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RECHTBANK DEN HAAG
C-09-608588-HA ZA

I hereby certify that the DUTCH to ENGLISH translation of the above-mentioned document is accurate and true.

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Translation Agency of Alberta
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ECLI:NL:RBDHA:2022:12635

Authority	The Hague Court
Date Of Decision	11/30/2022
Date Of Publication	11/30/2022
Case Number	C-09-608588-HA ZA 21-245
Fields Of Law	Civil Law
Special Features	Main Case, First Instance - Multiple Judges
Content Indication	Claims for Financial Compensation from Coal Power Plants were Rejected.

On November 30, 2022, the Hague Court rendered its verdict in a case related to the Coal Ban for Electricity Production Act. According to this law, by the end (latest by 2030), coal power plants are prohibited from using coal as fuel for electricity generation. This law aims to reduce the CO_2 emissions of power plants.

The case against the State was initiated by the owners of the Eemshaven power station, the MPP3 power station on the Maasvlakte, and the Amercentrale. The owners of these three coal power plants claimed financial compensation for the consequences of the law. According to them, the law infringes their property rights. They argue that the law should not have been enacted without providing them with financial compensation. The court has rejected their claims.

Infringement Not Unlawful

The court ruled that, although this law indeed infringes upon property rights, this infringement is not unlawful. The measures taken by the State with this law to reduce CO_2 emissions are proportional. The interests of the owners have been sufficiently considered.

Ban was Foreseeable

It is crucial – among other things – that it was foreseeable for the owners that such a ban would be imposed if the emissions from the power stations were not significantly reduced before 2020, for instance, by burning biomass or by capturing and storing or reusing the CO_2. This did not happen with the MPP3 and the Eemshaven power stations. Regarding the Amercentrale, it already runs almost entirely on biomass. The owner could anticipate that this power station would not be allowed to be converted back to a coal power station once the subsidy for burning (woody) biomass ends in 2027.

Transition Period

The court also considered that the ban on burning coal did not come into effect immediately after the law was enacted. The owners were granted a transition period. During this period, they can still generate income with the coal power stations and limit their damages. Moreover, they can use this period to explore other potential uses for the power stations.

Sites Rechtspraak.nl

Enhanced pronunciation

Excerpt

Judgment

THE HAGUE COURT

Trade Division

Case Number/Roll Number: C:/09/608588/HA ZA 21-245

Judgment of November 30, 2022

in the case of

the private company with limited liability
RWE GENERATION NL B.V. located in Geertruidenberg,
plaintiff,
lawyer Mr. T. Barkhuysen in Amsterdam,

against

the public legal entity
THE STATE OF THE NETHERLANDS (MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE) located in The Hague,
defendant,
lawyer Mr. J.S. Procee in The Hague.

The parties will hereafter be referred to as RWE Generation and the State, respectively.

1 Introduction

The Core of the Dispute

1.1. RWE Generation owns the Amercentrale. The Amercentrale is a facility where electricity and heat are generated by burning (currently mainly) biomass and coal. The power station was commissioned in 1993**1**. On December 20, 2019, the Law prohibiting the use of coal for electricity production (hereafter: the Wvk) came into effect. Under this law, it is prohibited to produce electricity in a production facility using coal. The start date of the prohibition varies from immediate effect from the date of entry into force of the Wvk to entry into force on January 1, 2030. It depends on the characteristics of the production facility. Since the electrical efficiency of the Amercentrale's installation is less than 44%, but renewable energy is also produced due to heat production and co-firing of biomass, the prohibition applies to this power station from January 1, 2025.

1.2. RWE Generation argues that the absence of adequate financial compensation for the damage it suffers due to the prohibition set out in the Wvk means that the Wvk is unlawful towards it. According to RWE Generation, this damage amounts to € 62 million, and it claims in this procedure that the State fully compensates it for this damage. It bases this on the fact that the Wvk violates Article 1 of the First Protocol (hereafter: EP) to the European Convention on Human Rights and Fundamental Freedoms (hereafter: ECHR) and Article 17 of the Charter of Fundamental Rights of the European Union (hereafter: EU Charter). In short, these treaty provisions protect the right of every natural and legal person to the peaceful enjoyment of his possessions.

1.3. The State denies that the Wvk constitutes a violation of the aforementioned treaty provisions and is thus unlawful towards RWE Generation. In addition, the State disputes that RWE Generation suffers damage that is causally related to the Wvk. The State concludes by rejecting RWE Generation's claims.

Structure of this Judgment

1.4. This judgment is structured as follows. The course of the proceedings is briefly described in No. 2. In No. 3, some facts important for the assessment of this case are included. Subsequently, in No. 4 - in more detail - the claims made by RWE Generation are presented. The court gives its assessment in No. 5. In this assessment, the court will involve further facts. As in No. 3, this refers to facts that are undisputed between the parties or that emerge from the attachments (productions) they have submitted, the content of which has not or insufficiently been contradicted. The assessment leads to the decision included in No. 6.

2 The Proceedings

Case File

2.1. The case file consists of the following documents:
- the summons of February 26, 2021, with exhibits 1 through 19;
- the statement of defense, with exhibits 1 through 18;
- the judgment of January 5, 2022, ordering an oral hearing;
- the deed submitting exhibits 20 through 23, also invoking articles 21 and 22 of the Dutch Code of Civil Procedure (Rv) on the side of RWE Generation;
- the deed submitting further information and exhibits 19 through 35, on the side of the State;
- the minutes of the oral hearing.

Further Course of the Proceedings

2.2. The oral hearing took place on June 21 and 23, 2022, combined with the oral hearing in the cases with case and roll numbers C/09/608584/ HA ZA 21-244 (Eemshaven Power Station) and C/09/611221 / HA ZA 21-419 (MPP3 Power Station). RWE Generation, on June 16, 2022, thus after the expiration of the term mentioned in Article 87(6) Rv, submitted exhibit 24 (Brattle memorandum dated June 16, 2022).

2.2. The State objected to this. The court accepted this document as a case document, with the commitment that the State would be allowed to comment on it if the court considers the document relevant to its decisions. On June 21, 2022, the State sent the court a message with the attached letter of the same date from the Minister for Climate and Energy to the House of Representatives, in which it stated, among other things, that the legal production restriction for generating electricity with coal for the period 2022-2024 will no longer be enforced immediately. It is preparing a bill to withdraw that production restriction, which will take effect retroactively. This letter - with the parties' agreement - is also part of the case file.

2.3. During the oral proceedings, the parties used speaking notes. These have been submitted and are part of the case documents. A transcript of the oral proceedings was drawn up outside the parties' presence, with their (implied) consent. Parties were given the opportunity to comment on the transcript regarding factual inaccuracies. By letter of July 22, 2022, RWE Generation's lawyer made use of this opportunity. This letter is also part of the case file, and the judgment is made considering this letter.

2.4. Finally, the parties have requested the court to pronounce a judgment. The judgment date is further set for today.

3 Some Facts

RWE Generation and the group to which it belongs

3.1. RWE Generation is fully part of the RWE Group, with RWE A.G., headquartered in Essen (Germany), being the parent company. The group has a market capitalization of approximately €23.4 billion (end of 2020) and a revenues of €24.5 billion (2021). In addition to the Amercentrale, RWE AG owns the Netherlands' Eemshaven power plant. RWE AG owns several other power plants outside the Netherlands, including in Europe, Asia (Turkey), and the United States. The companies within the RWE group use various fuels for energy generation, including coal, biomass, gas, oil, and nuclear energy. They also generate energy using water, wind (onshore and offshore), and sun. In 2020, the total generation capacity of the RWE group was 40,702 Megawatts (MW), of which 2,257 MW was generated using coal as fuel.

The Amercentrale

3.2. The production unit Amer 9 (hereinafter: the Amercentrale) was built on the instruction of Essent Energie Productie B.V. (hereinafter: Essent) and was commissioned in 1993. The Amercentrale is located in Geertruidenberg.**2** The plant burns coal and biomass to produce electricity (with a net capacity of 600 MW) as well as heat (with a net capacity of 350 MW). The power station has an electrical efficiency of 42%.**3** The heat is supplied via a heat network to city heating systems in, among others, Breda and Tilburg, and to nearby greenhouses. Since mid-2000, the Amercentrale has had a gasification facility for the gasification of construction and demolition of wood and the co-firing of biogas. In 2001, co-firing facilities for secondary fuels (such as biomass) were expanded. To achieve CO_2 emission reduction through co-firing and adding secondary fuels, Essent has received a subsidy since 2003 based on the Environmental Quality of Electricity Production Subsidy Scheme (hereinafter: MEP subsidy). With this, a wood gasification installation was realized, and two coal mills were made suitable for biomass. In addition, this subsidy included compensation for the so-called unprofitable peak that arises from replacing coal with biomass as a fuel (this compensation relates to the fact that biomass's energy yield is lower than coal's). In September/October 2009, the RWE group acquired Essent, making RWE Generation the owner of the Amercentrale. In the years that followed, the Amercentrale was gradually converted into a biomass power plant, and the necessary permits were also adjusted. The Amercentrale is permitted to burn 1,700 kilotons of biomass. This is approximately 80% of the total required fuel when the Amercentrale operates at full capacity. For burning biomass, RWE Generation has been receiving a subsidy from the State since 2018 and will continue to do so until September 2027 based on the Sustainable Energy Production Incentive Scheme (SDE), the "successor" to the MEP subsidy**4**. The State has granted RWE Generation over €2.3 billion in subsidies for burning biomass (€675,028,947 in MEP subsidies and €1,651,946,071 under the SDE scheme).

Biomass

3.3. Biomass is a collective term for waste and other by-products from organic material, such as wood pellets, agricultural crops, manure, and non-chemical waste from the industry. Biomass is considered a renewable energy source. Although the combustion of biomass also releases carbon dioxide (hereinafter: CO_2), in accordance with European regulations**5**, this emission is administratively set at zero (neutral energy source). The thinking behind this is that the CO_2 released when biomass is burned is stored again by growing trees and plants.

CO_2 Emissions

3.4. The electricity sector accounts for approximately a quarter of CO_2 emissions in the Netherlands. Of that (varying per year, but on average), half is from coal-fired power plants. Coal-fired power plants emit twice as much CO_2 per produced MW as gas-fired power plants. The CO_2 emissions from the Amercentrale in recent years have been as follows (rounded to million tons (MT); the percentage of these emissions of the total emissions in the Netherlands is mentioned after it):

	Amercentrale	**Total Emissions NL**
2014	6.4 (7.17%)	89.1
2015	5.7 (6.02%)	94.1
2016	3.5 (3.75%)	93.9
2017	3.6 (3.91%)	91.4
2018	2.2 (2.58%)	87.4
2019	1.8 (2.19%)	83.7
2020	0.9 (1.27%)	74.1

Investments in the Amercentrale

3.5. The RWE group purchased Essent (the entire company) on September 30, 2009, for a total amount of € 7.3 billion. Which part of this purchase price relates to the Amercentrale, as part of Essent's assets, has remained unknown in this procedure.

Revenues from the Amercentrale

3.6. In response to questions from the court regarding the revenues realized with the Amercentrale over the years, RWE Generation replied during the oral proceedings that "the Amercentrale (...) was not housed in a separate company," making it "not possible to obtain separate data from only the Amercentrale."

International and European Climate Policy

The Climate Treaty

3.7. The Earth Summit organized by the United Nations in Rio de Janeiro in 1992 led to the United Nations Framework Convention on Climate Change (hereinafter referred to as the Climate Treaty). The Climate Treaty aims to stabilize the concentration of greenhouse gases in the atmosphere at a level that prevents a dangerous human influence on the climate. The treaty signatory states have committed themselves to combat climate change, among other things, by taking measures in the field of CO_2 emissions. This obligation particularly applies to the so-called Annex I countries, including the Netherlands. For these Annex I countries, the goal is to reduce their CO_2 emissions to the highest level of 1990. The Netherlands signed the Climate Treaty on June 4, 1992.

Kyoto Protocol

3.8. In 1997, the Climate Convention was expanded with the Kyoto Protocol. It tightened the emission reduction targets for Annex I countries. For the Netherlands, the concrete emission reduction target amounts to a 6% reduction in greenhouse gas emissions in the period 2008 - 2012 compared to 1990. The Netherlands signed the Kyoto Protocol on April 29, 1998, and ratified it in 2002.

Emission Trading System (ETS).

3.9. On October 13, 2003, Directive 2003/87/EG**6** was adopted, creating the Emission Trading System (hereinafter ETS) in Europe. In a nutshell, the ETS involves a system where participating companies are allocated a permit on the basis of which they are allowed to emit a certain amount of CO_2. Each allowance represents 1 ton of CO_2 emissions. No more CO_2 may be emitted in the European Union (hereinafter: EU) as a whole than the total number of allowances issued (European CO_2 emissions cap). The permit holder can use the emission rights allocated to it itself or trade them to other companies to which the ETS applies (including electricity production companies). If a company emits more CO_2 than it has allowances, it will have to buy additional allowances. Conversely, a company with allowances left over because it emits less CO_2 than allowed can sell the surplus allowances. The underlying idea is that in this way, an incentive is created for emitting companies to reduce their CO_2 emissions (for example, by investing in cleaner technologies). If they do not, they will have to pay more and more for emission rights. After all, the European Commission's policy aims to have the CO_2 emissions ceiling fall further and further (in stages), which will cause the price of an emission allowance to rise. Initially (2008-2012), emission allowances were allocated for free, but from 2013 onwards, more and more allowances will be auctioned. Until 2025, the number of allowances to be issued decreases by 2.2% annually. The European Commission plans to increase that rate to 4.6% starting in 2026. Eventually, the prices for these allowances will be so high, it is intended, that it will no longer be profitable for participating companies to engage in business activities that involve (a lot of) CO_2 emissions.

European Commission: limiting climate change to 2 degrees Celsius

3.10. On January 10, 2007, the European Commission presented the communication "Limiting Global Climate Change to 2 degrees Celsius." **7** In order not to exceed that 2-degree limit, according to the Commission, global CO_2 emissions need to be 50% below 1990 levels by 2050. With emissions having only increased since 1990, developed countries, including the Netherlands, will need to reduce their emissions by 60% to 80% by 2050.

UN Climate Conference in Bali

3.11. This December 2007 conference of the parties to the Climate Convention adopted, among other things, a Bali Road Map that included the need for "deep cuts in global emissions."

Regulation EERP

3.12. Regulation 663/2009 of the European Parliament and of the Council, adopted on July 13, 2009 (hereafter Regulation EERP), calls on EU Member States to propose energy investment projects that the EU can financially support. These include projects aimed at carbon capture and storage, also known as Carbon Capture and Storage (hereafter CCS). The Netherlands has nominated the Rotterdam Storage and Capture Demonstration (ROAD) project for funding. The grant for this project has been awarded.

UN Cancun Climate Summit and Roadmap to Competitive Low Carbon Economy 2050

3.13. Following the exhortations made by the ad hoc working group of Annex I countries at the UN climate summit in Cancun in the fall of 2010, the European Commission presented, on March 8, 2011, a roadmap to a competitive low carbon economy in 2050. This roadmap sets a goal of reducing emissions by 25% by 2020, 40% by 2030, and 60% by 2040 compared to 1990 levels to achieve 80% to 95% reductions by 2050 compared to that year.

Paris Agreement 2015 (Climate Agreement)

3.14. After establishing the Doha amendment to the Kyoto Protocol (December 8, 2012), with emission reduction targets from 2013 to 2020, and further refinements and specifications of European climate policy, the UN Climate Conference took place in December 2015. The main outcome of this conference was the establishment of the Paris Agreement (hereinafter: the Climate Agreement). The parties to the Climate Agreement have committed themselves to keeping the global temperature rise well below 2 degrees Celsius compared to the pre-industrial level. The EU ratified the Climate Agreement in October 2016.

