

The Faculty of Law
UIT – The Arctic University of Norway
9037 Tromsø

Evaluation of the Thesis of Maria Madalena das Neves “The Legal Framework for Norway’s External Energy Trade and Investment Relationships”

1. Introduction

The following Evaluation Committee was appointed by an undated letter (April 2016) from the Faculty of Law on:

- Professor Martha M. Roggenkamp, University of Groningen
- Professor Ole Kristian Fauchald, University of Oslo
- Associate Professor Magne Frostad, University of Tromsø (chair of the committee)

The Committee recommended on 10 August 2016 that the Faculty should permit the candidate to submit minor revisions before the final recommendation is made, in accordance with Section 31(2) of the Regulations for the degree of Philosophiae Doctor at the University of Tromsø – The Arctic University of Norway (UiT) (PhD Regulations). Such an extension was then granted by the Faculty, and the Committee now considers the revised thesis submitted on 18 November 2016. The Committee has in relation to the revised version of the thesis conferred by telephone on one occasions and by means of e-mail correspondence.

Henceforth the Committee gives its evaluation report.

2. Evaluation Criteria

Relevant regulations and guidelines – Regulations concerning the degree of Philosophiae Doctor (PhD) at the University of Tromsø – The Arctic University of Norway (UiT) / The standard for Doctoral Degrees in law at the Faculty of Law, University of Tromsø / Evaluation of Candidates for Norwegian Doctoral Degrees – Guidelines for the evaluation of candidates for doctoral degrees at the University of Tromsø / Plan for doctoral (PhD) studies at the Faculty of Law at UiT The Arctic University of Tromsø – state, *inter alia*, that a Norwegian PhD thesis in law must be an independent and comprehensive piece of legal scholarly work that meets international standards of ethics, scholarship and methods in its field. Moreover, the thesis should contribute to the development of new knowledge with respect to the theme or legal discipline of the thesis, and achieve a level meriting publication in the scientific literature in the field.

The PhD candidate must satisfy the minimum requirements for a researcher, demonstrated through the formulation of research questions, precision and logical stringency of the analytical work, as well as demonstrate originality and comprehension of current methods of

analysis. It is also important that the candidate is able to reflect upon these methods' possibilities and limitations. In the evaluation, it is especially important to assess whether the material or the methods applied are relevant to the posed research questions or objective of the thesis, and whether the arguments and conclusions stated are justifiable. The candidate should also prove to have knowledge and understanding of and a reflective attitude towards other research in the field. As a general rule a doctoral thesis of 250-400 pages is normally considered appropriate in length, given the timeframe for the education and increased complexity due to the internationalization of law.

A Norwegian doctoral degree is, hence, awarded as proof of the work being of a certain standard. In the assessment, the Committee has relied on these criteria set out in the said regulations and guidelines.

3. Structure and Content of the Thesis

The thesis is a monograph of 508 pages, excluding table of contents, list of documents, case law and literature, and other appendices (totally 608 pp. (xlix+559)). The content of the thesis is divided in six parts, consisting in total of 18 chapters.

Part I Introduction comprises three chapters: "Research Topic and Purpose of the Research" (pp. 2-8), "Methodology and Scope of the Research" (pp. 9-25) and "Structure of the Thesis" (pp. 26-27). This part presents the rationale for the choice of topic and research questions into which it has been divided. The purpose of the thesis is identified on pp. 5 and 6 as "to provide a holistic and critical examination of the key legal framework supporting Norway's external energy trade and investment relationships, and to discuss potential reforms to that framework where shortcomings exist. The thesis should contribute to a better understanding of that framework, of the motives behind Norway's legislative choices, of discussions concerning the legal regime for international energy trade and investment; and should also make a contribution to discussions concerning potential reforms to that legal framework." This part explains the research methodology and clarifies the meaning of terms used.

Part II Background comprises three chapters: "Norway as an Energy Nation" (pp. 29-38), "Norway's Energy Policy and Historical Contextualization to Legislative Choices" (pp. 39-72) and "Barriers and Risks Associated with Energy Trade and Investment" (pp. 73-84). This part provides background information for the analysis of the current legal framework for Norway's external energy trade and investments, addressing *inter alia* (i) Norway's role in regional and global energy markets, (ii) the current Norwegian energy policy, (iii) the historical background for why Norway has decided on certain policy and legislative choices, and (iv) market access barriers and investment risks which may frustrate energy trade and investments.

