SUPREME COURT OF NORWAY

On 28 June 2018, the Supreme Court gave judgment in

HR-2018-1258-A (case no. 2017/1891), civil case, appeal against judgment,

CapeOmega AS	(Counsel Thomas G. Michelet) (Assisting counsel: Kyrre Eggen)
Solveig Gas Norway AS Silex Gas Norway AS Infragas Norge AS	(Counsel Jan B. Jansen Counsel Thomas K. Svensen) (Assisting counsel: Kyrre Eggen)
v.	
The state represented by the Ministry of Petroleum and Energy	(The Attorney-General represented Tolle Stabell and Christian Fredrik Michelet) (Assisting counsel: Håvard H. Holdø)

V O T I N G :

(1) Justice **Bårdsen:** The case concerns the validity of the Ministry of Petroleum and Energy's Regulations 26 June 2013 no. 792 relating to amendment of the Regulations relating to the stipulation of tariffs etc. for certain facilities (the Tariff Regulations), adopted under section 4-8 of the Petroleum Act, among others.

(2) The Tariff Regulations 20 December 2002 no. 1724 regulate the tariffs that third parties must pay for shipment of gas in the pipelines owned by the joint venture *Gassled*. The joint venture was established in 2003, and tariffs were stipulated in the Tariff Regulations for the various areas of the pipeline network. This network is the world's biggest offshore system for transport and processing of gas, consisting of a number of gas pipelines on the seabed of the North Sea and the Norwegian Sea, some onshore processing plants in Norway and six receiving facilities in the UK, France, Belgium and Germany. The system is subject to licences from the Ministry of Petroleum and Energy pursuant to section 4-3 of the Petroleum Act. Upon the expiry of the licence period in 2028, the state will be entitled to take over most of the facilities free of charge under section 5-6 of the Petroleum Act.

(3) With the amendment of the Tariff Regulations from 1 July 2013, the tariffs for using Gassled's pipeline network were reduced, with effect for new agreements for shipment of gas after 1 October 2016. This entailed lower future revenues for the owners than what they could have received had the tariffs from the establishment of Gassled in 2003 remained unchanged throughout the licence period.

(4) Four Norwegian companies, with a total ownership in Gassled of approximately 45 percent, claim that the amendment of the Tariff Regulations in 2013 is invalid and that the state is liable for the loss of revenues they have incurred. The relevant owners are CapeOmega AS (CapeOmega), Solveig Gas Norway AS (Solveig), Silex Gas Norway AS (Silex) and Infragas Norge AS (Infragas). CapeOmega AS was founded as Njord Gas Infrastructure AS (Njord), but changed its name in December 2017. Before the Supreme Court, the companies contend that the amendment of the Tariff Regulations goes beyond the scope of its legal basis and that it, in any case, interferes with the owners' right to enjoy their possessions under the European Convention on Human Rights (ECHR) Protocol 1 Article 1 (P1-1).

(5) *Background*

(6) The court of appeal's judgment contains a detailed presentation of the facts of the case and the events giving rise to the dispute, which I refer to and use as a basis for my opinion. As the case now stands, I will confine myself to pointing out some main elements.

(7) The costs of establishing gas pipelines on the seabed are so substantial that the owners obtain a natural monopoly. In connection with the development of oil and gas fields in the North Sea and in the Norwegian Sea in the 1970s and 80s, the Norwegian authorities saw a need to regulate the transport system to ensure maximum exploitation of the Norwegian petroleum resources.

(8) Prior to 2003, there was a number of gas pipe systems in operation with various owners. Shippers had to enter into several transport agreements; they had to deal with various owners with different terms and tariffs. Therefore, in a letter of 25 June 2001, the Ministry of Petroleum and Energy requested the owners of the different transport systems to initiate negotiations to establish a joint venture.