The European Climate Law and the "*Green Deal*"

3.15. On June 25, 2021, the EU Regulation established a framework for achieving climate neutrality. This "European Climate Law" aims to contribute to the realization of the goals of the Climate Agreement. According to this regulation, the EU must be climate-neutral by 2050. To achieve this, net greenhouse gas emissions in 2030 must be at least 55% lower than in 1990. This means that member states must take the necessary measures to achieve this target. The European Commission presented the "Green Deal" on July 14, 2021, in which it further elaborated on how it intends to implement the Climate Law.

4 The Claim

4.1. RWE Generation claims, in summary, that the court should declare by provisionally enforceable judgment:

1. rule that the Wvk is unlawful against it due to the lack of adequate compensation;
2. order the State to pay RWE Generation an amount of €62,000,000.00, plus statutory interest from December 20, 2019 until the day of payment in full;
3. order the State to pay the litigation costs, including follow-up costs.

The basis of the claims

4.2. Underlying these claims, RWE Generation argued that the Wvk violates Article 1 EP ECHR and Article 17 EU Charter and is therefore unlawful towards it. According to RWE Generation, the incompatibility of the Schedule of Rights with the aforementioned treaty provisions lies in the fact that the Schedule of Rights does not provide for adequate financial compensation for the damage it suffers as a result of the fact that, pursuant to this Act, it is no longer allowed to generate electricity and heat using coal at the Amercentrale as of January 1, 2025. After the coal ban comes into effect on January 1, 2025, the Amercentrale may continue to operate using only biomass as fuel for almost two more years. Still, RWE Generation argues that this will no longer be economically possible once the subsidy for biomass use ends in September 2027: after that, RWE Generation will have to close the Amercentrale because the coal ban prevents it from switching back (from biomass) to coal. Importantly, RWE Generation (in addition to seeking a declaratory judgment that the Wvk is unlawful vis-à-vis it) seeks damages and expressly does not demand that the prohibition in the Wvk on generating electricity using coal be suspended or set aside due to violation of said treaty provisions. RWE Generation argues that the damage it suffers as a result of the Wvk is equal to the decrease in value of the Amercentrale that has occurred now that it can (only) produce electricity with coal until 2025 instead of 2033 (assuming a "lifetime" of the plant of 40 years).

Calculation of drop in value and reference date; the "Brattle Report".

4.3. RWE Generation had this decline in value calculated by the economic expert firm The Brattle Group Ltd. In the damage report issued by this firm ("Brattle Report"), the "fair market value" of the Amercentrale was calculated for this purpose in the actual situation ("actual case"), i.e., with the coal ban in 2025, and in the hypothetical situation ("but for-case"), in which the Amercentrale would continue to operate through 2032. Brattle calculated the difference between these two values at €62 million. Brattle calculated the "fair market value" based on the free cash flow generated by electricity production from coal and biomass (as long as the State subsidizes it through September 2027) in both situations - with and without a ban on electricity production from coal in 2025.

Besides some features of the method used to calculate the "fair market value" (such as that in the Brattle report it is based on the "discounted cash flow" and that the so-called "Monte Carlo method" was used, with 100 different "pairs" of "price paths" that could occur up to 2032), the chosen reference date is important. RWE Generation has set this as October 9, 2017. This is the day before the announcement of the 2017 coalition agreement, which stated that electricity may be generated using coal until 2030 at the latest. According to RWE Generation, this announcement was sufficiently concrete to effectively influence the price an independent buyer would be willing to pay for the Amer plant. In its quantification, Brattle only took into account available data and expectations up to this chosen reference date; subsequent developments were disregarded. According to RWE Generation, the quantified amount of €62 million is the decrease in value resulting from the announced coal ban: it would be what an independent, well-informed, and willing buyer would have been willing to pay less for the purchase of the Amercentrale after the announcement of the coalition agreement on October 10, 2017 (which includes the agreement that coal plants will be closed by 2030 at the latest), than it would have been willing to pay for it before that announcement.

4.4. The State presented reasoned defenses and moved to dismiss the claims.

4.5. What the parties have further submitted in support of their claims and defenses, respectively, will be addressed, in so far as relevant, in the assessment in No. 5.

5 The Assessment

The Electricity Production Coal Prohibition Act (Wvk).

5.1. The Wvk entered into force on December 20, 2019. Article 2 Wvk stipulates that generating electricity in a production facility using coal is prohibited. It follows from Section 3, paragraph 1, sub a, of the Wvk in conjunction with Section 3a of the Wvk that until January 1, 2025, the prohibition does not apply to a production installation that has an electrical efficiency of less than 44% and in which renewable electricity is produced using biomass or in which renewable heat is produced. Thus, the ban does not take effect for RWE Generation's Amercentrale until Jan. 1, 2025. The period between December 20, 2019 and January 1, 2025 will hereafter be referred to as the transition period.

5.2. Section 4(1) of the Wvk provides that the Minister of Economic Affairs and Climate (hereinafter referred to as EZK) may grant relief at the request of an operator of a production facility if the operator in question demonstrates that it will be disproportionately affected as a result of the ban, relative to other operators of a coal-fired production facility. Article 4a Wvk creates a fund from which payments can be made to employees of a production installation as well as investments in retraining and further training. Further rules will be set by or pursuant to an order in council, including the manner in which benefits from the fund are provided.

State's primary defense: RWE Generation has no interest in these proceedings

5.3. The State has argued that the Amercentrale is fired almost entirely on biomass. Therefore, according to the State, the ban on generating electricity with coal does not affect RWE Generation. What RWE Generation is really after is obtaining a continuation of the subsidy for biomass use beyond September 2027. That is not the purpose of these civil proceedings, according to the State, which concludes that RWE Generation has no interest (as the Court understands: within the meaning of Article 3:303 of the Dutch Civil Code) in these proceedings, so already for that reason it should be declared inadmissible. This primary defense does not stand. RWE Generation bases its claims on the fact that the legal prohibition to generate electricity with coal is in violation of Article 1 ECHR and Article 17 EU Charter because its property (the Amercentrale) is affected, while there is no adequate financial compensation in return. It argues that the State is thereby acting unlawfully towards it and seeks damages. Although the Amercentrale is largely biomass-fired, this plant is in principle also suitable (to be made suitable again) for burning coal so that it cannot be judged in advance - without further investigation - that the (future) prohibition does not affect the possibilities of use and thus the economic value of the plant. RWE Generation, as the owner of the Amercentrale, therefore, has a sufficient interest in its claims.

Article 1 EP ECHR and Article 17 EU Charter: no substantive difference

5.4. The parties agree, and the court also concurs that Article 17 of the EU Charter encompasses and should be applied and interpreted in the same way as Article 1 EP ECHR. The court will only consider Article 1 ECHR in its considerations below, but those considerations, even without always mentioning it, apply correspondingly to Article 17 of the EU Charter.

Text Article 1 EP ECHR

5.5. Article 1 EP ECHR, in its authentic English version, reads as follows:

"***Protection of property***
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In the official Dutch translation:

"***Protection of property***
Every natural or legal person has the right to the peaceful enjoyment of his possessions. No one shall be deprived of his property except in the public interest and under the conditions provided for by law and by the general principles of international law.

The preceding provisions in no way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the public interest or to secure the payment of taxes or other contributions or penalties."

Review of the formal law based on Article 1 EP ECHR

5.6. The Wvk is a formal law. As determined in Article 94 of the Constitution, the court, in this procedure, checks whether the Wvk is compatible with universally binding provisions of treaties and decisions of international public law organizations. Article 1 EP ECHR concerns a universally binding treaty provision. If the Wvk is in conflict with Article 1 EP ECHR, as RWE Generation claims, then the consequence is that the issuance and enforcement of the Wvk against it is unlawful, and the State is obliged to pay damages, provided that the other conditions for liability based on tort are met**8**. In interpreting Article 1 EP ECHR, the court will align with the established case law of the European Court of Human Rights (hereafter: ECHR). The court, in determining whether the Wvk is incompatible with Article 1 EP ECHR, will not interpret this treaty provision in a manner that deviates from or offers RWE Generation more protection than follows from the established case law of the ECHR concerning this provision.**9**

Framework for assessing Article 1 EP ECHR

5.7. Article 1 EP ECHR guarantees the right to peaceful enjoyment of property, protects against the deprivation of property, and sets out the possibility of regulating property. From the case law of the ECHR and national case law, it can be inferred that testing against this article takes place according to the following decision-making scheme**10**:

(a) is there a "possession" (property) in the sense of this provision?
(b) is there "interference", meaning deprivation or regulation of property rights?

If both of these conditions are met, then the following requirements are examined**11**:

(c) is the infringement "lawful" (legitimate), meaning provided for by law;

(d) if so, does the infringement serve a legitimate purpose that promotes the "general interest" (public interest), and

(e) if so, is there a "fair balance", meaning a reasonable equilibrium between the demands of the general interest and the protection of the individual's fundamental rights?

The aforementioned "fair balance test" notes that it is not met if there is an "individual and excessive burden" for the person concerned. All circumstances of the individual case should be taken into account.

Is there a particular interest that can be considered a "possession" in the sense of Article 1 EP ECHR?

5.8. The concept of "possessions" in this treaty provision has its own autonomous meaning. The ECHR, in the case Kristiana Ltd. v. Lithuania, considered:

*"The concept of 'possessions' referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent of the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as 'property rights' and thus as 'possessions' for the purposes of this provision."***12**

5.9. Article 1 EP only protects existing properties and "assets, including claims, in respect of which the applicant can argue that it has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right". Article 1 EP, therefore, does not entail the right to earn income, nor does it protect the mere hope or expectation of future income. Future revenues are only considered as "possessions" when they have already been earned or when a legally enforceable claim exists.**13**

5.10. According to the State, RWE Generation has not demonstrated that the property it claims has been affected falls within the scope of protection of Article 1 EP ECHR. RWE Generation has done nothing more than allegedly miss out on (possible) future income over the period from 2028 to 2032, presented as a depreciation of the Amercentrale, according to the State, which refers to the damage calculation in the Brattle report (see above in no. 4.3). Therefore, according to the State, RWE Generation's claims should be rejected.

5.11. The court sees it differently. RWE Generation's business (the Amercentrale) consists, as evidenced by the litigation documents, among other things, of land, business buildings, production units, inventory, stocks, permits, etc., and the earning capacity contained therein. This entire business is considered property within the meaning of Article 1 EP ECHR. The company, as the court understands RWE Generation's position, due to (the announcement of) the future prohibition of generating electricity with coal, lost a value of €62 million on October 10, 2017. That the calculation of that (alleged) depreciation includes missed or lost revenues, which (possibly) themselves cannot be considered as "possessions" doesn't mean that RWE Generation does not have an economic interest in its business that falls under the protection of Article 1 EP ECHR.**14** The court rejects the State's defense on this point.

Is there "interference", meaning deprivation or regulation of property rights?

5.12. Both parties do not dispute that the ban on generating electricity with coal in the Amercentrale from 2025 infringes on RWE Generation's right to uninterrupted power plant use. It's also undisputed that this ban does not qualify as a formal expropriation/deprivation of its property ("deprivation of possessions"). What is in question, however, is whether this ban can be considered as a de facto expropriation or at least a very heavy interference that excludes any meaningful use of the Amercentrale (RWE Generation's view) or merely as (limited) property regulation (the State's view). This will be further discussed in the fair balance test. Here, it suffices to note that the requirement of "interference" as referred to in no. 5.7 under (b) has been met.

Is the infringement "lawful" (legitimate), meaning provided for by law?

5.13. A measure that infringes upon a property right must be provided for by law. Jurisprudence from the ECHR reveals that the infringement must be sufficiently precise, accessible, and foreseeable, in the sense that the measures are formulated enough to allow individuals to adjust their behavior accordingly (this requirement for predictability should not be confused with the foreseeability of the Wvk, which will be addressed in the context of the fair balance test). The Wvk is a formal law and meets these requirements. This is also undisputed between the parties.

Does the infringement legitimately promote the 'general interest' (public interest)?

5.14. The parties agree that the Wvk has a legitimate purpose and serves the public interest, specifically to contribute to the CO_2 emission reduction targets applicable to the Netherlands, which aim to prevent or limit climate change. This requirement is thus established. The fact that RWE Generation has argued that the Wvk is not or insufficiently effective/efficient (related to the so-called leakage effect and waterbed effect) does not change this. The court will discuss the efficiency aspect in 5.19.

Is there a "fair balance," meaning a reasonable equilibrium between the demands of the public interest and the protection of the individual's fundamental rights?

5.15. As previously stated, all circumstances of the case, seen in interrelation, should be taken into account in the fair balance test. In Dutch case law, it is often assumed that the fair balance test can take place on two levels: the level of the general legal measure (at the regulation level) and the level of the individual case, taking into account the circumstances specific to that individual case. This distinction is practically relevant if a legal regulation, in general, does not conflict with Article 1 EP ECHR (because it meets the fair balance test in general), but in an individual case, it does create an "individual and excessive burden" due to particular facts and circumstances. RWE Generation and the State have argued that there's no reason to make this distinction in this case because only a few coal power stations are owned by a few owners who don't differ significantly in this context and face the same consequences from the Wvk. As a result, if the Wvk meets or does not meet the fair balance test at the regulation level, the same applies at the individual level. The court agrees with the parties, noting this doesn't negate the possibility for a coal power station owner to request compensation based on the hardship clause as mentioned in article 4 section 1 of the Wvk (more on this in 5.21).

From the jurisprudence of the ECHR and national case law, it follows that the following circumstances can be relevant in the context of the fair balance test:

5.15.1. The nature and severity of the "interference" in property rights. As announced in 5.12, the main question is whether there's a de facto expropriation, severe interference in property rights, or a more limited form of regulation. The court will discuss this in 5.16.

5.15.2. The foreseeability of the measure affecting property rights. This concerns the legitimate expectation that the citizen/legal entity, in this case, RWE Generation, has concerning the use of its property. The business risks associated with generating electricity with coal play a role, especially regarding how much RWE Generation should have anticipated facing changed regulations. The foreseeability of the ban on generating electricity with coal, as set out in the Wvk, also depends on relevant government statements and facts and circumstances otherwise recognizable for a company like RWE Generation. The parties particularly disagree on whether the said ban was foreseeable, and they have devoted much attention to this aspect during the procedure. The court will address this in 5.17.

5.15.3. The extent to which there are alternative uses for the Amercentrale. This will be addressed in 5.18.

5.15.4. The efficiency of the prohibition. As previously mentioned, the court will address this aspect in 5.19 in relation to RWE Generation's argument that the prohibition affects them severely while it's not effective (due to the so-called 'leakage effect' and 'waterbed effect').

5.15.5. Whether (adequate) compensation has been provided for the damage experienced due to the measure, the court will also take into account the transition period in 5.20.

5.15.6. The presence of a hardship clause. In 5.21, the court will evaluate the extent to which the hardship clause from Article 4 section 1 Wvk and the provisions meant in Article 4a Wvk are relevant in the context of the fair balance test.

5.15.7. In 5.22, the court will state its conclusion regarding the fair balance test after considering all case circumstances in conjunction.

The nature and severity of the "interference"

5.16. The question now arises whether the coal prohibition amounts to a de facto expropriation or should be viewed as a property regulation. This distinction is important because, according to established ECHR jurisprudence, in the case of (de facto) expropriation, compensation is generally expected**15**, but this isn't necessarily the case with property regulation**16**.

5.16.1. Unlike (de facto) expropriation, the starting point for property regulation is not that compensation must be provided. Whether and to what extent compensation is provided in the case of property regulation is one factor that can be considered in the fair balance test. A missing or insufficient compensation weighs heavier the more severe the infringement of the property right is.

