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# The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations

Stan Putter (Smallegange, Dutch Arbitration Association) · Tuesday, August 24th, 2021

Western European countries have taken divergent approaches to dealing with the consequences of shutting down power plants while transitioning towards cleaner energy sources. On one side, Germany resolved the resulting compensation disputes by making settlement payments to the owners of affected nuclear and coal power plants. In contrast, the Netherlands appears reluctant to similarly compensate affected power plant owners, which resulted in claims. This contribution focusses on the latter; specifically, the Netherlands' coal phase-out legislation and, in turn, the resulting ICSID arbitrations commenced by RWE and Uniper.

The Paris Agreement on climate change led the Netherlands to adopt the Law Prohibiting the use of Coal with the Production of Electricity in 2019. The law affects the Netherlands' five coal-fueled power plants by prohibiting them from generating electricity through the use of coal. The prohibition is divided into three categories.

*First*, as from 1 January 2020, inefficient coal plants (i) with an electrical efficiency rate lower than 44%; (ii) that cannot produce any renewable energy through biomass; and (iii) that don't produce any renewable heat, are prohibited.

*Secondly*, as from 1 January 2025, inefficient coal plants (i) with an electrical efficiency rate lower than 44%; (ii) that can produce renewable energy through biomass; and (iii) that can produce renewable heat, will be prohibited.

*Thirdly*, as from 1 January 2030, all coal plants will be prohibited.

The oldest of the five affect plants is owned by Vattenfall and was commissioned in 1994. The four remaining plants are owned by RWE (who owns one plant required to be shut down by 2025 and one plant required to be shut down by 2030), and Uniper and Onyx (who both own plants required to be shut down by 2030). The three plants required to be shut down in 2030 were commissioned in 2015 and 2016 respectively, after having received the necessary governmental permits and in part built at the specific request of the Netherlands in 2004 to ensure continuity in the power supply during the country's energy transition. At the time, the Minister of Economic Affairs explained to Parliament that newer more efficient coal plants would be important in the transition towards renewables, in part due to the limited adverse environmental effects that such plants would cause.

With regards to compensation, the Netherlands agreed In 2019 to pay Vattenfall EUR 52.5 million in compensation to close the oldest plant (and therefore, the plant with the shortest remaining lifespan) by 2020. That payment was subject to state-aid investigations, just as payments made by Germany for its coal phase-out. The European Commission finally authorized the payment to Vattenfall as can be read here.

As for the remaining four plants, it is believed that the Netherlands is currently in negotiations with Onyx regarding compensation for one plant, but has refused to compensate RWE and Uniper for the remaining three plants, resulting in various legal proceedings.

RWE commenced ICSID arbitration on 2 February 2021 and Uniper commenced ICSID arbitration on 30 April 2021. Uniper and RWE also commenced court proceedings (presumably one procedure per power plant, as reported to the Netherlands Parliament). In response to the commencement of the ICSID arbitrations, the Netherlands initiated two anti-arbitration injunctions (one against RWE and one against Uniper) before the German courts to block the ICSID arbitrations to proceed. The basis for these injunctions, which can be distilled from correspondence to the Netherlands Parliament, would be that the arbitration agreement in the Energy Charter Treaty cannot be given effect due to the incompatibility of the Energy Charter Treaty with EU law in intra-EU investment protection matters. The German anti-arbitration injunctions are reported separately on Kluwer Arbitration Blog.

Should the German anti-arbitration injunctions be unsuccessful, the central issues in the ICSID arbitrations would include:

- jurisdictional objections arising out of the alleged incompatibility of the Energy Charter Treaty with EU law in light of the ECJ judgment in the Achmea matter; and
- a State's right to regulate to achieve climate change goals.

**RWE and Uniper's claims**

RWE and Uniper made their position known in the public consultation process in advance of the law being adopted. They argued that the law would not appropriately take into account the interests of power plant owners as these would not be compensated appropriately for the inability to operate their power plants in an undisturbed manner until the end of their lifespan.