(9) After an extensive process involving consultations with the Ministry of Petroleum and Energy and where the Ministry worked simultaneously to determine the future transport regime for Norwegian gas, the participants presented on 17 December 2002 an agreement on the establishment of Gassled and a partnership agreement for the Ministry's approval.

As part of the agreement, applications were made for prolongation of existing operating licences until 31 December 2028 to obtain a joint licence period for the entire pipeline system. Consent was given on 20 December 2002 under section 10-12 of the Petroleum and Energy Act, and the Tariff Regulations were adopted on the same day. A standard agreement on transport of gas in Gassled was also presented, setting out in clause 5.1 that the tariffs are to be calculated as regulated by the Ministry.

(10) Against this background, Gassled was established with effect from 1 January 2003, and several new pipeline systems have since been included. Today, nearly all Norwegian gas that is sold to the United Kingdom and Central Europe is transported through Gassled.

(11) The establishment of Gassled is a result of the proposal, during the partial privatisation of Statoil and the transfer of the management of the state's direct economic interest to Petoro in 2001, to establish an independent company for the operation of pipelines and associated gas processing facilities. This led to the establishment of Gassco AS (Gassco). Gassco is owned by the state and appointed to operate Gassled under section 4-9 of the Petroleum Act, and to be responsible for the administration, technical operations and development of the pipeline network. In addition, Gassco supervises the entire infrastructure for Norwegian gas.

(12) The development of the transport regime for Norwegian gas must be seen in the light of the incorporation of EU's Gas Market Directive (Directive 98/30/EC) into the EEA Agreement in 2001. The Directive permitted third parties to access the gas transport systems. As a result, section 4-8 subsection 1 of the Petroleum Act was amended in 2002 to include a new second and third sentence giving undertakings operating with natural gas and eligible customers domiciled in an EEA State the right of access to upstream pipeline networks. The Ministry also worked out an EEA-adjusted access regime for gas transport by adding a new chapter 9 to Regulations 27 June, no. 653 to the Petroleum Act (the Petroleum Regulations).

(13) Pursuant to section 61 subsection 1 of the Petroleum Regulations, the Gassled owners are to make spare capacity available to Gassco, which in turn will make it available to potential shippers. Shipment agreements in the primary market are entered into by Gassco on behalf of Gassled by the shippers booking capacity under section 61 subsection 3. The agreements are entered into on conditions stipulated in regulations and a standard agreement approved by the Ministry. Individual shipment agreements are no longer subject to the Ministry's approval, see section 65 of the Petroleum Regulations.

(14) In 2007, ExxonMobile Exploration and Production Norway AS initiated a process with the intent to sell their ownership interest of 9.48 percent in Gassled. The Ministry became involved early in the process. There were several potential buyers, but negotiations were completed with UBS International Infrastructure Fund and Caisse des Dépôts, which later formed Njord Gas Infrastructure AS. Both parties engaged legal, financial and commercial advisors. Extensive reports were made and meetings were held, including meetings with the Ministry.

(15) A purchase agreement was signed on 13 April 2010, on the same date as Njord submitted an application to the Ministry for approval of the transfer and the mortgaging of the licence under sections 10-12 and 6-2 of the Petroleum Act. Both were approved by the Ministry on 1 February 2011. In connection therewith, the Ministry assessed Njord's

financial position and made certain conditions to ensure that the technical security system would not be weakened because of the sale.

(16) Following the transfer to Njord, several other Gassled owners initiated similar sales processes, most of which were finalised by the end of 2011. Statoil sold its ownership interest of 23.58 percent to Allianz Capital Partners, Canada Pension Plan Investment Board and Infinity Investments SA, which for this purpose established Solveig Gas Norway AS. In 2012, Solveig bought a small ownership interest of 1.27 percent from Eni Norge AS. Total E&P Norge AS sold its ownership interest of 6.1 percent to Allianz Capital Partners, which established Silex Gas Norway AS as a holding company. A/S Norske Shell sold an ownership interest of 5 percent to Infragas Norge AS.