5.16.2. Even though the Wvk came into force on December 20, 2019, and RWE Generation is claiming compensation for the depreciation of the Amercentrale that it supposedly experienced earlier, namely when the coalition agreement was announced in October 2017, the court believes that, in principle, the severity of the interference in property rights and whether or not there is a de facto expropriation should be assessed at the time the measure (the prohibition) effectively applies to the Amercentrale. That is from January 1, 2025. However, it is undisputed that after this date, Amercentrale can continue producing electricity and heat using only biomass as fuel until September 2027. According to RWE Generation, this is only profitable as long as the state provides subsidies. As soon as that subsidy ends, Amercentrale can only produce electricity profitably with coal, which the Wvk prohibits. While it's technically possible to run the power station on 100% biomass, according to RWE Generation, this won't be financially viable after September 2027, and the power station, because the Wvk doesn't allow switching to coal, will become unusable and thereby worthless from that moment. The assets belonging to the business (including the installations specifically designed for electricity and heat production) will remain the property of RWE Generation after September 2027. Still, they are unsuitable for alternative applications and, therefore, do not have any real value. According to RWE Generation, the Wvk, after the termination of the SDE subsidy in September 2027, excludes any meaningful use of the Amercentrale, so there's a "very heavy interference in property rights," which is equivalent to a de facto expropriation, says RWE Generation.

5.16.3. Referring to the jurisprudence of the ECHR, the Supreme Court summarized the standard to be used as follows:

"To determine whether there's a de facto expropriation of a business, one must look at the actual effect on the business as a whole of the measure being complained about; if the measure leads to the termination of the business but the owner retains some economic interest or a meaningful use possibility in (assets of) the business, then there's no de facto expropriation of the business." **17**

Based on this (strict) criterion, the court believes no case of de facto expropriation exists. After the transitional period, RWE Generation still retains full control over all its assets affected by the measure. It remains possible for it to generate electricity with the Amercentrale, although with the restriction that it cannot use coal for this purpose. The court does not believe it has been proven that this can only be profitable with coal after 2027 (without subsidy). The court refers to 5.18 for this. Also, suppose RWE Generation decides to stop the production of electricity **18** in the Amercentrale in 2027. In that case, the court finds it plausible that RWE Generation still retains some relevant economic interest in the company's assets. RWE Generation has not sufficiently contested the State's argument that the land on which the Amercentrale is built, located in an industrially attractive area, represents significant economic value. Hence, this must be taken as a given in these proceedings. **19** Furthermore, it's likely that the same applies to (a part of the) other assets currently used by the company to generate electricity and heat. From the foregoing, it follows that there is no reason to regard the restriction on the use of Amercentrale's assets resulting from the Wvk as or equating to, a de facto expropriation.

Foreseeability of the Measure

5.17. RWE Generation argues that when acquiring Essent in September/October 2009, it expected to produce electricity and heat with coal with the Amercentrale it acquired until the end of its technical lifespan: until 2033. The government even allegedly encouraged coal use for electricity generation to reduce dependence on (Russian) gas and enhance the international competitive position of the Dutch industry by increasing coal's share in Dutch electricity production, thereby reducing electricity prices (since producing electricity with gas was more expensive than with coal at that time). This cheaper electricity would also benefit consumers. Throughout Amercentrale's entire lifespan, the only obligation concerning CO_2 emissions would be for RWE Generation to have enough CO_2 emission rights according to the ETS. RWE Generation contends that a ban on using coal contradicts the government policy until 2017 and is also inconsistent with many of the government's promises between 2005 and 2009.

5.17.1. In contrast, the State argues that the Dutch climate policy (in line with international developments) has consistently aimed to reduce CO_2 emissions since the 1990s. This policy was already in place long before RWE Generation acquired Amercentrale through the takeover of Essent. RWE Generation should have anticipated that environmental regulations and climate objectives might become stricter. Especially since the Amercentrale (with billions in subsidies from the government) has already been converted to a biomass power plant, RWE Generation should have foreseen that it wouldn't be able to take a step back in sustainability – meaning it wouldn't be allowed to convert its biomass plant back to a coal plant. The State disputes that any government promises or statements were made that led RWE Generation to assume that they were only expected to comply with the ETS emission rights for Amercentrale's CO_2 emissions for its entire lifespan until 2033.

5.17.2. Based on prevailing jurisprudence on the foreseeability of a measure in the context of the fair balance test, the court will now examine whether RWE Generation could justifiably assume that a measure like the ban on using coal for electricity generation would remain absent until 2033. This examination will also take into account the national climate and energy policy.

Activities Subject of Social Debate: Extra Cautious About Measures

5.17.3. In assessing the foreseeability of a measure, the starting point is that a company, especially if it is part of an international group, is expected to be aware of national and international developments that could lead to government actions that might impact its operations. This is especially true for companies involved in activities that are the subject of social debate, such as activities viewed by some as morally objectionable, unsafe, harmful to the environment, or health ("controversial sectors") that generate resistance**20**. In such cases, a company should be particularly cautious about the possibility of regulatory actions from the government and adjust accordingly, perhaps by modifying its activities or focusing on less controversial ones, thereby reducing vulnerability to these measures. If a company does not do this or does so inadequately, it is at its own risk. **21**

Scope of Measures

5.17.4. Furthermore, when assessing the foreseeability of a measure, like in this case, the prohibition from a certain date to generate electricity using coal, it is not decisive whether the person whose property is affected by this measure had previously considered this exact action: it's about whether the imposed measure is within the range of actions that could reasonably have been expected given the circumstances and the public interest involved. Therefore, foreseeability does not require the exact nature and scope of the eventual measure to have been known beforehand. **22**

Regulation Foreseeable

5.17.5. Based on the above, combined with the developments in international climate policy outlined in 3.7 to 3.15, the court assumes that when RWE Generation acquired the Amercentrale in September/October 2009, they could expect to face government measures to reduce CO_2 emissions, which would (increasingly) (restrict) the use of the Amercentrale throughout its lifespan. RWE Generation does not factually dispute this. However, they claim that, based on the government's actions and statements, they expected that these measures would be limited to the application of the ETS throughout the remaining lifespan of the Amercentrale (until 2032). A (future) ban on generating electricity with coal, RWE Generation argues, was entirely unforeseeable for it. To assess this claim, it's necessary to scrutinize the national climate and energy policy and the statements made in that context by officials, politicians, and other policymakers.

Implementation Climate Policy Note

5.17.6. On 21 June 1999, the government presented the Implementation Climate Policy Note **23** to execute the Kyoto protocol. The government distinguished between short-term policy (the CO_2 reduction to be achieved between 2008-2012) and long-term policy (reduction from 2012 onwards). They also distinguished between measures taken in the Netherlands and those in a European context, hinting at the later ETS system. The note states:

"The challenge for Dutch climate policy in the coming years is twofold. Firstly, greenhouse gas emissions must be reduced by 6% in the period 2008-2012 compared to 1990. This reduction represents the Netherlands' contribution to the EU's obligation agreed upon in the Kyoto protocol of the Climate Agreement. Secondly, the foundations must be laid for technological and instrumental innovation, which is necessary if the Netherlands wants to continue contributing to international climate policy in the years after 2012.

A 6% reduction means a reduction of 50 Mton CO_2 equivalents to be achieved for the Netherlands in 2010 compared to unchanged policy. The paper describes the measures that will be taken in the Netherlands. These measures constitute the domestic share of the additional policy effort. The other part of the policy intensification may be achieved under the Kyoto Protocol through so-called "flexible instruments" with measures outside the Netherlands. The foreign share is not fleshed out in this paper. (...)

The agreements made in Kyoto are an important first step towards controlling man-made climate change. In the course of the next century, global emissions of greenhouse gases will probably have to be at least halved in order to get and keep the climate problem under control. For the Netherlands to continue to participate in this, fundamental changes in energy management will have to be made." **24**

5.17.7. The Implementation Memorandum also contains some specific measures for coal-fired power plants (p. 34 et seq.). In the short term, the government sees several options for reducing CO-2 emissions from coal-fired power plants:

"- through the benchmark covenant. The owners of the coal-fired power plants participate in the benchmarking covenant and thereby commit to making the coal-fired power plants among the world's best in terms of energy efficiency by 2012 at the latest. Since the efficiency of the world top is currently significantly higher than that of the Dutch coal-fired power plants, this needs to be improved. (...).

- By partially replacing coal with biomass. (...)

- by replacing all or part of the use of coal with natural gas. (...)

Reducing CO_2 emissions from coal-fired power plants is included in the basic package in the form of a voluntary agreement to be made with the owners of these plants. The main element in such an agreement will have to be that the average CO_2 emissions of the coal-fired power plants per kWh produced from 2008 will be at the level of natural gas firing. The sector will determine what measures, in addition to those of the benchmark covenant, it wants to deploy to that end."

5.17.8. The Implementation Memorandum also mentions that when using fossil energy sources, conversion techniques should be combined with a decarbonization process, for example, based on CO_2 removal and storage. In this regard, reference is made to the advice of the VROM Council:

"(...) it is also necessary for fossil energy use itself to reduce CO_2 emissions, if only because this will remain very substantial for the time being. Efforts will, therefore, have to be made to decarbonize processes in which fossil fuels are used (...). This could include capture, storage, and sometimes reuse of CO_2. In particular, the safe and responsible storage of CO_2 in the subsurface requires attention in this regard." **25**

Environmental program 2001 - 2004

5.17.9. The Environment Programme 2001 - 2004, presented to the Lower House of Parliament on September 19, 2000, also mentions that the government wants to agree with the owners of coal-fired power stations to reduce the CO_2 emissions of those power stations to the level of natural gas firing (which is about half as much). In accordance with the intention stated in the Implementation Memorandum on Climate Policy, the Ministers of Economic Affairs (EZ) and Housing, Spatial Planning, and the Environment (VROM) have made agreements with the main players in the electricity production sector, including the owners of coal-fired power plants, on the reduction of CO_2 emissions in the short term (6 Mton CO_2 on an annual basis). These agreements were laid down in the "Outline Policy Agreement (Coal Power Plants and CO_2 Reduction)" and, in elaboration thereof, in the "Covenant on Coal Power Plants and CO_2 Reduction" concluded on April 24, 2002. In this Covenant, which runs until December 31, 2012, it was agreed (article 2) that of the total reduction of 6 Mton CO_2 emissions to be achieved in coal-fired power stations on an annual basis, an amount of 3.2 Mton CO_2 reduction would be achieved through the increasing use of biomass. Article 3, paragraph 1 of the Covenant further states:

"To fulfill the obligation in Article 2, production companies can also take other CO_2 reduction measures than the use of biomass, such as closing a coal-fired power plant, using natural gas, or using alternative fuels and/or mixed fuels."

Fourth National Environmental Policy Plan

5.17.10. On June 4, 2001, the Ministry of Housing, Spatial Planning, and the Environment (VROM) published the Fourth National Environmental Policy Plan. According to this plan, the transition to sustainable energy management should be realized through three tracks: (i) the use of renewable energy sources such as wind, sun, and biomass, (ii) reducing energy consumption by improving efficiency, and (iii) fossil energy technology that meets the long-term goal of near-zero greenhouse gas emissions ("clean fossil"). In this context, avoiding CO_2 emissions when using fossil fuels by capturing and storing CO_2 underground is also discussed.

Parliamentary Letter on Energy Supply and Security

5.17.11. A few months after the inauguration of the Balkenende II cabinet, the (new) Minister of Economic Affairs ([Minister 1]) sent a letter to the House of Representatives on September 3, 2003, titled "Energy Supply and Security". In response to several incidents concerning the reliability of electricity supply (including in Northeast Canada and the United States), the minister writes that it wants to get a complete picture of concerns about supply security in the short and long term and outlines the process it envisions for some actions it intends to initiate to answer these questions. In this letter, the minister strongly advocates for a structured approach:

"Energy policy is not about incident management. Especially supply and delivery security require a structured, internationally coordinated approach. Investments in power plants often have a lifespan of thirty years or more. To ensure enough capacity to generate electricity in five years, producers need to know whether the gas needed to generate this will still be available at reasonable prices for another twenty years or even longer. An investor considering building a coal-fired power plant needs to be certain that this plant will still be allowed to operate in fifteen years. The government must be stable and reliable and ensure a consistent investment climate and regulatory framework so that market players can make sound investment decisions."

5.17.12. In the annex to the letter of September 3, 2003 **26**, the minister provides his long-term vision concerning supply security, also addressing energy production and the investment climate in this area. According to the minister, the investment climate is particularly favorable for gas-fired electricity production but also contains several bottlenecks:

"The investment climate in the Netherlands has led to a predominantly gas-fired production fleet. Risks include increasing dependence in the future on potentially politically unstable countries, limited diversification of price risk, and, as a result, a rise in electricity prices with high oil prices. This results in higher production costs for electricity production companies and negatively affects the overall competitiveness of Dutch businesses. It also means higher price levels for all consumers and other customers. Building units other than gas-fired ones can help reduce the risks associated with the predominantly gas-fired production fleet. An obvious option is investing in renewable energy and coal-fired power plants, although the latter option also has environmental drawbacks. Conventionally, using coal leads to the emission of the greenhouse gas CO_2 and the acidifying gases NOx and SO2. Currently, there are no formal barriers to investing in coal units, but these investments are not being made in practice. The first condition for companies is that long-term certainty is provided regarding the environmental regulatory framework and the conditions contained therein. These units' most important environmental requirements (will) are derived from European and other international policies. In the long term (relevant because the lifespan of a new coal-fired power plant extends at least until around 2040), the National Environmental Policy Plan 4 (2002) indicates the ambitions for the development of the main emissions. Long-term ambitions require international elaboration. Details cannot be provided at this moment. Besides these long-term ambitions, there are firm commitments for the short term (up to 2010) that the Netherlands has made internationally.

For coal-fired units, the most important are the Kyoto protocol for greenhouse gas emissions (...) and the EU directive on acidification, with emission ceilings for 2010 for NOx and SO2, among others. In practical terms, this means that additional emissions due to new coal-fired power plants must fit within strict national ceilings and the sectoral objectives currently being prepared. For CO, it will apply that the allowed emission space can be expanded by purchasing rights within the upcoming system of European emission trading. For substances like NOx and SO2, however, additional emissions from new coal power must be compensated elsewhere within the Netherlands. This effect can be minimized by implementing as many reduction measures as possible within the power plants." **27**

Policy Note "Clean Fossil"

5.17.13. On September 22, 2003, the Minister of Economic Affairs sent a policy note on climate-neutral (fossil) energy carriers to the House of Representatives. This note is titled "Clean Fossil"**28**. In the accompanying letter, the minister writes that a further tightening of emission targets in the post-Kyoto period is conceivable and that in this context, it is expected that new solutions, such as clean fossil applications, will increase to significantly reduce CO_2 emissions. The "Clean Fossil" note (Chapter 6) draws, among others, the following conclusions:

"Short-term (Kyoto)
There is no short-term problem for which clean fossil must provide the solution. The Kyoto goal is expected to be achieved with the current policy. However, it should be noted that clean fossil is included in the reserve package of the Climate Policy Implementation Note and can, therefore, come into play if there are setbacks in the implementation of the regular package of measures.

Medium and long term (Post-Kyoto)
Given the increasingly urgent sense of the climate problem, a further tightening of emission targets in the post-Kyoto period is likely. Since the Netherlands heavily relies on other greenhouse gases in the current Kyoto package and struggles to reduce CO_2 emissions, there will be a need for new solutions and tools. Clean fossil applications are not only an opportunity but very likely also a necessity.

In addition, by 2005, an emission trading system will come into effect for several large companies. Depending on the market price development of a ton of CO, within this system, as well as the (future) possibility of valuing CO_2 storage within that system, clean fossil can be an attractive option for companies to stay under their "cap."