Part III The Legal Framework for Trade in Energy Goods and Services comprises three chapters: "Regulation of Energy Trade under the WTO's Legal Framework" (pp. 89-149), "Regulation of Energy Trade under EEA Law" (pp. 150-195), and "Regulation of Energy Trade under EFTA's Convention and Free Trade Agreements" (pp. 196-224). This part

systematizes and analyzes the legal framework for trade in energy goods and services, focusing on the key trade related international arrangements to which Norway is a party.

Part IV The Legal Framework for the Promotion and Protection of Energy Investments comprises four chapters: “Promotion and Protection of Investments via Bilateral Investment Treaties” (pp. 227-301), “Promotion and Protection of Investments through EFTA Agreements” (pp. 302-308), “Promotion and Protection of Energy Investments through EEA Law” (pp. 309-361), and “Protection of Investments under the European Convention on Human Rights” (pp. 362-390). This part systemizes and analyzes the theoretical and international normative framework for the promotion and protection of foreign investments.

Part V The Way Forward: Norway’s Concerns, and Additional Legal Instruments for Energy Trade and Investment comprises four chapters: “Norway’s Concerns with International Investment Law” (pp. 393-415), “Norwegian Model BITs” (pp. 416-450), “The Energy Charter Treaty and Related Instruments” (pp. 451-481), and “Norway’s Adoption of Additional Legal Instruments seen in the Context of Discussions on Global Governance in Energy and on Convergence of International Trade and Investment Law” (pp. 482-493). This part explores options available to Norway in order to ameliorate the shortcomings of the current legal framework, and it concludes by discussing the convergence of international trade law and investment law and global energy governance.

Part VI Conclusion consists of one chapter: “Enabling or Hampering Energy Trade and Investment Relationships?” (pp. 495-508). This part provides a final assessment of whether the current legal framework is adequate for Norway’s trade and investment relationships, and concludes with recommendations for ensuring that Norway’s policy and normative goals in respect of external energy trade and investment are met.

4. The Committee’s Evaluation

4.1 General Strengths and Weaknesses of the Thesis

There has so far been little research on the legal framework supporting Norwegian energy trade and investment, and this thesis is thus a welcome contribution to this field. The thesis examines and refers a very broad range of treaties, cases and literature. In this regard, it presents a comprehensive and well-researched general picture of complex rules as well as associated interests and interpretive arguments.

The Committee finds that the candidate generally applies legal methodology in a satisfactory manner. The discussion of “adequate” legal framework is good (pp. 22-25), but we miss more active use of the factors identified in Parts III and IV of the thesis.

The thesis’ structure facilitates orientation and avoids repetition. The tables provide helpful summaries and comparisons, although it would have been preferable if the candidate had made more use of them in her analyses.

The thesis contains good and well-researched sections on Norway’s interests and policies, the history and background and content of Norway’s commitments under WTO, BITs and the

European Convention on Human Rights, Norway's concerns with international investment law, and relevant EU and EEA energy law and Norwegian constitutional law. We therefore find that the candidate succeeds in providing a holistic and critical examination of the key legal frameworks supporting Norway's external energy trade and investment relationships.

The Committee observes that the candidate on some occasions offers statements without providing the corresponding sources. Some of the text in Part II on the background of the thesis would have benefited from updating. The thesis, although well written, suffers from a few misspellings, the candidate does not always refer the most recent editions of some of the literature, and the thesis would have benefited from more thorough editing.

In the following, we set out our more detailed comments.

4.2 Part I

As regards the thesis' theoretical framework and hypotheses, the Committee finds that the thesis is well positioned in the theoretical traditions of international and Norwegian law, and that the research questions are well formulated. The introduction also shows well why this is a worthwhile topic to pursue, and it provides a good overview of the structure of the thesis, as well as adequately defines key terms. The Committee also finds the explanation for choosing the "bird-eye-view", as well as the candidate's identification of the weaknesses of such an approach, satisfactory.

It would nevertheless have been preferable if the candidate wrote more on the convergence of international trade law and international investment law when she first introduces it, and for that purpose some of the content of chapter 17 could have been relocated to chapter 1.

4.3 Part II

The Committee finds that this part of the thesis is generally good, but that it nevertheless suffers somewhat from unclear discussions on the distinctions between trade in goods and services.

Chapters 4 and 6 give good descriptions of respectively the importance of energy for Norway and Norway's role in international energy markets, and barriers and risks associated with trade and investment in energy. However, chapter 4 could use some updating, and the definition of expropriation in chapter 6 needs to be justified more thoroughly in view of its broadness.