(17) These transfers of ownership interests meant abandoning the governing principle of a *balanced ownership* where the Gassled owners were also shippers. The new financial owners from 2010-2011, on the other hand, had no shipment interests.

(18) On 15 January 2013, the Ministry presented proposed amendments of the Tariff Regulations for consultation. The following is taken from the consultation memorandum:

> **"Developments on the Norwegian continental shelf indicate that, in the time ahead, the Gassled tariffs will be increasingly important in our resource management. The most profitable resources in a petroleum province are usually recovered at an early stage. Hence, low costs in pipelines and processing plants become more important on a mature continental shelf where several of the projects are economically less robust. This is important if the companies are to see exploration, development of discoveries and further measures on existing fields as an interesting proposition. In order to achieve good resource management, it is essential that the companies take an interest in exploiting socio-economically profitable resources. Lower tariffs for pipelines and processing facilities are also important for the establishment and correct choice of transport solutions. This is discussed and highlighted in a report submitted by Gassco in January 2012 (NCS 2020 – A study of future gas infrastructure).**
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> **In letter of 24 August 2012 to all owners and users of Gassled, the Ministry announced that it had initiated work on assessing the tariff level in Gassled, as stipulated in the Tariff Regulations.**
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> **As a part of this work, Gassco has, as instructed by the Ministry, calculated the return on the capital invested in the facilities currently constituting Gassled from the start of the investments in Norpipe until 2028. The analysis shows that by 2028, a real return before tax of 10.5% will be obtained based on historical tariff revenues and future capital tariff revenues from transport agreements entered into. Moreover, the analysis shows that the present value of net cash flows from the transport agreements entered into exceed the level assumed when the Tariff Regulations were adopted in connection with the establishment of Gassled in 2003.**
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> **Based on the above, the Ministry submits a proposal to amend the Tariff Regulations for consultation for the purpose of facilitating good resource management. The Ministry proposes to stipulate a new fixed part of the capital element per unit in the tariffs for future agreements on transport and management of natural gas for the greater part of the existing Gassled facilities. The Ministry does not suggest any amendments to the capital element in the tariffs for transport agreements entered into prior to the implementation of the proposed amendment of the Tariff Regulations. Accordingly, the proposal will not involve a reduction in the payment obligation of the users of the Gassled facilities or the income the owners of Gassled will receive from transport agreements already entered into."**

(19) A number of consultation responses were given, among others from the appellants in the case at hand.

(20) The Ministry adopted the amendment of the Tariff Regulations on 26 June 2013. The amendment was mainly in accordance with the consultation memorandum, which meant that the capital element in the tariff formula was substantially reduced for large parts of Gassled. However, the amendment was implemented a little later than originally proposed. The Ministry's arguments in favour of amending the Tariff Regulations are included in an extensive decision memorandum to which I will revert to some extent.

(21) Based on the figures presented before the Supreme Court, the tariff reduction entailed a likely future cost reduction for shippers in the order of NOK 30 billion. Based on prospective future bookings, the appellants have estimated reduced revenues of approximately NOK 15 billion due to the tariff adjustments.

(22) *The dispute*

(23) On 15 January 2014, Njord brought an action against the state represented by the Ministry of Petroleum and Energy before Oslo District Court. On 27 January 2014, Solveig, Silex and Infragas brought an action before Stavanger District Court. By Stavanger District Court's decision of 8 May 2014, the case was transferred to Oslo District Court and the two cases were consolidated for a joint hearing.

(24) On 25 September 2015, Oslo District Court concluded as follows:

> **"1. Judgment is given in favour of the state represented by the Ministry of Petroleum and Energy.**
>
> **2. The parties are to carry their own costs."**

(25) The district court found that no agreement existed between the Ministry and the Gassled owners concerning fixed tariffs and that the Ministry was entitled to adjust the tariffs under section 4-8 subsection 1 of the Petroleum Act. The amendment was not in conflict with the prohibition against retroactive effect in Article 97 of the Norwegian Constitution or with the protection of property in ECHR P1-1. The state had not failed to fulfil its duty to provide guidance or acted in conflict with good administration practice.