Supply Security
*Clean fossil allows the responsible use of all available fossil energy sources within an increasingly stringent climate policy, thus increasing supply security. Enhanced Coalbed Methane, for example, allows use of Dutch coal layers effectively.***29** *Therefore, clean fossil can play a significant role as an interim solution on the long road to sustainable energy management and in this way also contribute to supply security."*

Greenhouse Gas Emission Rights Implementation Act

5.17.14. The Implementation Act EC Directive trading in greenhouse gas emission rights (Directive 2003/87/EC) came into effect on October 20, 2004. This law provides for the implementation of this directive and regulates the introduction of the ETS; see section 3.9 of this verdict.

Policy Note "Supply Security in a Liberalized Electricity Market"

5.17.15. In a letter dated June 9, 2004, the Minister of Economic Affairs offered the House of Representatives the note "Supply Security in a Liberalized Electricity Market," announced in his September 3, 2003 letter. This note deals with the balance between electricity supply and demand in the long term. Section 6 of the note addresses the investor perspective:

Considering the lifespan of the current production fleet, the rising demand for electricity, and the supply and demand developments elsewhere in Europe, significant investments in production capacity are needed in the coming years. This requires a conducive investment climate. I observe that in the Netherlands, investments in production capacity are picking up again. This year, a new 800 MW power plant in the Rijnmond area will start operations. The energy company Delta plans to build an 800 MW power plant in the Sloe area, which is expected to be operational in 2007 or 2008. Additionally, the lifespan of several large existing power plants will be significantly extended. Market parties indicate that they see investment opportunities in the Netherlands, partly due to the relatively favorable investment climate. I aim to ensure that these opportunities can indeed be capitalized on. I am convinced that, given the favorable investment climate and considering the anticipated effects of CO_2 emission trading, the Netherlands has the potential to become an electricity exporter in the long term. My role primarily involves ensuring minimal regulatory uncertainty. Clarity and consistency are vital, and I am committed to that. **30**

Answers to Parliamentary Questions on New Coal Plants

5.17.16. In response to parliamentary questions prompted by comments from a senior official of his ministry in an interview with the Financial Daily that there is room for new coal-fired power plants in the Netherlands, the Minister of Economic Affairs replied on July 1, 2004:

"I am in favor of building a new coal-fired power plant. This fits within our energy policy but must also fit within this Cabinet's environmental policy. Regarding the energy policy, building a new coal-fired power plant will enhance supply security: more new capacity will become available, and older (less efficient) plants will mainly be used during peak demand. In the long run, it's also advantageous not to have a solely gas-fired production park. Furthermore, the construction of a new coal-fired plant contributes to economic efficiency: there will be a greater supply of relatively cheap electricity. This benefits consumers and the competitive position of the Dutch industry. Concerning environmental policy, a new coal-fired power plant aligns with the policy regarding the environmental quality of electricity production. After all, a new coal-fired plant must adhere to strict, market-conforming, and generic environmental policies. For CO_2 emissions, emission trading is the benchmark. (...) I see no contradiction between building a new coal plant and transitioning to sustainable energy management. Coal plants produce a significant portion of electricity in Europe and the Netherlands. I am convinced that coal will continue to play an essential role in our energy supply in the medium term. With a well-functioning CO_2 emission trading system, CO_2 emissions have a price. With the strict CO_2 emission ceiling for companies under the emission trading scheme (i.e., 112 Mton/year for 2008-2012), we are confident of achieving our climate targets. From the perspective of CO_2, I have no further objection to new coal plants. (...) Due to technological advancements, the efficiency of coal plants has improved significantly in recent years, reducing their negative environmental impacts. It may sound paradoxical, but a new coal-fired power plant can also promote sustainable energy. A part of a new coal-fired power plant is potentially a biomass plant because co-firing of biomass in a coal plant is very feasible. Moreover, a new coal-fired plant can help balance fluctuations in wind and solar energy supply, ensuring the stability of the electricity system." **31**

Energy Report 2005: "Now for Later"

5.17.17. In the preface of the Energy Report 2005, titled "Now for Later"**32**, the Minister of Economic Affairs writes:

"Those who look beyond tomorrow in energy matters have concerns. The availability of oil and gas is becoming constrained, oil price hikes disrupt economic growth, and the world's increasing energy consumption leads to severe environmental issues. It's clear that we need to intensify our efforts to respond to these developments. We owe this not only to ourselves but also to future generations. The 2002 Energy Report mainly focused on the market and liberalization. Now that liberalization is completed, the Cabinet is primarily addressing the challenges of energy supply security and climate change. This Energy Report maps the urgency of these problems, offers concrete actions for the present, and provides insights into necessary long-term actions. It also encourages creativity. Indeed, besides traditional measures, we also need currently unknown solutions. The Cabinet has set the goal of transitioning to sustainable energy management in the medium and long term. This report sets the policy agenda for the coming years. (...)."

5.17.18. The report specifically addresses electricity generation from coal power plants in several places:

"Coal, as a fuel for electricity generation, deserves renewed attention, especially considering the promotion of supply security. However, this fuel will only be used under the condition that it does not compromise the achievement of CO_2 emission agreements. Nor should it interfere with other policies (...). In the future, capturing and safely storing CO_2 emissions from coal-fired power plants will be possible. The electricity sector's offer to co-invest in a CO_2 storage demonstration project is an essential first step." (p. 10)

"Using coal for electricity production is, in principle, very attractive for supply security due to its vast reserves and geographical spread. However, the environmental consequences are a downside: CO_2 emissions are nearly twice as high as those from a high-efficiency natural gas power plant. A coal power plant that's built now will have a lifespan up to approximately 2050. By that time, this plant shouldn't emit any CO_2. Initiators need to be fully aware of this when deciding on new coal capacity. A CO_2 capture and storage decision might be necessary as soon as 10 years after the plant becomes operational. In that case, merely co-firing or adding biomass will not be sufficient." (p. 26/27).

More Parliamentary Questions

5.17.19. In response to parliamentary questions, the Minister of Economic Affairs confirmed on April 10, 2006, that it considers the construction of an ultra-modern and environmentally friendly coal power plant a "sensible idea," but:
"The government does set the parameters for construction, especially when public interests are at stake. A new power plant can only be built following the latest environmental insights and technologies. These insights consider different emissions: CO_2, NOX, SO2, particulate matter, and heavy metals. I assume that the investor will also take into account future developments in national and European energy and environmental policies." **33**

RWE AG Announces Intention to Build Biomass/Coal Power Plant

5.17.20. In a letter dated May 18, 2006, RWE AG informed the Ministry of Economic Affairs of its intention to build a state-of-the-art "biomass/coal power plant" in the Netherlands. RWE AG states it is considering two locations: Maasvlakte in Rotterdam and Eemshaven in Groningen. The company adds:
"During the procedural stages for granting permits, RWE will make further decisions about various technological applications in the power plant. These decisions primarily relate to minimizing environmental impact, possibly through CO_2 capture and storage and the use of biomass. (...) RWE is well aware of the ongoing discussion in the Netherlands about potential alternatives (nuclear, solar, and wind energy) to fossil fuels. RWE wants to demonstrate that it can contribute to a cleaner environment as a major electricity provider."

Response to Parliamentary Questions by Minister [Minister 2]

5.17.21. In response to parliamentary questions about the intention of RWE AG, among others, to build a new coal power plant, Minister [Minister 2] of VROM of the subsequently inaugurated Balkenende IV cabinet answered on June 28, 2007:

"(...) Both Europe and the Netherlands have decided to change directions concerning climate and energy. The international stalemate on climate policy had to be broken. We've chosen ambitious goals for 2020 for reducing greenhouse gas emissions, significantly accelerating the pace of energy conservation and a substantial increase in the use of renewable energy sources. I am confident that these ambitions will impact the development of energy demand and the use of fossil fuels. A 2% energy-saving rate per year will reduce demand, and combined with potentially covering one-third of electricity needs with renewable sources, this cannot leave the supply side of fossil fuel generation unaffected. Thus, it's highly questionable if the market conditions for plants based on fossil energy sources are the same as when the relevant environmental permits were requested. Investors in new plants will have to consider this.

Regardless of the number of new plants being built, I believe that we cannot do without coal as a fossil fuel in light of a reliable, long-term energy supply. It also makes no sense for the Netherlands to adopt a different position than other countries. Both the energy supply and the climate issue have a global dimension. However, I am also convinced that, in the long run, the CO_2 emissions from coal-fired power plants cannot be reconciled with our climate ambitions. Therefore, we should work as swiftly as possible over the next decade, in a European context, towards a situation where CO_2 capture and underground storage become standard technology, prescribed within the framework of licensing, with costs borne by the operator or absorbed within the European emissions trading system. My commitment in a European context is to achieve this situation within 10 years. If a company wants to build coal-fired power plants now, it should take this into account in its financial forecasts. (...).
New coal-fired power plants that will be built in the coming years must already be prepared for the future application of CCS (Carbon Capture and Storage), and energy companies should also invest in the development, demonstration, and application of CO_2 capture and storage (CCS). I promote this message together with the Minister of Economic Affairs. Each of the electricity producers endorsed this approach in their recent proposal concerning the cabinet's climate ambitions. The companies have expressed their willingness to invest in CCS provided the government also contributes by creating the right conditions. In the coming months, it will be detailed what these conditions are and what role is appropriate for the government. It is clear that financial support from the government (both national and European) is temporary and will focus on the development and demonstration phase we still need to go through. After that, CCS will have to be self-sufficient.
The above ingredients - emission trading with a European ceiling for power plants, significant deployment of biomass, and the application of CCS - make me find the construction of new coal-fired power plants ultimately acceptable in light of the cabinet's climate ambitions. (...).
As you know, electricity production is liberalized, and the government cannot block construction plans. The government specifies the conditions under which coal-fired power plants may be built. In terms of environmental aspects, this is done by the national government (for CO_2) and the province (for substances like acidifying emissions). As for CO, the European directive on emission trading does not allow me to set requirements for the emission of this substance. However, as I've indicated, I have sufficient confidence that the CO_2 emission trading system will ultimately, combined with the application of CCS and large-scale deployment of biomass, be a powerful enough instrument to permit coal-fired power plants within the climate ambitions of the Netherlands and Europe." **34**

Letter to Parliament from Minister of Economic Affairs dated June 28, 2007

5.17.22. In the letter sent to the House of Representatives by the Minister of VROM (and co-signed by the Minister of Economic Affairs) dated June 28, 2007, much of the same sentiments were expressed as in the answers to the aforementioned parliamentary questions:

"(...) In the long run, the CO_2 emissions from coal-fired power plants cannot be reconciled with Europe's and this cabinet's climate ambitions. Coal-fired power plants are ultimately only acceptable through a combination of the highest possible generation efficiency, a significant share of biomass, the use of released heat, and the application of CO_2 capture and underground storage. (...).

I aim to achieve a situation in a European context within 10 years where CCS is a standard technology that can be prescribed through environmental permits. Additionally, from now on, new coal-fired power plants must be designed and constructed in such a way that CCS can be added at a later stage (when it becomes standard technology) at the lowest possible costs (capture ready). Each of the electricity companies recently indicated that they will do this. Moreover, the companies have expressed their willingness to invest in CCS, provided that the government contributes by creating the right conditions. (...). It is clear that financial support from the government (both national and European) is temporary and will focus on the development and demonstration phase we still need to go through. After that, CCS will have to be self-sufficient. If a company now wants to build coal-fired power plants, they should take this into account in their financial forecasts." **35**

"Clean and Economical" work program

5.17.23. The "Clean and Efficient" Work Program announced by the Cabinet on August 24, 2007 elaborates on the policy described above. In it, the Cabinet announces that the government wants to make agreements with operators of new coal-fired power plants, in addition to the ETS, on very substantial reductions of CO_2 to be realized from 2015. These reductions should assure the government that the necessary reductions will be achieved. According to the government, it is also the intention that through the conclusion of covenants, agreements will be made about capturing and storing CO_2 in the ground.

Energy Report 2008

5.17.24. The Energy Report 200836, presented by the Cabinet to the House of Representatives on June 18, 2008 **36**, states that in addition to conservation and more renewable energy, further diversification of the fuel mix is needed in the form of coal or nuclear power plants, but that in the case of coal-fired power plants, the capture and storage of CO_2 (CCS) is essential to be able to meet the target for CO_2 emissions reduction (p. 85):

"Partly in response to the opinions of the AER and the SER, the government is of the opinion that no option should be excluded in advance and that none of the options mentioned is by definition better than another. Natural gas will continue to play an important role in the Dutch electricity supply. Coal-fired power plants also contribute and may grow in the coming years. However, the development of CCS is essential to reduce CO_2 emissions. Finally, the option of nuclear energy must also be kept open."

An increase in new coal-fired power plants in the Netherlands brings with it the need to offset increasing CO_2 emissions through the development of CCS, this report adds (p. 86):

"Companies investing in new coal plants in the Netherlands are welcome if they are serious about their efforts to offset the increase in CO_2 emissions."

The Energy Sector Agreement 2008 - 2020

5.17.25. To implement the "Clean and Economical" Work Program (see no. 5.17.23), the State concluded the Energy Sector Agreement 2008 - 2020 (hereinafter: the Sector Agreement) with energy companies and network operators on October 28, 2008. This covenant runs until January 1, 2021. With regard to fossil fuels, the State promises, among other things, that in shaping government policy, the central government will not use measures that force the number or type of (coal) power plants. The energy sector will ensure that new coal-fired power plants will be among the cleanest in Europe and that new (coal-fired) power plants will be maximally more efficient than the generation of power plants in use at the time of the Accord. Article 5 of the Sector Accord contains agreements made on CCS and, insofar as relevant here, reads as follows:

"1. Fossil energy will still make up a significant part of the fuel mix in 2020.
2. The energy sector will promote that energy companies, including the operators of new coal-fired power plants, will report how they implement the agreements of this declaration within their own power plant stock and invest in renewable energy and the application of technology to capture and store CO_2 (CCS), and have very substantially reduced CO_2 from 2015. The start of demonstration projects is a necessary step for this.
3. Parties have the ambition that CCS at coal-fired power plants will be applied on a large scale by 2020 at a competitive CO_2 price. To this end, the power sector will promote the construction of new coal plants 'capture ready' for this purpose and will have proposals ready in 2011 for two large demonstration projects under the EU flagship program for CCS."

In the attachment to the Sector Agreement, in which details are elaborated for each component, under the CCS section, several prerequisites are mentioned that must be met to succeed in the ambitions in this area. One of these prerequisites is (article 7.3.6):

"There is sufficient societal support for storing CO_2 underground."

5.17.26. The Sector Agreement also contains agreements on the further development of biomass use in energy generation and aims to:

"(...) ensure that by 2020, biomass contributes to the objective of 20% sustainable energy within the bounds of sustainability and cost-effectiveness."

Parties state in the agreement that they consider co-firing and additional firing of sustainable biomass crucial for the energy and climate objectives for 2020 and pledge to make maximum efforts to achieve these ambitions. The State promises to provide clarity by January 2009 on the prospects of potential financial support (subsidy) for the use of sustainable biomass in electricity generation.

5.17.27. Appendix 2 of the Sector Agreement includes the investment willingness of each affiliated energy company. Regarding the investment willingness of the RWE Group in the area of CCS, the following is mentioned:

"In the field of CCS development, RWE participates in more than 15 global CCS projects and is also a driving force behind CCS innovation in post-combustion, gasification, and oxy-fuel (...). By applying CCS technology, RWE intends to achieve a progressive reduction in CO_2 emissions in general and the Eemshaven power plant in particular. To achieve this, RWE aims to build several demonstration projects worldwide in collaboration with various partners by around 2011 so that the required reliable technologies can be tested, minimize energy losses, and optimize operational functioning."

