

1 JUS5851 assignment V21

In 2018 the Norwegian Supreme Court handed down a judgement in the so called Gasled-case (HR-2018-1258-A, an excerpt of the case is attached [HR-2018-1258-a-eng](#)). The case concerned a claim brought by foreign investors who had bought shares in the upstream-pipeline network on the Norwegian continental shelf. The claim was brought pursuant to the Norwegian government's reduction of the regulated tariffs for transportation of gas through the network. This substantially affected the expected future profits of the investors on their investment in the pipeline network. The monetary value of the claim was not quantified, but you may assume it would probably have amounted to more than 25 billion NOK.

You may assume that the tariff (i.e. the regulated price for transportation of gas) was composed of a cost element and a capital element. The reduced tariff essentially involved a 90 % reduction of the capital element for future, i.e. not yet concluded, transportation agreements. The tariff reduction did not apply to the substantial bulk of already concluded transportation agreements, i.e. here the old tariff still applied. For the sake of this assignment, you may assume that this in practice meant that the net current value of the expected profits of the investors on its investment was reduced from 9 % to 4 % of its total investment (although this is not necessarily an accurate rendering of the real facts of the case).

The investors provided several legal grounds for their claim under Norwegian law, one of which was that the regulatory change violated their right to property under the ECHR, first protocol, article 1. The Supreme Court dismissed the claim, finding no violation.

Norway is a signatory to, but has not ratified, the Energy Charter Treaty, and it has provided a reservation against provisional application of the treaty. In practice, this means the treaty is not applicable to Norway.

For this assignment you shall assume that Norway is contemplating a ratification of the treaty. You are part of a team tasked with advising the Norwegian government on the potential implications this may have for internal Norwegian regulatory policy. In that connection it has been brought up as an issue what the implications might have been for the Gasled-case if Norway had been bound by the treaty. You are asked to write a legal opinion where you discuss the following questions:

1. Based on relevant arbitral practice, how is it likely that an arbitral tribunal under article 26 of the Energy Charter Treaty would have decided the claim of the investors against the Norwegian government in the Gasled-case if the claim had been brought under the Energy Charter Treaty? (You may assume that there would be jurisdiction over such a claim under the treaty). You should particularly discuss the possible grounds of a claim under the treaty under Part III of the treaty on Investment Promotion and Protection. A link to the treaty is provided here:

<https://www.jus.uio.no/english/services/library/treaties/09/9-02/ect.xml>

2. Discuss the pros and cons for Norway of ratifying the Energy Charter Treaty in light of your conclusions to question 1) above. Which elements of the treaty (if any) do you find that the Norwegian government should be particularly concerned about?

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