(26) Njord, Solveig, Silex og Infragas appealed to Borgarting Court of Appeal, which on 30 June 2017 concluded as follows:

> **"1. The appeal is dismissed.**
>
> **2. Njord Gas Infrastructure AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norway AS, as severally and jointly liable parties, are to pay costs in the court of appeal to the state represented by the Ministry of Petroleum and Energy of NOK 17,546,831 – seventeenmillionfivehundredandfortysixthousandeighthundredandthirtyone – within two weeks of the service of this judgment.**
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> **3. Njord Gas Infrastructure AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norway AS, as severally and jointly liable parties, are to pay costs in the district court to the state represented by the Ministry of Petroleum and Energy of NOK 24,650,108 –**

twentyfourmillionsixhundredandfiftythousandonehundredandeight – within two weeks of the service of this judgment.

(27) The court of appeal also concluded that the Ministry was entitled to adjust the tariffs under section 4-8 subsection 1 of the Petroleum Act, cf. section 70 subsection 1 and section 63 of the Petroleum Regulations. The establishment of Gassled and the conditions for the tariffs stipulated in the Tariff Regulations 2003, did not limit the Ministry's right to amend the Regulations based on the return. No agreement had been entered into stating that the tariffs would remain unchanged throughout the licence period. Moreover, the court of appeal concluded that all companies, when acquiring ownership interests in Gassled, knew and accepted that the Ministry was authorised to reduce the tariffs if the real return exceeded 7 percent of the invested capital. In the court of appeal's view, the amendment in 2013 was not an interference with the protection of property under ECHR P1-1, and the Ministry had not failed to provide guidance or acted in conflict with good administrative practice.

(28) CapeOmega, Solveig, Silex and Infragas have appealed to the Supreme Court against the court of appeal's application of the law. It has not been contended before the Supreme Court that the state was contractually bound by the tariffs during the licence period or that the state is liable due to its failure to provide guidance or to act in accordance with good administrative practice. The appeal against the application of the law only concerns the issue whether the amendment went beyond the scope of its legal basis and whether it interfered with the protection of ownership under ECHR P1-1. Thus, the case remains the same before the Supreme Court as before the lower courts.

(29) The appellants – *CapeOmega AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS* – contend the following:

(30) *The legal basis issue*

(31) The amendment of the Tariff Regulations entails an adjustment of already established tariffs in Gassled, which can only be made in accordance with section 4-8 subsection 2 of the Petroleum Act. No legal basis exists for the court of appeal's construction of a two-track system, where adjustments of tariffs stipulated for gas pipelines outside Gassled are regulated by section 4-8 subsection 2 of the Petroleum Act, while adjustments of tariffs stipulated for Gassled are regulated by section 4-8 subsection 1 of the Petroleum Act.

(32) As set out in section 4-8 subsection 2 of the Petroleum Act, the Ministry may "stipulate tariffs and other conditions or subsequently alter the conditions that have been agreed, approved or stipulated, to ensure that projects are completed with due regard to concerns relating to resource management and that the owner of the facility is provided with a reasonable profit taking into account, among other things, investments and risks". The provision is worded in general terms covering all existing conditions, including tariffs, irrespective of the form in which they have been given. Section 4-8 subsection 2 of the Petroleum Act is the undeniable legal basis and *lex specialis* before other possible bases for amendment.

(33) The amendment of the Tariff Regulations must be regarded as an individual decision relating to the rights or duties of the owners, see section 2 subsection 1 b of the Public Administration Act. The owners constitute a limited and identifiable group that is

severely affected. This means that a clear legal basis is required, and adjustments can only be made within the scope of section 4-8 subsection 2.