Letter to Parliament, 6 February 2009, from ministers [Minister 3] (EZ) and [Minister 2] (VROM); temporary government financial support for CCS

5.17.28. This letter confirms that CCS is a necessary supplement to energy savings and sustainable energy:

"In addition to all efforts in the field of energy savings and renewable energy, more is needed in the coming decades, during the transition to a fully sustainable energy system, to achieve ambitious climate objectives in the Netherlands even after 2020. Using CCS (Carbon Capture and Storage), CO_2 can be captured, transported, and stored underground at businesses that emit large amounts of CO_2. In this way, a contribution is made to achieve climate objectives in the medium term. CCS is not a substitute for more energy savings and a larger share of renewable energy, but is a necessary supplement."

The letter further confirms that the government is willing to temporarily financially support the development of CCS:

"The principle of "the polluter pays" also applies to CCS. However, the costs of CCS are currently too high, and the levy on CO_2 emissions is too low to make CCS profitable. Technological development and scaling up must reduce costs. Therefore, the government wants to accelerate technological development and stimulate large-scale practical experience so that costs and returns (CO_2 price from the ETS) come together more quickly. Any government support for CCS will always be temporary, aimed at accelerating the development and application of an essential environmental innovation." **37**

The takeover of Essent and acquisition of the Amercentrale by RWE Generation.

5.17.29. RWE Generation argues that when acquiring Essent in September/October 2009, they were entitled to believe that they would be allowed to produce electricity and heat using coal until the end of the technical lifespan of the acquired Amercentrale, which is until 2033. Everything the court mentioned in sections 5.17.6 to 5.17.28 took place before the acquisition and, therefore, could have been considered by RWE Generation in their deliberations. Although the foreseeability of the prohibition outlined in the Wvk also takes into account subsequent facts and circumstances, the court will now assess whether, at the time of acquisition, RWE Generation could reasonably expect, as they claimed, to face no other CO_2 emission-reducing government measures for the remaining lifespan of the power plant other than restrictions resulting from the application of the ETS.

5.17.30. The court believes that RWE Generation's claim is unfounded. The court agrees with RWE Generation that previous sections show the Dutch government was supportive of plans by several energy companies, including the RWE Group, to build a modern coal plant due to considerations such as supply security and relatively low electricity production costs (leading to cheaper electricity for consumers and a competitive advantage for Dutch industry). However, it's also clear that successive governments have conditioned the establishment of new coal plants on their alignment with the climate policy and objectives the Netherlands committed to. It was evident that these objectives would become progressively stricter, leading to increasingly stringent measures to reduce CO_2 emissions. While RWE Generation correctly pointed out that successive cabinets strongly advocated for a European approach to CO_2 emission reduction and supported the introduction of the ETS, they have not proven that this means, or that they could assume, that the Dutch government would take no other CO_2 emission-reducing measures regarding coal plants other than the introduction and application of the ETS. The court will further explain this judgment concerning the previously outlined facts.

5.17.31. The Climate Policy Implementation Note (1999), see section 5.17.6, already stated that fossil energy use must emit less CO_2. The average CO_2 emissions of coal plants had to match the levels of gas-fired coal plants by 2008. The Fourth Environmental Policy Plan (2001), see section 5.17.10, indicated that a fossil energy technology that meets the long-term goal of near-zero greenhouse gas emissions ('clean fossil') must be realized. According to the ETS, this 'clean fossil' is an independent requirement for fossil fuel use and is not contingent on the availability of emission allowances. Building on this, the 'Clean Fossil' Policy Note (2003), see section 5.17.13, stated that clean fossil applications would likely be necessary in the medium to long term (post-Kyoto, thus from 2012). The Energy Report "Now for Later" (2005), see section 5.17.17, plainly mentioned that initiators planning to build coal plants should be aware that possibly within 10 years after commissioning, a decision might need to be made about CO_2 capture and storage, and that co-firing and additional firing of biomass would not be sufficient. In its answers to parliamentary questions and its letter to the parliament (2007), see sections 5.17.21/22, minister [Minister 2] stressed that their consistent message has been that CO_2 emissions from coal plants would soon be incompatible with 'our' climate ambitions and that they aim for a situation within 10 years where CO_2 capture and underground storage becomes mandatory for coal plants at a European level. They clarified its belief that the CO_2 emission trading system would be a robust enough tool to allow coal plants within the climate ambitions of the Netherlands and Europe, but only in conjunction with the application of CCS and large-scale use of biomass. The letter from ministers [Minister 3] and [Minister 2] (2009), see section 5.17.28, reiterated that according to the then-cabinet, CCS is not a substitute for more energy savings and a larger share of renewable energy but is a necessary addition to them. The court also considers it essential that the Energy Sector Agreement 2008 - 2020, see section 5.17.26, stipulated that coal plant operators would report on their "significant" CO_2 emission reductions from 2015 **38** onwards and collectively aim to apply CCS to coal plants on a large scale by 2020. Both commitments were made independently of the ETS emission allowances. Thus, RWE Generation's argument that they could trust in 2009 that the ETS would be used as the 'exclusive regulatory framework' for reducing CO_2 emissions during the remaining lifespan of the Amercentrale is unfounded.

Commitment: no mandatory measures for coal plants

5.17.32. RWE Generation has appealed to the commitment made in the Energy Sector Agreement 2008 - 2020, which states that the national government, in shaping its policy, will not implement measures that mandatorily determine the number or type (coal) of power plants. According to it, it was therefore not foreseeable at the time that the state would enact a measure restricting coal usage. However, this claim cannot benefit it. After all, the Sector Agreement lasts until January 1, 2021, while the prohibition arising from the Wvk to produce electricity using coal in the Amercentrale only starts on January 1, 2025. Given that significant mutual ambitions have not been realized during the term of the Sector Agreement, the state was free to introduce measures afterward that impact coal plants. RWE Generation could also expect the state to do so, given the failure to achieve those ambitions.

No obligation to burn biomass or implement CCS

5.17.33. RWE Generation further argued that they did not commit to the state to use biomass (especially not when the state ceased providing subsidies for it) or to apply CCS. These are certainly not the result of obligations, RWE Generation emphasized. The court remains undecided on whether this is correct because this would not lead to a different verdict, even if true. The issue here is not whether the state can oblige RWE Generation to use (more) biomass or implement CCS in the Amercentrale. The question is whether it was foreseeable for RWE Generation in 2009 that if the energy companies failed to reduce their CO_2 emissions "very substantially" from 2015 onwards, whether using biomass extensively in coal plants, by applying CCS, or otherwise, the state could impose restrictions on coal plant use (apart from ETS). The court believes RWE Generation should have or could have foreseen this.

The Shell climate case and the 'exempting effect' of the ETS

5.17.34. To support its claim that it was only expected to comply with the ETS and could not foresee that the state would introduce other restrictive measures affecting the Amercentrale, RWE Generation referred to the court's judgment in the so-called Shell climate case. **39** In that case, the court partially upheld Shell Group's defense based on the "exempting effect" of the ETS, and other similar "cap and trade" emission trading systems in place worldwide. The court applied the rule that, when assessing the behavior of the person whose liability is at stake, safety regulations and codes of conduct in force at the time and place of the causative event must be taken into account. In that case, this meant that the Shell Group's top holding could not principally be held liable for CO_2 emissions covered by the ETS system on the grounds of tort (article 6:162 Civil Code). This is an entirely different matter than the question relevant in this case: whether RWE Generation could expect not to face a state-enforced measure limiting the use of the Amercentrale, as stipulated in the Wvk, as long as they have sufficient emission allowances under the ETS. The court's judgment on the "exempting effect" of the ETS in the Shell climate case is irrelevant to this question.

Risk of ETS supplementary measures foreseeable during Essent acquisition

5.17.35. The court concludes that RWE Generation, when acquiring the ownership of the Amercentrale as a result of the takeover of Essent in September/October 2009, had to consider that the ETS would not remain the "exclusive regulatory framework" for the CO_2 emissions of that plant for its remaining life. It knew or should have understood that, in addition, there was a risk that the government would take supplementary restrictive measures concerning the use of the Amercentrale if they did not manage to reduce the CO_2 emissions from that plant significantly, whether through extensive use of biomass, by applying CCS, or otherwise.

Furthermore, it should have been clear at that time that this reduction should have been achieved from 2015 to 2020 at the latest. This judgment also implies that RWE Generation knew or should have known that if the Amercentrale were to be (almost) fully converted to a biomass power plant, as has now actually happened with the help of government subsidies, there is a very real possibility that government measures will be announced that prevent the plant from being converted back to a coal-fired power plant. It should be noted that even if RWE Generation could not be blamed for not (any longer) achieving this reduction, they should still take into account these restrictive measures. The court also believes that if a very substantial CO_2 reduction were not to be achieved or could no longer be achieved, the scope of measures (as referred to in no. 5.17.4) that RWE Generation had to consider includes a measure that restricts the use of coal in the plant (in the long term).

Period after the takeover of Essent
The court will now assess whether any facts and circumstances have arisen after the takeover of Essent and the acquisition of the Amercentrale that are relevant for the foreseeability of the prohibition in the Wvk to generate electricity with coal in the Eemshavencentrale from 1 January 2025.

Motion by [Member of Parliament 1] and others
5.17.36. On 3 November 2009, a motion was submitted in the House of Representatives by several members of parliament, including [Member of Parliament 1] (hereinafter: motion by [Member of Parliament 1]). **40** This motion states that the construction of new coal-fired power plants seriously threatens climate targets. The motion, therefore, asks the government to advocate, at the European level, for a CO_2 standard of a maximum of 350 grams of CO_2 per kWh of produced energy for power plants. The State has undisputedly stated that this standard means that a coal-fired power plant cannot be operated without CCS unless so much biomass is co-fired that biomass is the primary fuel of the plant. The House of Representatives adopted the motion.

Minister: CCS unavoidable, but not under land due to societal resistance
5.17.37. The new Minister of Economy, Agriculture, and Innovation [Minister 4] wrote a letter to the House of Representatives on 14 February 2011 about possibilities for the reuse and storage of CO_2. Like its predecessors, it believes that CCS is inevitable in achieving the CO_2 reduction target:

"Given the expected tightening of the reduction targets after 2020, I think it is wise to ensure that this technology can be implemented in time across the industry if necessary, both by the energy production sector and by industrial sectors that emit large amounts of CO_2. (...)"

The minister is prepared under certain conditions:

"(…) to promote and accelerate the development of capturing and storing CO_2, including through large-scale demonstration projects. (...)"

It also reports that for the time being, it will only cooperate with demonstration projects with storage under the sea:

"The cabinet has always stated that local support also plays a role in the decision-making process regarding CO_2 storage. In 2007, in collaboration with the province of Groningen, some energy companies took the initiative to store CO_2 in empty gas fields under land. The cabinet and a majority of your Chamber were initially positive about these plans (...)
However, the plans provoked quite a societal discussion. Therefore, I took the initiative to speak with all stakeholders about the usefulness and necessity of CCS in the north during my working visit to Groningen on 3 February. In these talks, I found that citizens, social organizations, and local and regional administrators have serious doubts about CO_2 storage in their immediate environment.

I do not want to take measures that unnecessarily cause unrest among residents if real alternatives are available. Given the assumptions used in the most recent studies for the composition of our energy production capacity in 2050, and the associated estimates of CO_2 emissions in 2050, I conclude that based on current insights, especially for the medium term, CO_2 storage under the sea is sufficient. (...)
If at a later time, despite all efforts in the field of energy saving and all measures to achieve a CO_2-poor energy system, it turns out that storage capacity under the sea is still insufficient, then at that time, the possibility of storage under land will have to be reconsidered." **41**

Energy Report 2011

5.17.38. The Energy Report 2011 confirms that the use of CO_2 capture and storage is inevitable in the long term. Therefore, the government promotes the development of CCS to ensure that this technique can be implemented industry-wide by the energy production sector and industrial sectors that emit large amounts of CO_2. However, according to this report, the government is limiting its commitment to CCS for the time being to:

"(...) demonstration projects with storage under the sea. Based on current estimates, this is sufficient, especially for the medium term. Safety is, of course, paramount. The government is not making any spatial reservations for a CCS demonstration project on land."

5.17.39. The report also states that for the time being, a significant part of European electricity supply will come from coal-fired power plants. However, the role of coal-fired power plants in future energy supply depends on the cost-effective application of CCS. It is noted that in the long run:

"(...) the business case for coal-fired power plants will probably deteriorate due to the expected rise in CO_2 prices and the additional need for flexibility because of a larger share of renewable energy. Market signals indicate that under current and future market conditions, investing in coal-fired power plants does not seem attractive."

The report also includes the government's intention to make co-firing and co-processing of biomass mandatory in coal-fired power plants (instead of subsidizing it), but this did not happen.

Energy Agreement for Sustainable Growth

5.17.40. This is evident, among other things, from the Energy Agreement for Sustainable Growth established in September 2013 between the State and a large number of societal organizations and companies, including the industry association Energie Nederland (of which RWE Generation is a member). **42** It has been agreed that the government will subsidize the large-scale use of biomass in the new coal-fired power plants and the power plants built in the 1990s, including the Amercentrale, up to a total of 25 petajoules (PJ).

5.17.41. Part of the agreements in the Energy Agreement is the closure of five old coal-fired power plants built in the 1980s. It was agreed that these closures would take place on January 1, 2016 (three coal-fired power plants, including the Amer 8 unit of RWE Generation) and January 1, 2017 (two coal-fired power plants). This agreement is linked to the reintroduction on January 1, 2016, of the exemption for electricity production in coal tax.

Closure of the Amer 8 unit and letter on behalf of RWE/Essent to the Department of Economic Affairs

5.17.42. In accordance with the agreements in the Energy Agreement, the Amer 8 unit **43**, which was put into use in 1980, was closed. RWE Generation has, in this procedure, invoked a letter of July 24, 2014, to the Ministry of Economic Affairs in which they/Essent, in line with the Energy Agreement, confirmed that they were waiving financial compensation for the closure of the Amer 8 unit. RWE Generation did not submit this letter as a production "due to its poor readability", but a fragment of it is printed in the summons, which reads as follows:

"Under these circumstances (...) I consider it likely that the measures mentioned in your letter will prompt Essent to refrain from seeking financial compensation for the (...) closure of the Amercentrale (referring to the Amer 8 unit, court). (...) I assume no other measures will be introduced to significantly hinder Essent's electricity production activities."

5.17.43. It is established that the State (Ministry of Economic Affairs) did not respond to this letter. RWE Generation concludes from this that the State agreed that no restrictive measures would be taken regarding the electricity production of the RWE Group in the Netherlands, including the Amercentrale (= the Amer 9 unit). According to RWE Generation, this means they could assume that the prohibition in the Wvk to generate electricity using coal would be waived. The court's decision on this is as follows: Merely not responding by the State to this letter does not mean that the State agreed to waive taking restrictive measures regarding the Amercentrale for the rest of its lifespan. This is also unlikely because the closure of the Amer 8 unit results from agreements already made in the context of the Energy Agreement, and financial compensation for the closure of old coal-fired power plants has already been provided (in the form of the reintroduction of the exemption for electricity production in coal tax). RWE Generation's argument, therefore, fails.