RWE said that the law would cause unequal damages in view of the economic lifespans exceeding 2040 (for the plant required to be shut down by 2025) and 2055 (for the plant required to be shut down by 2030). The latest plant commissioned cost RWE an investment of EUR 3.2 billion. If the plants would be shut down before the end of each plant's economic lifespan, appropriate compensation would have to be paid as the 2025 and 2030 phase-out deadlines would not be sufficient to recover the investments made. RWE also said that it built one of the plants at the specific request of the Netherlands. While the law would not prohibit another use of the plants from 2025 and 2030, RWE believes that it cannot make the plants profitable using another fuel type.

Uniper also said that it should receive appropriate compensation and that the law provides an imbalance between climate goals and the rights of plant owners. Uniper believes that it had legitimate expectations to rely on the policies of the Netherlands when it took the investment

decision (before the Paris Agreement was concluded), especially since the Netherlands repeatedly stressed the importance of coal plants in the energy transition. The coal phase-out was not foreseeable and an appropriate compensation mechanism is missing. See also Uniper's 16 April 2021 press release.

**The position of the Netherlands**

In the past, the Netherlands said that "*the EU must respect international law in the exercise of its power, in particular with respect to the termination and suspension of international treaties*". That statement was made in 2010 when it intervened as an amicus in the Achmea / Slovak Republic arbitration. The Netherlands at the time confirmed that it was working towards "*a practical solution that … secures … the protection of investors in the European Union*".

Since 2010 circumstances have changed because of the 2018 ECJ decision in the Achmea matter; and the 2019 joint declaration of more than 20 EU member States (including the Netherlands and Germany) in relation to the consequences of the ECJ decision on intra-EU investment protection instruments.

The government's position is that it cannot be held to arbitrate intra-EU investment protection disputes. This, it believes, is justifiable as it is established EU law that arbitration clauses in investment protection instruments governing intra-EU investments cannot be given effect. In an explanation to parliament, the Minister of Economy and Climate said that the analysis in relation to intra-EU BIT's would equally apply to arbitrations based on a multilateral instrument such as the Energy Charter Treaty. No position is taken on the decisions that reject the Achmea-objections, the latest being the 30 July 2021 Infrastructure Services Luxembourg ICSID annulment committee decision that reports 56 tribunal decisions having rejected the Achmea-objections.

The jurisdiction of the ICSID tribunals will be heavily contested, both in and outside of the arbitrations, as evidenced by:

1. the German anti-arbitration injunctions having been commenced; and
2. the contents of the minister's letters to parliament.

The Netherlands shed some light on its merits defences of the claims of RWE and Uniper. Before the ICSID arbitrations commenced, the minister updated parliament in relation to the modernization discussions relating to the Energy Charter Treaty and the importance of the States' right to regulate, especially in view of *inter alia* reaching climate goals. The Netherlands seems to invoke the right to regulate as a reason to exculpate itself. In letters to parliament in relation to both the RWE and the Uniper arbitration, it says that in its view, the adopted law takes into account the Netherlands' international and European law obligations. Plant owners should not have expected that the government would not impose measures to significantly reduce carbon emissions given long term developments. How this can be reconciled with the government's request to build more efficient coal plants and its repeated emphasis on the importance of more efficient coal plants in the energy transition is unclear.

As the law does not prohibit the plants from being repurposed, they may be able to be used to generate power with alternative fuels or be used for a purpose other than power generation. The coal phase-out would further be appropriately long-term structured to allow power plant owners a

(sufficient) return on investment.

**NGO perspective on the profitability of the power plants**

If the ICSID arbitrations proceed into a merits phase, the Netherlands may argue that RWE and Uniper do not suffer (material) damages. Research from the NGO's IEEFA, Ember and Somo indicates that RWE and Uniper already devaluated their plants years before 2019 when the law on coal prohibition was adopted.

According to the research, the cause of the devaluations did not relate to the State-ordered coal phase-out, but rather is attributable to the uncompetitive economics of the exploitation of coal plants through rising carbon prices and cheaper renewable energy.

While the Netherlands has not yet forwarded these arguments, there is little doubt that it would stay clear from advancing these at the appropriate time.

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