The Committee finds chapter 5 satisfactory, providing amongst other an interesting elaboration on the guiding principles of Norwegian energy policy. The chapter would nevertheless benefit from more references to Norwegian academic literature. Moreover, chapter 5 is generally too reliant on the official statements on Norwegian policy.

4.4 Part III

Chapter 7 provides a relatively well-informed and updated overview of WTO rules, disputes and negotiations. However, the Committee questions the candidate's selection of rules and topics to be discussed. It is not clear to the Committee why issues concerning subsidies and

technical barriers to trade, as well as general obligations under GATS are not discussed even though they concern very important issues in current energy policies.

An analysis of the EEA agreement (historical background and main features) and how some of the main elements of EU secondary energy law are incorporated in the EEA agreement is provided in chapter 8. The candidate presents a clear overview of the EEA agreement and its institutions which is especially relevant for those less familiar with these concepts. She also presents an overview of the key issues in relation to the principles applicable to the free movement of goods. Section 8.4.1.5 presents an analysis of principles and case law applying to quantitative restrictions in the context of energy trade. The candidate analyses the key energy law cases, but the terminology is sometimes imprecise (e.g. her use of the concepts “feed-in-tariff” and “electricity certificates”). The freedom to provide services is discussed in section 8.4.2, and the candidate concludes that this is of marginal relevance for the energy sector without having discussed what type of services are or could be relevant for the energy sector: Is transport of electricity and gas, for example, to be considered as a service? Section 8.5 presents the main EU secondary energy laws incorporated in the EEA agreement. This section is brief and sometimes incomplete. The focus is on the downstream electricity and gas sector, although the upstream hydrocarbons sector is also a part of it and has an impact on energy trade. Moreover, the analysis of the electricity and gas sector is limited to the directives of 1996/1998 and 2003. The Regulation of 2003 is, for example, not discussed (except in a footnote) although it is relevant for cross-border trade. The main issues of the directives are discussed (although not always consistent), but a broader picture of the impact of the directives and regulations on the sector is missing. Obviously, third-party access to transport infrastructure is a key issue for energy trade, but can this be discussed without referring to the need for independent network operators? The candidate has included a section on the Directive on renewable energy sources, but has insufficiently dealt with access rules under this Directive. Furthermore, the lengthy discussion on reciprocity and transit lacks sufficient analysis of the Regulation on cross-border trade.

A thorough examination of schedules of commitments for services in EFTA’s free trade agreements is provided for by chapter 9. The candidate’s analysis of the commitments is interesting and well-founded, and concludes that Norway has had little success in promoting commitments as regards services in the energy sectors. The chapter also flags an interesting issue; whether states are allowed to reduce their commitments to a lower level than the commitments under GATS in the free trade agreements. However, the topic is not further discussed.

4.5 Part IV

Chapters 10 and 11 provide a general and thorough analysis of the scope and substantive provisions of investment agreements based on extensive references to case law. They represent the first extensive academic analysis of Norway’s commitments under investment agreements. The chapters provide a very good introduction to and overview over the most important and controversial interpretational questions and they discuss in a convincing manner the uncertainties regarding the applicable law. The Committee finds that the structure of the analyses could have been improved by discussing BITs and free trade agreements in the

same chapter, in particular as Norwegian practice since 1995 has been linked to the negotiation of free trade agreements, and by discussing jurisdictional issues concerning investment and investors in one place. In the opinion of the Committee, the analysis would in some places have been more relevant and stringent if it had more consistently used the wording of Norway's treaties as starting point (such as is done for example in the analysis of MFN) and focused more consistently on energy issues (one essential argument of the thesis concerns the particular features of energy projects). It would, for example, have been of interest to get a clearer picture of the relative importance of the agreements and their (lack of) relevant protections in terms of energy related investments in Norway and abroad. It is not clear to the Committee why the candidate chooses to discuss umbrella clauses, but omits discussion of provisions regarding transfers, key personnel and performance requirements, all of which would seem to be important for investments in the energy sector. On occasions, the Committee finds the legal reasoning to be somewhat selective in the sense of emphasizing case law that point one direction while not sufficiently referring case law pointing in other directions. It would also have been good if the analysis in these chapters had included references to discussions regarding the draft Norwegian model agreements.

Chapter 12 discusses energy investments in the energy sector of the EU/EEA and thus supplements chapter 8, which focuses on trade. The chapter includes a lengthy discussion on freedom of establishment and free movement of capital. These principles basically apply to the energy sector, i.e. energy companies. However, the candidate does not distinguish between the types of energy companies. Does it matter whether it is a vertically integrated energy company (as was the case with the golden share rulings), an independent trade and supply company and/or a network company? Although the chapter discusses some of the main elements of the energy market liberalization process, it is not always clear how it relates to investments and investments in what (network companies/networks or trade/supply companies). The chapter would have benefitted by including more analysis and a more precise discussion on types of investments, such as approaches to investments in TSO/DSOs and the impact of types of unbundling, investments in cross-border infrastructure (regulated/non-regulated) etc.

Chapter 13 on the issue of human rights and their protection of investments provides an interesting discussion on the application of Protocol 1 Article 1 of the European Convention on Human Rights to investments. The application of this rule to the Gassled tariffs case currently before Norwegian courts illustrates well the level of protection that human rights may offer. Some additional consideration of other issues of particular relevance to foreign investors, for example the duty to exhaust domestic remedies, would have been beneficial.

4.6 Part V

In relation to the introductory text to Part V, pp. 392-393, the Committee does not find the classifications as “amply satisfactory”, “relatively satisfactory” and “noticeably inadequate”, and the associated text, sufficiently justified, nuanced and precise. In particular, the Committee would have expected the candidate to make use of the criteria for “adequate” legal framework identified on pp. 24-25.

The Committee observes that the research questions formulated in the two introductory sections of chapter 14 concern different issues, and that the focus of the chapter therefore is unclear. The findings of causal relationships (section 14.2) and the discussions of Norwegian concerns regarding internal effects of investment agreements (section 14.3) remain largely undocumented, but they do intuitively seem sound. The chapter provides a well-researched and -reasoned analysis of Norwegian constitutional issues related to investment agreements.

The approach in chapter 15 consists of two main elements, a description of a selection of provisions contained in the draft model BIT of 2015 (in some cases compared with the 2007 draft) and a presentation of the candidate's views on the proposals. The Committee finds the descriptive part to be well-formulated and interesting, although not without weaknesses (in particular the missing reference to Annex B of the 2015 model BIT), and the selection of provisions needs better justification. The views presented are not always sufficiently explained or related to discussions or findings in other parts of the thesis.

Chapter 16 is a brief overview of parts of the ECT with a main focus on selected provisions of the investment chapter. The Committee would have appreciated a more thorough discussion on some elements of the ECT (for example the provisions on competition and state enterprises) and the changes currently being discussed with regard to the treaty (the idea of an International Energy Charter instead of European Energy Charter), given the candidate's emphasis on the ECT as an instrument Norway should turn to in the conclusion.

Chapter 17 deals with global governance in energy and is brief. The candidate essentially endorses the current approach to governance issues, building on the WTO and the ECT, although with some minor adjustments. The Committee finds that the chapter fails to take appropriately into account issues associated with trade in energy-related services and climate change issues.

4.7 Part VI

This part consists of one short chapter (Chapter 18) which provides a concise overview of the main elements of the thesis. Also here, the candidate fails to make use of the criteria for an "adequate" legal framework as identified in Part I. Section 18.6 provides the candidate's assessment as regards the extent to which she has fulfilled the purpose of the thesis; to 'provide a holistic and critical examination of the key legal framework', 'a better understanding of that framework' and 'make contribution to discussions concerning potential reforms to that legal framework'. In general, we find that these purposes have been met. The candidate's suggestions for further improvement are fair and not very controversial. It seems, however, that a chance has been missed to go one step further and present a clearer analysis as regards the distinction between energy goods and services, and how the current legal framework and a potential new regime should be adjusted in light of the current challenges of climate change and the promotion of renewable energy.

5. Conclusions

The Committee finds that the thesis contributes to the development of new knowledge with respect to the general legal framework for energy trade and investment to and from Norway. The candidate has demonstrated significant research skills through her formulation of research

questions and associated legal analyses. While we have some reservations as to her assessments of the “adequacy” of the legal framework, we find that her material and the methods applied are relevant to the research questions and purposes of the thesis, and that her arguments and conclusions are justifiable. The thesis is analytically sound and demonstrates significant originality. The candidate has knowledge and understanding of and a reflective attitude towards existing research in the field.

The Committee unanimously finds that the thesis fulfills the minimum requirements for a PhD thesis, making it thereby worthy of public defense.

Groningen/Oslo/Tromsø
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The document has been accepted electronically.