The judgment in the Urgenda case; the motion [Member of Parliament 2]

5.17.44. On June 24, 2015, this court ordered the State, at the request of the Urgenda foundation, to limit or have greenhouse gas emissions reduced so that their volume will have decreased by at least 25% by the end of 2020 compared to the level of 1990. This court order to the State was upheld in the appeals and cassation. On September 25, 2015, the House of Representatives adopted a motion from, among others, the member [Member of Parliament 2] (motion [Member of Parliament 2]), asking the government to investigate which measures can be taken to comply with the Urgenda judgment. In this motion, the government is explicitly asked to include the closure of Dutch coal-fired power plants in this investigation. **44**

Motion [Member of Parliament 3] and [Member of Parliament 4]: plan to phase out Dutch coal-fired power plants

5.17.45. On November 25, 2015, the House of Representatives adopted a motion related to coal-fired power plants: the motion of the members [Member of Parliament 3] and [Member of Parliament 4]. This motion states that CO_2 emissions are a problem for climate change and that the Netherlands must contribute to a solution by reducing its CO_2 emissions. Furthermore, it's noted in this motion that coal-fired power plants are among the largest CO_2 emitters in the Netherlands and that surrounding countries like Germany and the United Kingdom have fundamentally chosen to phase out coal-fired power plants. Therefore, the motion's authors request the government:

"(...) to phase out Dutch coal-fired power plants and to develop a plan for this with the sector, taking into account the growth of the share of renewables, legal and financial aspects, potential CO_2 leakage to other countries, and the security of energy supply and innovation, and inform the House about this during the review of the energy agreement in 2016." **45**

Minister: It is inevitable that phasing out coal-fired power plants is considered

5.17.46. In a letter to the House of Representatives dated December 18, 2015, the Minister of Economic Affairs responded to the motion of [Member of Parliament 3] and [Member of Parliament 4]:

"The electricity market in the Netherlands and Northwest Europe is undergoing major changes due to the energy transition. This transition aims at a low-CO_2 energy supply by 2050. With the Energy Agreement, we have made agreements to make an irreversible step in that transition. We primarily focus on promoting renewable energy production. In addition, we agreed to phase out the most polluting electricity production faster. Due to the efficiency standards the government introduces, the five oldest coal-fired power plants will close by July 1, 2017." **46**

5.17.47. The minister also mentions in this letter that there is no place for new coal-fired power plants in the energy transition. It also announced that it will work out different scenarios for phasing out the five coal-fired power plants remaining after 2017, including the Amercentrale. The minister writes that the Netherlands is committed to an ambitious European climate and energy policy with instruments that contribute to CO_2 reduction and the energy transition at both the national and European level:

"It is inevitable that this will also involve looking at the phasing out of coal-fired power plants since they are among the largest CO_2 emitters in the Netherlands."

Motion [Member of Parliament 5] et al.: Timeline for closing coal-fired power plants

5.17.48. On September 22, 2016, the House of Representatives adopted a motion from members [Member of Parliament 5], [Member of Parliament 6], and [Member of Parliament 7], which considered that to comply with the Paris Climate Agreement, all participating countries must take significant policy measures to reduce CO_2 emissions quickly enough. **47** The motion also considers that various reports show that closing coal-fired power plants is the cheapest option for the Netherlands. The motion calls on the government to ensure that the timeline for closing coal-fired power plants aligns with the ambitions of the Climate Agreement, and a reduction in CO_2 emissions by 25% in 2020 and 55% in 2030.

Response from Minister [Minister 5] (EZ) to the motion by [Member of Parliament 3] et al.

5.17.49. In a letter dated January 19, 2017, the minister informed the Chamber about the scenarios related to coal-fired power plants that the cabinet had developed in response to the motion by [Member of Parliament 3] et al. **48**. The minister states that to gain insight into the effects of phasing out all coal-fired power plants, it established a steering group with the energy companies involved and Energie Nederland to direct various studies. In addition, it set up an advisory group in which various civil society organizations participated at his invitation. The letter includes a summary of the studies done to develop the scenarios. RWE Generation asserts from this minister's letter that the government did not want to close coal-fired power plants at the beginning of 2017, concluding that the closure of coal-fired power plants was still unforeseeable at that time. RWE Generation points to two objections mentioned in the studies against (short-term) closure of coal-fired power plants: the leakage effect and the waterbed effect.

The leakage effect

5.17.50. This effect is explained as follows in the aforementioned summary of the studies:

"The Dutch electricity market is closely linked to the market in other European countries, which is evident from the scenarios. Due to this connection, interventions in the Netherlands also have effects abroad. When measures are taken in the Dutch electricity market that reduces electricity production at Dutch coal-fired power plants, all scenarios show that to meet the electricity demand in the Netherlands, power plants abroad take over part of the lost electricity production, mainly in Germany. Reducing electricity production from Dutch coal-fired power plants results in significant CO_2 reduction in the Netherlands, leading to CO_2 reduction at the European level. However, the CO_2 reduction achieved in Europe by closing coal-fired power plants is considerably less than the CO_2 reduction in the Netherlands. This is because when coal-fired power plants in the Netherlands are closed, replacement electricity production occurs abroad, resulting in additional CO_2 emissions. From a Dutch perspective, interventions in the Dutch electricity market thus lead to CO_2 leakage to foreign countries."

5.17.51. Thus, reducing electricity production from Dutch coal-fired power plants results in a significant CO_2 reduction in the Netherlands and also a CO_2 reduction in Europe, but it's less because part of the electricity production is replaced abroad (mainly Germany). The studies also show that the later the closure of Dutch coal-fired power plants takes place (e.g., in 2025 instead of 2020), the smaller the "leakage effect." Moreover, this effect depends on national policy in other countries. The summary refers specifically to the (then) recent Climate Plan 2050 of the German government (which gradually reduces the use of coal-fired electricity):

"In the context of developments in Europe, the situation in Germany is particularly relevant. The scenarios show that the leakage effects caused by the phasing out of coal plants in the Netherlands are mainly caused by a significant increase in electricity production from German lignite and coal-fired power plants. If Germany were to decide on a concrete phase-out of coal-fired power plants, this would make an approach in the Netherlands also more effective."

The Waterbed Effect

5.17.52. This refers to the effect that occurs when emission reduction as a result of the new policy in an ETS sector in a certain member state provides room for more emissions within the ETS system later or elsewhere in the EU. The minister notes that a European approach is more effective in countering climate change than a national approach. However, see the diminishing significance of the waterbed effect in point 5.19.5.

Measures to Phase Out Coal-fired Power Plants

5.17.53. The minister's letter indicates that 29 different measures have been assessed for (including legal) feasibility and effectiveness in achieving CO_2 reduction or phasing out. Ten potential measures remained, of which the summary of the letter mentions:
- tightening the minimum efficiency requirements of coal plants from 2021;
- introducing a ban on coal-fired electricity production from a certain date;
- measures aimed at strengthening the ETS at the European level, with the caveat that the Netherlands has limited influence on this.

Amendments by [Member of Parliament 2] et al. Aim for Closure of Coal Plants

5.17.54. Although the minister's response and the studies it refers to show that a European approach would be more effective than taking national measures to reduce CO_2 emissions, the court believes that RWE Generation cannot derive support from that response for its assertion that a measure like the one in the Wvk was unforeseeable (even in early 2017). The minister's letter rather confirms that the closure and phasing out of coal plants have become increasingly prominent on the (political) agenda. This is also evident from the submission on February 16, 2017, of two amendments in the context of the amendment to the Electricity Act and the Gas Act by members [Member of Parliament 2] et al.**49** The submitters aim with the first amendment (no. 9) to phase out the two remaining coal plants from the 1990s, including the Amercentrale, by setting stricter minimum efficiency requirements for these plants (from 40% to 45%). The second amendment (no. 10) aims to close the last five more modern coal plants by 2030 by tightening the standard for the energy efficiency of these plants from 40% to 48% in 2030.

Council of State's Advice on Amendments by [Member of Parliament 2] et al.

5.17.55. The minister submitted both amendments to the Advisory Division of the Council of State for advice. The Division issued advice on July 10, 2017, in which it concludes:

"(…) that serious consideration must be given to the fact that the intended closure of coal-fired power plants by prescribing unachievable efficiency standards is not permitted due to a conflict with the Industrial Emissions Directive. In addition, closing the coal plants in this manner is inappropriate, as the possibility to set efficiency standards is only meant to promote the energy efficiency of operational installations. If closing the coal plants is deemed desirable, it is advisable to do it more directly, namely through a so-called closure law. (…)".

ROAD Canceled by Electricity Producers Engie and Uniper

5.17.56. Shortly before, on June 27, 2017, the minister informed the House of Representatives about the latest Rotterdam Capture and Storage Demonstration Project (ROAD) status. ROAD was an initiative of the French energy multinational Engie and Uniper, which was spun off from the E.ON group in 2016 and is involved in electricity production through conventional fuels.

ROAD aimed to create a large-scale underwater CCS demonstration project at Uniper's MPP3 plant on the Maasvlakte. The project was supposed to be operational by 2015. The minister informed the House that it had learned from Engie and Uniper that they had decided to withdraw from this project. In doing so, the promoters indicated they could no longer justify further investment in this project. The minister has informed the House that it regrets this decision, as the cabinet considers CCS indispensable for achieving climate goals. It announced that the cabinet will continue to encourage the development of CCS and promote its widespread application. **50**

Coalition agreement includes announcement of coal plant closure

5.17.57. On October 10, 2017, the Rutte II cabinet presented the Confidence in the Future coalition agreement. It states that coal-fired power plants will be closed by 2030 at the latest. The bill that led to the Wvk was presented to the House of Representatives on March 18, 2019.

Conclusion foreseeability

5.17.58. The court concluded in No. 5.17.35 that RWE Generation, when it acquired the Amercentrale in September/October 2009, could foresee that government restrictions would be imposed on the use of coal as a fuel unless, in the period starting in 2015 and before 2020 at the latest, the power plant's carbon emissions were very substantially reduced. The court also considered that this judgment implies that in the event that that reduction would be achieved by converting (with government subsidy) the power plant to one that runs almost entirely on biomass, it was also foreseeable to RWE Generation that government measures would be taken that would prohibit the power plant from being converted back to a coal plant, as the above shows, following RWE Generation's acquisition of the Amercentrale, the Lower House's desire to (eventually) close coal-fired power plants was increasingly insistent. Several motions to that effect were passed. Successive cabinets have long kept several options open, initially expecting large-scale deployment of biomass and especially application of CCS as possibilities to very substantially reduce CO_2 emissions from coal-fired power plants. When it turned out that these expectations were not realized, the Rutte II cabinet ultimately opted for a (phased) ban on the use of coal in electricity generation to take effect no later than 2030 (and for the Amercentrale in 2025). The Court sees no support in the facts and circumstances after RWE Generation acquired the Amercentrale in September/October 2009 for RWE Generation's assertion that the promulgation of that measure was or has become unforeseeable for it. That contention, therefore, fails.

The extent to which there are alternative uses for the Amercentrale

5.18.

The parties agree that the Amercentrale currently runs almost entirely on biomass. It is also established that it is technically possible without too many modifications to burn this power plant entirely on biomass (RWE Generation states in the summons, margin number 349, that "this modification (will) be relatively limited and (will) be able to take place quickly").

Biomass is also a real alternative?

5.18.1. RWE Generation has argued that after the termination of the biomass subsidy (i.e., from October 1, 2027), full (continued) firing with this fuel is not a real alternative to (co-)firing the coal in this power plant. To this end, it first argues that the government wants to stop using biomass for electricity production. It also argues that switching to biomass, without government subsidy, is not economically feasible. The State disputes this and moreover argues that RWE Generation's assertion that the Amercentrale, ignoring the Wvk, would have returned to (fully) running on coal after the subsidy for the use of biomass expired has by no means been made plausible.

Ban on biomass for electricity production? Motion [MP 8] et al.

5.18.2. RWE Generation takes the position that the government no longer considers the use of biomass for electricity generation desirable after the entry into force of the Wvk. It refers in support of this contention to a motion adopted by the House of Representatives on June 30, 2020 calling on the government to:

"(...) to immediately terminate new subsidy decisions for the combustion of woody biomass for new biomass power plants that generate electricity only." **51**

SER advice "Biomass in Balance"

5.18.3. RWE Generation also points to the SER advice "Biomass in Balance" from 8 July 2020 - 52. As far as relevant here, it states:

"For the use of bio-resources for base-load electricity, there are now sufficiently profitable alternatives that fit better in a sustainable final vision of the energy supply. The SER, therefore, advises to phase out the subsidy as quickly as possible and to offer opportunities to use the bio-resources to develop higher-quality applications. Steps have been taken by no longer issuing new decisions; the current decisions for co-firing and co-combustion will expire in 2027."

Government position on the use of bio-resources

5.18.4. In the letter to the parliament from the Minister of Climate and Energy, [Minister 6], and the State Secretary of Infrastructure and Water Management, [State Secretary], dated April 22, 2022 regarding the policy use of bio-resources **53**, they responded to both the motion mentioned above and the SER advice:

"For achieving a climate-neutral and circular society by 2050, the government sees an essential role in using sustainable bio-resources. Bio-resources are essential to end the dependence on (imported) primary fossil resources and mineral raw materials, for instance, in chemistry, construction, and the production of fuels for aviation and shipping. At the same time, the government recognizes the concerns in society about woody bio-resources. Concerns about air quality, deforestation, loss of biodiversity, and thereby the sustainability of bio-resources."

The ministers further state that when using bio-resources, the guiding principle is that sustainable bio-resources are only used when they fit into the final vision or the transition towards it:

"Where sustainable alternatives become available in the short term, this will eventually lead to a phasing out of the subsidy for the use of bio-resources for those applications."

Furthermore, the ministers report that using woody bio-resources for low-value energy applications is being phased out. No new subsidies are already being issued for the production of electricity only from woody bio-resources.

No prohibition on the use of biomass; non-woody biomass

5.18.5. The State correctly pointed out that this does not concern a ban on generating electricity with biomass, but the cessation of issuing new subsidies (after 2027) for the use of woody biomass. The State also notes that even if there was a political desire to ban the use of (woody) biomass for electricity generation, implementing such a measure is impossible because biomass is recognized as a sustainable fuel at the European level (in the Renewable Energy Directive). Given this, the court has ruled that RWE Generation has not demonstrated that a ban on generating electricity and heat using woody biomass for existing power plants will come into force before 2033 (i.e. before the technical lifespan of the Amercentrale expires). Additionally, non-woody biofuels, such as bagasse (fibrous waste remaining after the juice is squeezed from sugarcane stalks), sewage sludge, or other waste streams from bio-refinery processes, can technically be used for electricity generation. This means that even if a ban on burning woody biomass was introduced before the lifespan of the Amercentrale expires, there is a possibility that this power plant could continue to operate on alternative (bio)fuels.

Switch to full biomass economically viable? The Frontier Report

5.18.6. Parties disagree on whether switching to full biomass combustion instead of coal, without subsidies, is economically viable. According to the State, this is certainly a realistic option, especially for the Amercentrale, which has already been converted to a biomass power plant. RWE Generation argues otherwise and refers to a report by Frontier Economics from September 2019 (hereafter: the Frontier Report) commissioned by Uniper Benelux. The report examines whether a full conversion of Uniper's MPP3 plant in Maasvlakte can be profitable by 2030. Frontier bases its analysis on "the market framework and power market assumptions" used in a 2018 study they conducted for the Ministry of Economic Affairs. Frontier's "overall conclusion" is that (without subsidies) "the biomass conversion in 2030 is not a profitable investment". The State challenges Frontier's findings, arguing they rely on outdated data and an incorrect reference date (2019). Moreover, the State points out that Frontier's findings don't apply to the Amercentrale, which has been almost fully converted to a biomass plant.

The Nera Report

5.18.7. RWE Generation also refers to an "Economic Assessment of Biomass Conversion" by Nera Economic Consulting from 18 December 2021 (hereafter: the Nera Report), commissioned by RWE Eemshaven Holding II. The report concludes that based on information available in October 2017, a prudent and reasonable investor would not convert a power plant like the Eemshaven plant from coal to full biomass by 2030 "in the absence of biomass support schemes" because of the high risk of unprofitability. The researchers maintained this conclusion even with data available in December 2021. According to the researchers, the recent government policy "to phase out energy generation from biomass" heavily influences this conclusion, making it unlikely that the Eemshaven plant would operate as a biomass plant from 2030 to 2054. A key assumption underlying the study is the temporary nature of the sharp increase in gas and electricity prices since August 2021. According to RWE Generation, the findings related to the Eemshaven plant in the Nera Report also apply to the Amercentrale.