(34) The tariffs were stipulated in the Tariff Regulations simultaneously with the establishment of Gassled, and they were assumed to apply throughout the licence period unless specific resource-management concerns suggested otherwise. This is set out in the preparatory works on the amendment of the Petroleum Regulations and the Tariff Regulations. Moreover, the tariffs were once stipulated by the Gassled owners and accepted by the Ministry without further intervention. The stipulation was based on a valuation of Gassled under the assumption that the tariffs would remain unchanged throughout the licence period. This is confirmed by section 4 i) of the Tariff Regulations deciding a gradual reduction of the capital element towards 2011, thus duly considering the need for a tariff reduction over time.

(35) Hence, the tariffs were stipulated *ex ante* in 2003, without the assumption that they would be adjusted if increased volumes gave a real return exceeding around 7 percent. The tariffs could thus not be reduced in 2013 exclusively based on the Ministry's conclusion that the prospective return had been obtained faster than expected.

(36) A tariff adjustment under section 4-8 subsection 2 of the Petroleum Act requires that it "ensure[s] that projects are completed with due regard to concerns relating to resource management". The effect of an adjustment in terms of resource management must thus be specifically assessed. No such assessment was made prior to the tariff adjustments in 2013, and there is currently no basis for arguing that specific projects have benefited from the tariff adjustments. The fact that low tariffs are generally profitable to the petroleum industry and may in principle facilitate increased exploitation of resources is not sufficient. When the amendment is made entirely generic, instead of being tuned to fit specific projects, it appears more as a subsidy to established fields that in any case would have been thoroughly exploited. The effect on the resource management is, at best, marginal.

(37) Section 4-8 subsection 2 of the Petroleum Act also requires that "the owner of the facility is provided with a reasonable profit taking into account, among other things, investments and risks". The "reasonable profit" requirement relates to the situation of any owner at any given time, including a new owner approved by the Ministry under section 10-12 of the Petroleum Act. Alternatively, the same is set out in section 63 subsection 4 of the Petroleum Regulations. The Ministry should therefore have assessed whether the tariff adjustment was consistent with the statutory requirement of "reasonable profit" for the owner in the light of the transfer that had taken place and the effect of the transition from a balanced to a non-balanced ownership.

(38) *ECHR P1-1*

(39) The tariff adjustments are an interference with the protection of property under ECHR P1-1. The provision comprises any interference with ownership rights to existing property, including the right to a return on the possession in question. The joint venture Gassled's ownership rights to the gas pipeline network include a Convention right to receive the return this system might yield and consideration for a third party's use. The Gassled owners have a duty to contract and may not demand higher tariffs than those stipulated in the Tariff Regulations.

(40) As it appears from extensive case law from the European Court of Human Rights (ECtHR), various forms of price control are regarded as interference. This applies regardless of whether adjustments have been implemented before or after the relevant acquisition of the property or the right. The value of Gassled ownership interests corresponds to the current value of future shipper agreements. The amendment constitutes stricter government price control reducing the future cash flow and, with that, the value of the Gassled ownership interests.

(41) The tariff adjustments in 2013 were thus an interference with the protection of property under P1-1. This must, to be legitimate, meet the Convention's requirements of a legal basis in national law, of a legitimate purpose, of a predictable application of the law and of proportionality. The tariff adjustments may have had a legitimate purpose, but they do not fulfil the other conditions that justify the interference.

(42) The requirement of predictability entails not only an abstract assessment of the level of accuracy in the relevant legal basis, but there must also be a genuine possibility to predict the specific interference. According to the ECtHR, the national legal bases must be "foreseeable in their application". The appellants acquired their Gassled ownership interests in the belief that the tariffs would remain stable throughout the licence period. Nowhere is it stated that the Ministry had a right to reduce the capital element from the moment the investment value of Gassled had been earned, and there is no clear definition of "prospective return". No system was made for measuring of the current return in Gassled against the investment value. The owners had thus no realistic chance of predicting if or when the tariffs would be adjusted, or how large any such adjustments would be.

(43) