



## **ECT Claim Uniper against Dutch State**

for Coal Exit 2030 – material prepared for German gov.

# Coal Exit NL – Legal implications in a nutshell

## Dutch legislation

Coal phase out act adopted December 2019:

- MPP3 to stop power production with coal as of 1st Jan 2030
- No financial compensation foreseen: transition period to 2030 presented as a compensation in kind, additional financial compensation only if disproportionately affected compared to other coal fired power plant operators
- Conversion to biomass argued to be an alternative business model by Dutch gov which acc to Dutch gov can be developed in the transition period



## Effect on MPP3

- Closure of MPP3 as of 1st Jan 2030 inevitable consequence of Coal Phase Out Act
- Conversion to biomass or other fuels no alternative (commercially not viable) supported by independent Frontier Report. Conversion to other fuels politically sensitive.
- Substantial loss of revenues for MPP3 and value of the site



## § Uniper legal assessment

- Act leads de-facto to an expropriation of Uniper
- No fair balance between the impact of the measure and Uniper's ownership rights
- Act is unlawful because of lack of compensation → [REDACTED]

## ECT: international arbitration

- ICSID arbitration, filed April 2021
- Expropriation as violation of standards of ECT
- Action for damages

## OLG Cologne: Dutch State

- Dutch State requested OLG Cologne to declare ECT procedure of USE is inadmissible as it is a forum in breach with EU law

**Entitlement for compensation due to Urgenda production cap undisputed.**

# ECT claim: ICSID arbitration for compensation

<b>Claimants</b>	Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. represented by Gibson Dunn, against Dutch State
<b>Position / argumentation</b>	Violation of ECT standards: <ol style="list-style-type: none"><li>1. <b>Indirect expropriation</b>, art. 13 ECT: MPP3 required to shut down without adequate compensation (conversion to other fuels commercially not viable)</li><li>2. <b>Unstable regulatory framework</b> and lack of <b>fair and equitable treatment</b>, art. 10: investment decision for MPP3 was supported by the government in 2006, the coal exit law in its current form was unforeseeable and is disproportionate due to lack of adequate compensation and low impact on CO<sub>2</sub> emissions.</li></ol>
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED] → [REDACTED]
<b>Enforceability</b>	Enforceability possible even taking into account the ECJ decision like Achmea / Komstroy, but challenging within EU.
<b>Timeline +</b> [REDACTED]	<ul style="list-style-type: none"><li>- Lead time minimum 3 years, but many delays to be expected (5-8 years not unrealistic).</li><li>- Proceedings can be paused or stayed at any time, e.g. in case of prospects for settlement.</li></ul> [REDACTED]
<b>Withdrawal</b>	<ul style="list-style-type: none"><li>- Currently proceeding is put on hold until 9<sup>th</sup> of January 2023 in alignment with NL gov.</li><li>- Withdrawal can be done with a Letter to the Tribunal.</li></ul> [REDACTED]

# OLG Cologne: ECT claim inadmissible EU law

## Claimants

Dutch State, against Uniper SE

## Position / argumentation

The Dutch State requested a declaration from OLG Cologne that EU law forbids intra-EU investment arbitration. On 1<sup>st</sup> of September 2022 the OLG Cologne had concluded that it is competent to decide on the request from Dutch government and concluded:

- that the arbitration proceeding instituted by Uniper SE before ICSID under ICSID ARB/21/22 is inadmissible;
- that any arbitration proceeding between Uniper and the Netherlands on the basis of Art. 26(3), (4) Energy Charter Treaty of 17 December 1994 (ECT) is inadmissible.

## Impact ECT

**No impact** on ECT procedure as ICSID decides on its own competence and jurisdiction and the tribunal already confirmed that Uniper should be able to continue with the ECT procedure unconstrained.

## Appeal

Appeal will pause the effect of the OLG Cologne decision and is necessary for two main reasons:

- the decision from OLG Cologne is in contradiction with decision of the court in Berlin (Germany/Mainstream)
- the decision has far reaching impact due to conclusion about any arbitration which could have an impact to investment protection in general

## Timeline +

- Appeal to be filed before 7<sup>th</sup> of October 2022.

- Substantiation of appeal can be done at a later stage.

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