Other Studies, Different Conclusions

5.18.8. As mentioned in the Nera Report, other studies based partly on current high energy prices conclude that electricity generation with biomass can be profitable even without subsidies. For example, studies from Barclays (September 2021) and Credit Suisse (September 2021) suggest this. The latter, which the State also references, specifically relates to a large former coal power plant in Great Britain (the Drax plant) converted to biomass and the Eemshaven plant of RWE Eemshaven Holding II B.V. Referring to Drax's 2019 annual report, the State also mentions that the plant expects to operate profitably on full biomass without subsidies from 2027 onwards.

Expectations Expressed by RWE Generation Itself

5.18.9. The State argues that RWE itself has publicly stated it sees a future for the Amercentrale (and Eemshaven plant) as a biomass power plant. The State refers to RWE AG's 2019 annual report, which includes an interview with the CEO of RWE AG, [CEO 1]. When asked why coal no longer belongs to the core business of the group from 2020, it replies:

"(...) 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 coals if we fully convert them to biomass. (...). All of these activities form our core business. Our German hard coal (...) 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."

5.18.10. In addition, the State has pointed to a 2018 interview with Mr. [the director], Director of Electricity Production at RWE Generation, in which it expresses the expectation that the Amercentrale can remain operational until 2040, despite the coal prohibition and despite the cessation of biomass subsidies:

"The Amercentrale must run on other types of biomass than wood pellets in the long term (...) such as lignin left over after biomass is converted into sugars that can serve as a raw material in the chemical industry (...). The fact that the coalition agreement states that the subsidization of biomass co-firing will end in 2024 and that coal plants must be closed by 2030, is (...) not an obstacle to these plans. New forms of biomass will anyway become more competitive (...)". **54**

In another 2018 interview, [the director] made similar statements:
"There is enough biomass available, and we are working on making the prices competitive when the SDE+ scheme for biomass expires". **55**

The State also highlighted that RWE's own website announces the conversion of the Amercentrale and Eemshaven power stations into biomass power stations (screenshot from May 10, 2022):

*"**The era of hard coal at RWE is drawing to a close.***
A commodity becomes part of history.
(...)
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."

Also, [the CEO 2], CEO of RWE Generation, discussed the use of biomass in the Amercentrale in a recent interview with De Volkskrant on August 28, 2021. [the CEO 2] indicates that RWE Generation aims for the Amercentrale to be fully powered by biomass, and the CO_2 released from it will be stored under the seabed by 2030:

"If RWE's two coal plants are fully powered by biomass and the CO_2 is stored under the seabed, (...) a yearly 10 megatons of negative emissions will be created. Since biomass is already considered a climate-neutral fuel, CO_2 storage leads to the removal of carbon dioxide from the atmosphere. That room can initially be used to keep gas plants operational. Their emissions can then formally be offset against the savings from CO_2 storage."

These statements, among others, suggest, according to the State, that RWE Generation itself assumes that the Amercentrale will continue to operate profitably on biomass without subsidies after the ban on coal-fired electricity production comes into effect. The fact that RWE Generation extended the heat supply contract for the Breda-Tilburg heat network with Ennatuurlijk until 2040 also indicates this, according to the State.

Conclusion on Alternative Uses

5.18.11. Regarding the question of the extent to which there are alternative uses for the Amercentrale, if it may no longer generate electricity with coal after the transition period (from 2025 onwards), the court concludes as follows. It is technically feasible to run this power plant entirely on biomass. This requires a relatively minor adjustment that can be quickly implemented, certainly well before the end of the transition period. Whether the full transition to biomass without subsidy will be profitable is uncertain. This depends on developments in the energy market, which, as recent events have shown, are highly volatile and hard to predict. The fact that the Dutch government lifted the temporary additional restriction on coal-fired electricity generation (see no. 1.2) shortly before the oral proceedings in this case, and the remaining coal plants in the Netherlands have since, as the court understands, been operating at full capacity, speaks volumes.

It can also by no means be ruled out that (temporary) subsidies will become available for firing with (non-woody) biomass whether or not combined with CCS. It can be reasonably expected that electricity and heat can be generated in the Amercentrale with a fuel other than biomass as of 2025, apart from coal, has not been established in the Court's opinion. On the other hand, the Court deems it by no means proven that RWE Generation would have converted the Amercentrale back into a coal plant if there had been no ban on electricity production with coal from 2025.

5.19. ***The effectiveness of the ban***

RWE Generation has rightly argued that, according to the settled case law of the ECtHR, a measure that infringes the right to property must be appropriate to achieve the objective pursued by that measure. According to RWE Generation, the prohibition on generating electricity with coal laid down in the Wvk is not expedient. In this regard, in brief, it points to the leakage effect and the waterbed effect, which would negate the ban's effect in the European context. These concepts have already been addressed in Nos. 5.17.50 and 5.17.52. The court takes as its starting point that the legislature is entitled to a "wide margin of appreciation" when it comes to assessing what is in the public interest and the choice of means to serve this interest. **56**

The purpose of phasing out coal-fired power plants

5.19.1. The Explanatory Memorandum **57** to the Wvk confirms that the government has committed to the coalition agreement to reduce CO_2 emissions by 49% in 2030 (compared to 1990) in the Netherlands. The Explanatory Memorandum then states that the bill implements one of the Cabinet's measures to elaborate on the ambition to achieve that reduction in the Netherlands, namely the phasing out of coal-fired electricity generation in the Netherlands by 2030 at the latest. It is considered that a significant portion of CO_2 emissions in the Netherlands can be traced back to electricity generation and that in the electricity sector, coal-fired production plants are by far the largest emitters of greenhouse gases.

5.19.2. The District Court is of the opinion that it has been sufficiently demonstrated that the phasing out of coal-fired power stations as regulated in the Wvk is a suitable means of achieving the objective (as explained above: reducing CO_2 emissions in the Netherlands). A possible leakage or waterbed effect does not alter this. The State rightly argued that for this reason, RWE Generation's argument that the Wvk is inefficient does not hold.

The State's own responsibility for CO_2 reduction

5.19.3. For the sake of superfluity, therefore, the Court will address RWE Generation's position that the WRK is not efficient from a European perspective. As the State rightly argued on that point, it is responsible for reducing Dutch CO_2 emissions within its sphere of influence. The State cannot evade its responsibility by referring to a leakage or waterbed effect. The Supreme Court considered this in the Urgenda ruling:

"Like the Netherlands, other EU member states are responsible for limiting CO_2 emissions as much as possible. It cannot be assumed in advance that the other member states will take less far-reaching measures than the Netherlands. On the contrary, compared to member states such as Germany, the United Kingdom, Denmark, Sweden, and France, the Dutch reduction effort lags far behind." **58**

Road leakage effect from a European perspective

5.19.4 In addition, as considered in No. 5.17.51, despite the leakage effect, phasing out Dutch coal-fired power plants contributes to CO_2 reduction not only in the Netherlands but also in Europe, albeit to a more limited extent. Furthermore, it is certain that the later the ban on generating electricity with coal in the Netherlands takes effect, the less significant the leakage effect. Finally, the impact of the leakage effect is smaller as measures are taken in the countries surrounding us (and of these, Germany in particular) to reduce CO_2 emissions from electricity generation. Against this background, the court considers that the (remaining) leakage effect does not mean that the Wvk is ineffective, even if its purpose would be to reduce CO_2 emissions in Europe.

The waterbed effect has significantly decreased in importance

5.19.5. As for the waterbed effect, the court is of the opinion that its importance has significantly decreased due to two relatively recent developments, namely:

(a) the addition of the ETS from January 1, 2019, with the so-called market stability reserve (hereafter: MSR) combined with the cancellation mechanism to be explained below. The MSR is designed to dampen price fluctuations of emission rights: if the number of emission rights in circulation exceeds a (set by the European Commission) limit in a year, a portion of it is placed in the MSR the following year; if there are too few emission rights in circulation, these can be sold from the MSR. In addition, it has been determined that from 2023, a cancellation mechanism will apply: the number of emission rights in the MSR that exceeds the auction volume of the previous year will be (up to a certain maximum) canceled; it is expected that approximately 2 billion emission rights will be canceled in the period 2024 - 2030;

(b) the amendment of the ETS Directive (by Directive (EU) 2018/410), stating that Article 12(4) now stipulates that Member States, if electricity generation capacity is closed on their territory due to additional national measures, can scrap emission rights from the total amount of emission rights they auction.

5.19.6. From the above, it is not plausible that the emission rights no longer used in connection with the prohibition of electricity generation using coal will automatically and fully become available to other CO_2 emitters, as RWE Generation claimed.

Less intrusive alternatives?

5.19.7. Insofar as RWE Generation has intended to argue that there is a violation of Article 1 EP ECHR because the State could have achieved its goal with a less severe measure than a ban on coal-fired electricity generation, this argument fails. In the context of the fair balance test, the State has, as previously considered, a broad margin of appreciation regarding the choice of a particular measure that serves the public interest. This implies that there is no violation of Article 1 EP ECHR solely because a less burdensome measure might be available to achieve the same objective, even if the chosen measure is very intrusive. This could be different if the choice of a particular measure is obviously unreasonable and a comprehensible justification for choosing that very burdensome measure is missing. RWE Generation has not, or insufficiently substantiated with concrete facts, argued, and it has not been shown that this is the case with the prohibition set out in the Wvk to generate electricity using coal. The further hardly elaborated claims of RWE Generation that the State could also have chosen mandatory insulation of homes or a national work-from-home day, or could have tackled other major CO_2 emitters (other than coal-fired power plants), are insufficient for this purpose and therefore do not lead to a different judgment.

Conclusion on effectiveness

5.19.8. The conclusion is that it has been sufficiently established that the prohibition in the Wvk on the generation of electricity using coal is effective, as it significantly contributes to the reduction of CO_2 emissions in the Netherlands. It has not been proven that the State should have and could have settled for a less intrusive measure to achieve the same result.

5.20. ***Has sufficient compensation been offered for the damage suffered as a result of the measure?***

As stated in no. 5.16.1, the basic principle in regulating property is not that compensation should be offered for damage suffered due to the measure. As stated by the ECHR in the case of Country Side Alliance v. the United Kingdom (which concerns a law prohibiting fox hunting):

"For the lack of compensation in the 2004 Act, the Court accepts that a ban on an activity which is introduced by legislation will inevitably have an adverse financial impact on those whose businesses or jobs are dependent on the prohibited activity (...). Nevertheless, the domestic authorities must enjoy a wide margin of appreciation in determining the types of loss resulting from the measure for which compensation will be made

As stated in C.E.M. Firearms Limited "the legislature's judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable". This applies, a fortiori, to cases where the interference concerns control of the use of property under the second paragraph of Article 1 rather than deprivation of possessions under the first paragraph of the Article. There is normally an inherent right to compensation in respect of the latter but not the former (…)" **59**

Compensation is just one of many factors in the fair balance test

5.20.1. The court recalls that whether, and if so, to what extent compensation is provided in property regulation is one of many factors that can be taken into account in the fair balance test. And where missing or insufficient compensation weighs more heavily depending on the severity of the infringement of the property right.

5.20.2. For the present dispute, which involves the regulation of "possessions" by the Wvk, for assessing whether the fair balance test has been met, it is not solely decisive whether financial compensation is provided for the owners of the coal plants, let alone that it can only be met if they are offered "full compensation" or if they would be given the opportunity to "fully recoup their investments", as RWE Generation seems to assume.

No financial compensation, but a transition period

5.20.3. The Wvk does not provide for financial compensation for the owners of the coal plants affected by the ban (apart from the possibility of compensation in Article 4(1) of the Wvk if there is an individual and excessive burden - see more on this in no. 5.21). The explanatory memorandum takes the position that even without financial compensation, there is already a fair balance between the general interest served by the ban and the interest of the power plant owners affected by the property regulation. The minister takes into account that there is a transition period (which the minister regards as "compensation in kind").

Purpose of the transition period

5.20.4. The explanatory memorandum further elaborates on the transition period as follows:

- The transition period's duration depends on the plant's efficiency.

- Climate reports indicate that the climate targets for Europe, and thus also the Netherlands, are achievable if electricity generation using coal is phased out by 2030 at the latest: this is why 2030 has been taken as the basis for determining the transition period as the year by which coal use for electricity generation must have ended.

- For the coal-fired power plants in the Netherlands that started generating electricity not so long ago, the transition period is more than ten years: the government believes this is an adequate period for these plants' operators to recoup (a significant part of) their investments and prepare the plant, either gradually or fully, for further operation with fuels other than coal.

- The government believes it is unnecessary for the operators to fully recoup their investments during the transition period because it is partly meant to prepare the plants to switch to other, less CO_2 emitting fuels with which the plant can continue operations (even after the transition period).

- All plants have received a subsidy decision for co-firing and direct firing of biomass: through the SDE+ scheme, over €3.6 billion in decisions has been issued for co-firing and direct firing of biomass, part of which subsidies were used for the necessary modification of the plants.

- The government believes the plants have the relevant knowledge, skills, and organizational capacity to retrofit the plant for a complete switch to permissible fuels and have enough time to do so, given the transition period.

Transition period can contribute to a fair balance

5.20.5. Given the aforementioned explanation, the court cannot agree with RWE Generation's assertion that the transition period is solely motivated by climate objectives and not intended to provide adequate compensation. The fact that the final date by which coal can be used is determined by climate considerations does not mean that the transition period doesn't also intend to allow coal plant owners to recoup (part of) their investments and make preparations for a switch to other fuels. Additionally, just because the State hasn't justified why a period of over ten years (five years for the Amercentrale) is sufficient, it doesn't necessarily mean that the transition period doesn't provide coal plant owners adequate opportunities to mitigate their losses. RWE Generation has argued that the transition period doesn't contribute to a fair balance since the legislator "takes thirteen years from RWE and gives back five, meaning RWE has to close the Amercentrale eight years earlier... only able to produce electricity with biomass for just under two years due to ongoing subsidies." However, this argument overlooks that the State could have imposed the ban immediately upon the Wvk coming into force. Moreover, a transition period that allows the affected owner to mitigate their loss can contribute to the assessment that a reasonable balance has been struck between public interest and the protection of individual rights. **60**

Transition period offers opportunity to mitigate damage

5.20.6. Although RWE Generation claims the transition period isn't long enough to fully compensate for the alleged damages resulting from the prohibition in the Wvk, they haven't disputed that this period allows them to limit those damages (compared to the hypothetical situation where the prohibition would have started immediately upon the Wvk's enactment). The court, therefore, accepts this as given. Moreover, during the transition period, the Amercentrale is only marginally affected by the ban (as it primarily co-fires coal). It can operate fully on biomass with subsidies for at least two more years after the transition period ends. Whether and to what extent operating the Amercentrale during the transition period and the subsequent years will be profitable for RWE Generation depends on various factors, including market developments, which are part of the normal business risk.

