member Arbitral Tribunal be appointed. Claimants are interested in reaching an agreement with Respondent and propose the following method for the appointment of the Tribunal:

- (i) Claimants herewith appoint **Mr James H. Boykin** as arbitrator. The contact details of Mr Boykin are:

Hughes Hubbard & Reed LLP
Mr James H. Boykin
1775 I Street, N.W., 5th Floor
Washington, DC 20006-2401
UNITED STATES OF AMERICA

Email: james.boykin@hugheshubbard.com

Phone: +1 (202) 721-4751

- (ii) Respondent shall appoint an arbitrator within 30 days following the registration of the Request.
- (iii) The two arbitrators so appointed shall jointly designate a third arbitrator to be the President of the Tribunal within 30 days after the appointment of the second party-appointed arbitrator, or within such other time period as may be jointly agreed by both of them and the parties.
- (iv) Failing an appointment of an arbitrator by a party, or agreement by the two arbitrators on the designation of the third arbitrator to be President of the Tribunal, within the time periods stated above, ICSID Arbitration Rule 4 applies.

92 The above procedure is Claimants' proposal for purposes of ICSID Arbitration Rule 2(i)(a). Accordingly, Claimants submit that the 20-day period set forth in ICSID Arbitration Rule 2(i)(b) for Respondent's acceptance of Claimants' proposal as to the method of constituting the Tribunal, commence as of the date of registration of this Request. This Request is addressed to the Secretary General of the Centre at the principal office of the Bank in Washington, D.C. Pursuant to the Institution Rule 4(1), it

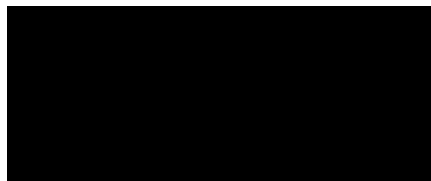
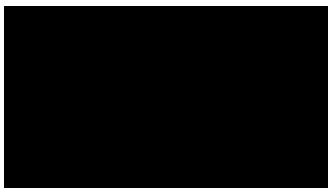
is accompanied by five signed copies and one additional copy for Respondent, including exhibits.

F. MISCELLANEOUS

- 93 The lodging fee of USD 25,000 has been transferred by wire transfer to the following account; proof of wire transfer has been attached hereto.³⁵
- 94 Based on the foregoing, Claimants respectfully ask that this Request be registered in the Arbitration Register pursuant to Article 36(3) of the ICSID Convention.

Hamburg, 20 January 2021

Luther Rechtsanwaltsgesellschaft mbH



³⁵ Wire transfer record regarding payment of Lodging Fee (Exhibit C-0018).