5.21. ***The hardship clause of Article 4 Wvk***

RWE Generation argues that the hardship clause in Article 4(1) of the Wvk only offers a theoretical possibility of compensation for the affected operators of the remaining coal plants. RWE Generation correctly points out that the provision requires the respective operator to demonstrate that they are disproportionately affected by the ban compared to other coal plant operators. Besides the Amercentrale, only three other coal plants are active in the Netherlands: RWE Holding II BV's Eemshaven Power Plant, Uniper's MPP3 Power Plant, and the Onyx Rotterdam Power Plant (previously owned by Engie, now by Riverstone). Vattenfall's Hemweg Power Plant coal unit was already shut down in December 2019. According to RWE Generation, the four coal plants' three remaining operators are disproportionately affected compared to other CO_2 emitters and "society as a whole." RWE Generation also lacks the necessary business data of the other operators to assess, let alone substantiate, whether they are more heavily affected than the other operators. Since the hardship clause doesn't guarantee full compensation but only a concession, even if an operator qualifies for it, RWE Generation believes the provision can't contribute to achieving a fair balance.

5.21.1. Given the very small number of owners of relatively new coal plants (although the Amercentrale is significantly older than the other plants and mainly operates on biomass, in contrast to the other plants), the court agrees with RWE Generation that there's a slim chance any of them would qualify for a concession under Article 4(1) of the Wvk. Consequently, the regulation's impact on achieving a fair balance is minor. The explanatory memorandum also expresses the expectation that the power plant owners are not sufficiently distinct from each other, "so there cannot be a case of an individual burden."

The court further believes that the differentiation in the transition period based on the electrical efficiency of the production unit already accounts for the fact that the owners of the newly built plants would be more affected by an immediate ban than the owners of old plants. This does not negate the possibility that a situation may arise where an owner is particularly and disproportionately affected by the ban and can claim compensation (financial or otherwise) based on Article 4(1) of the Wvk.

5.22. ***Fair balance: conclusion***

From the foregoing, it is clear that the prohibition set out in the Wvk to generate electricity with coal in the Amercentrale after January 1, 2025, qualifies as an interference (or regulation) of the property rights of RWE Generation, the owner of the Amercentrale. There's no case of de facto expropriation or similar interference. It has also been shown that the ban on generating electricity with coal is a measure within the scope of what RWE Generation could have expected in 2009, when it acquired the ownership of the Amercentrale through the acquisition of Essent, if it failed to substantially reduce the CO_2 emissions of the plant between 2015 and 2020, whether through biomass use, CCS, or other means. It is also evident that it's technically relatively simple to further convert the Amercentrale, which already largely runs on biomass, to operate entirely on biomass. However, whether the Amercentrale can profitably run entirely on biomass after 2027, without subsidies (which RWE Generation has been receiving since 2003 and will continue to receive until September 2027), is hard to predict in advance. This depends on various factors, including market developments, which are highly variable and hard to forecast.
Moreover, it's been sufficiently established that the prohibition in the Wvk is effective as it significantly contributes to the reduction of CO_2 emissions in the Netherlands. The court also determined that the five-year transition period, from the enactment of the Wvk until the ban becomes effective for RWE Generation's Amercentrale in 2025, enables RWE Generation to mitigate its damages and make preparations for a complete transition to other fuels. The impact of the hardship clause in Article 4(1) of the Wvk is minor, given the slim chance that RWE Generation or any of the other remaining coal plant owners could meet the stringent condition for a potential concession, which is that the requesting owner must demonstrate they are disproportionately affected by the ban compared to other coal plant operators.

5.22.1. Taking all circumstances into account, especially those summarized in section 5.22, the court concludes that regarding the Wvk and its embedded ban on coal-fired electricity generation, a reasonable balance (fair balance) exists between the demands of the public interest it serves and the protection of RWE Generation's fundamental rights. The court believes that it hasn't been established that the Wvk imposes an "individual and excessive burden" on RWE Generation. Whatever else the parties have argued does not lead to a different judgment.

Damage and causal relationship

5.23. In its previous considerations, the court assumed that RWE Generation had incurred damages as a result of the Wvk to the extent claimed by it (see section 4.3). However, in the court's view, such damage has not been established.

The State's position on this matter

5.23.1. Referring to the Expert Report from Compass Lexecon, commissioned by the State and dated 23 July 2021 (hereafter: the Compass Report), the State has challenged both the claimed damages and the causal link between those damages and the Wvk. Although the aforementioned report was drawn up in response to the Brattle report on the Eemshaven power station, Compass Lexecon's criticism of that report also applies to the Brattle report on the Amercentrale, which is identical in terms of methodology and assumptions. The State argued, among other things, that the Brattle report, on which RWE Generation bases its claim, uses an incorrect reference date (9 October 2017) and wrongly disregards - in violation of compensation law - information and insights after 9 October 2017. The State further argued that it is highly unlikely that the Amercentrale, without the Wvk, would have continued to operate as a coal power station after 2027. This is primarily because the Amercentrale has already almost completely been converted to and operates as a biomass power station; it's hard to imagine RWE Generation investing in converting the power station back to coal.
Moreover, the State pointed out the bleak prospects for coal power stations, mainly due to rapidly increasing ETS prices (the higher the prices, the bleaker the prospects). From 2020, this price increase has soared, breaking the €50 threshold in early 2021. The Brattle report wrongly assumes the median ETS price in 2020 would be €20, €37 in 2030, and €50 per ton of CO_2 emission in 2040. In this context, the State cited the Compass Report, noting Brattle's incorrect assumption that the EU wouldn't act to meet the Climate Agreement's goals: if Brattle had used "CO_2-price projections with a mean value compliant with the Paris Agreement, RWE Eemshaven's costs (and, as the court understands, the costs for the Amercentrale would be the same) would be significantly higher". This would mean that the number of scenarios where the power station would have had to close, regardless of the Wvk, would be higher than Brattle calculated. In contrast, in the remaining scenarios where no closure would occur, the profits would be lower than Brattle calculated **62**. Additionally, referring to the Compass Report, the State argued that the depreciation calculated by Brattle is based on fiction and fails several obvious reasonability checks.

5.23.2. Finally, the State argued that RWE Generation's claim is entirely premature. The prohibition on generating electricity from coal for the Amercentrale only comes into effect on 1 January 2025, after which, based on RWE Generation's own claims, the power station can still operate profitably as a biomass power station for two more years (though the State believes even in subsequent years). Since RWE doesn't seek suspension or invalidation of the prohibition but claims compensation, and they haven't sold the Amercentrale, the State suggests postponing the damage assessment until that date according to article 6:105 of the Civil Code. By 2025/2027, the development of gas, coal, ETS, and electricity prices from 2017-2025/27 can be factually and concretely determined, providing a much more realistic projection while determining whether RWE Generation has fully transitioned to biomass or another fuel.

RWE Generation's response: objections are unfounded

5.23.3. RWE Generation responded to these arguments by the State. It introduced additional documents from their appointed expert Brattle (Brattle Reply Report dated 28 April 2022 and Brattle memorandum dated 16 June 2022), which, in their opinion, show that the objections to Brattle's damage calculation are unfounded.

The court doesn't decide on damage and causal link

5.23.4. Since the court, within the framework of the fair balance test, assumed that RWE Generation suffered damages due to the Wvk of the magnitude as claimed by RWE Generation, it doesn't further address the question of whether it's likely that RWE Generation suffered damages or whether there's a causal link between the damage and the Wvk. Even with that assumption, the court comes to the conclusion mentioned in no. 5.22.1. Therefore, the arguments put forward by both parties regarding the damages don't need further discussion.

Conclusion

5.24. The preceding leads to the conclusion that the Wvk does not violate Article 1 EP ECHR (nor Article 17 of the EU Charter). Therefore, the enactment and enforcement of this law are not unlawful to RWE Generation. This means that RWE Generation's claim is denied. RWE Generation, being the unsuccessful party, will be ordered to pay the legal costs and the statutory interest thereon, as specified below. The State's legal costs are estimated at: €20,196. This amount consists of court fees (€4,200) and attorney fees (€15,996; 4 points x rate VIII of €3,999 each).

5.25. An order to pay the legal costs and the statutory interest thereon includes an order to pay the subsequent costs and the statutory interest thereon, provided that the statutory interest on the subsequent costs related to the necessary service of the judgment, if applicable, is due fourteen days after such service. Therefore, the court sees reason not to specify the subsequent costs and the statutory interest separately in the cost order, as requested by the State.

6 The Decision

The Court:

6.1. denies the claims;

6.2. orders RWE Generation to pay the legal costs, estimated at €20,196 on the side of the State up to now;

6.3. determines that the statutory interest on the legal costs is due fourteen days after the date this judgment is rendered;

6.4. declares this judgment provisionally enforceable concerning the convictions.

This verdict was delivered by Mr. M.A. van de Laarschot, Mr. D.R. Glass, and Mr. J.S. Honée and pronounced in public on 30 November 2022.

Footnotes:
1. Official Gazette 2019, 493.
2. From 1980 to 2016, another production unit, Amer 8, operated in the same complex in Geertruidenberg. The production unit Amer 9 is meant unless otherwise indicated when referring to the Amercentrale later.
3. The ratio between the electrical power and the total fuel input capacity determines the electrical efficiency. A power station thus has a higher electrical efficiency as more electricity can be produced with the same amount of fuel.
4. The original SDE scheme was thoroughly revised in 2011 and has since been referred to as SDE+ and, after a further adjustment in 2020, as SDE++. In this judgment, the court succinctly uses the abbreviation "SDE" for all these schemes.
5. See, for example, Directive (EU) 2018/2001, 11 December 2018, promoting the use of energy from renewable sources.
6. Directive establishing a greenhouse gas emission allowance trading scheme within the Community.
7. Communication from the Commission to the European Council, the European Parliament, the European Economic and Social Committee, COM (2007) 2 final.
8. Compare the Supreme Court, 18 September 2015, ECLI:NL:HR:2015:2722.

9 Supreme Court, December 16, 2016, ECLI:NL:HR:2016:2888 (Law prohibiting fur farming), r.o. 3.3.3.
10 See, for example, CBb 21 August 2018, ECLI:NL:CBB:2018:414.
11 Opinion of A-G Vlas, ECLI:NL:PHR:2016:898 (Act prohibiting fur farming), no. 2.33 et seq.
12 ECHR February 6, 2018, no. 36184/13 (Kristiana Ltd. v. Lithuania).
13 Conclusion of A-G Vlas, t.a.p., no. 2.9, with reference to the ECtHR case-law cited there.
14 Compare A-G Vlas, t.a.p., nos. 2.21 and 2.22 (concluding).
15 See, e.g., ECHR, 19 January 2017, no. 32377/12 (Werra Naturstein GmbH v. Germany): "In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see Lithgow and Others v. the United Kingdom, 8 July 1986, §. 120, Series A no. 10, and Jahn and Others v. Germany [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI)."
16 ECHR, 11/24/2009, 16072/06, 27809/08 (Country Side Alliance v. the United Kingdom).
17 Supreme Court December 16, 2016, ECLI:NL:HR:2016:2888 (Act prohibiting fur farming), para. 3.4.2.
18 Incidentally, the Wvk does not prohibit the generation of heat using coal. However, heat supply is a by-product of the production of electricity: without the production of electricity, the production of heat with coal is, as the Court understands, not obvious; in this sense also the State, Conclusion of Reply, margin 20.5.19.
19 Cf. ECHR 18 February 1991, Fredin v. Sweden, 12033/86, in which the Court considered that the possibilities of use of "proportions" affected by the measure should not be looked at "in isolation": "In order to take into account the realities of the situation, the effects of the revocation thus have to be ascertained in the light also of the situation obtaining on the applicants' surrounding properties. Nothing indicates, however, that the revocation directly affected these other properties (...). Viewing the question from this perspective, the Court does not find it established that the revocation took away all meaningful use of the properties in question."
20 In this sense, ECieRM October 17, 1991, 16221/90 (McKenna v. Ireland), concerning gambling halls.
21 The Hague Court of Appeal, November 10, 2015, ECLI:NL:GHDHA:2015:3025.
22 Cf. Court of Appeal of The Hague, October 31, 2017, ECLI:NL:GHDHA:2018:3072.
23 Parliamentary Papers II, 1998-1999, 26 603, no. 2.
24 Implementation Memorandum on Climate Policy, p. 2.
25 VROM Council, Transition to a low-carbon energy system - advice for the Implementation Memorandum on Climate Policy, December 23, 1998, p. 35.
26 Parliamentary Papers II, 2002-2003, no. 29023, no. 1.
27 Letter from the Minister of Economic Affairs dated September 3, 2003, t.a.p., under 3.1.1 (Investment climate).
28 Parliamentary Papers II, 2003-2004, 28 241, no. 6.
29 According to this method, CO2 is stored in deep coal beds, expelling the adhering methane gas so that it can be extracted.
30 Parliamentary Papers II, 2003-2004, 29023, no. 4
31 Appendix to the Bulletin, questions by members [MP 9] and [MP 10], Lower House, 2003- 2004, no. 1857.
32 Parliamentary Papers II, 2004-2005, 29 023, no. 14.
33 Appendix to the Bulletin, questions by member [MP 11], Lower House, 2005-2006, no. 1224.
34 Appendix to the Bulletin, questions by member [MPs 12 and 13], House of Representatives, 2006-2007, no. 2001
35 Parliamentary Papers II, 2006-2007, 28240, no. 77
36 Parliamentary Papers II, 2007-2008, 31510, Appendix 2.
37 Parliamentary Papers II, 2008-2009, 31510, no. 36.
38 Moreover, contrary to what RWE Generation has argued, it is not obvious to assume (already because the Sector Agreement speaks of "also the operators of new coal-fired power plants") that it has fulfilled this agreement by early closure of its older Amer 8 plant.

39 District Court of The Hague, May 26, 2021, ECLI:NL:RBDHA:2021:5337.
40 Parliamentary Papers II, 2009-2010, 32123 XIII, no. 38.
41 Parliamentary Papers II, 2010-2011, 31510, no. 44.
42 Social and Economic Council, Energy Agreement for Sustainable Growth, September 2013.
43 See note 2.
44 Parliamentary Papers II, 2015-2016, 32813, no. 115.
45 Parliamentary Papers II, 2016-2016, 34302, no. 99.
46 Parliamentary Papers II, 2015-2016, 30196, no. 380.
47 Parliamentary Papers II, 2016-2017, 34550, no. 14
48 Parliamentary Papers II, 2016-2017, 30196, no. 505.
49 Parliamentary Papers II, 2016-2017, 34627, nos. 9 and 10.
50 Parliamentary Papers II, 2016-2017, 31510, no. 67.
51 Parliamentary Papers II, 2019-2020, no. 32,813, no. 537 (motion [MP 8] et al.)
52 Opinion 20/07|July 2020.
53 Parliamentary Papers II, 2021-2022, no. 32. 813, no. 1039.
54 Energia, " RWE wants to keep Amercentrale open at least until 2040," January 10, 2018.
55 Energia, "Biomass without subsidy becomes competitive with solar and wind," March 15, 2018.
56 Supreme Court, November 16, 2011, ECLI:NL:HR:2001: AD5493 (Pig farmers), r.o. 6.2.2, with references to ECHR case law.
57 Parliamentary Papers II, 2018-2019, 35 167, no. 3
58 Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006, r.o. 2.3.2
59 ECHR, 11/24/2009, 16072/06, 27809/08 (Country Side Alliance v. the United Kingdom).
60 Supreme Court, December 16, 2016, ECLI:NL:HR:2016:2888 (Law prohibiting fur farming), r.o. 3.5.2, citing ECtHR case law.
61 In the explanatory memorandum to the Wvk, it is mentioned that the operator of the Hemweg power plant, for reasons of fair balance, is eligible for financial compensation for the disadvantage that, unlike the operators of the other coal-fired power plants, it is not offered a transition period, Parliamentary Papers II, 2018-2019, no. 35167, no. 3, p. 13.
62 Compass report, paragraph 78.

[Translators Notes:
"EP" of "EP ECHR": Refers refers to the "First Protocol", Specifically, Article 1 of the ECHR.
"ECHR": Refers to the The European Convention on Human Rights.
"Wvk": Law Prohibiting the Use of Coal in Electricity Production.]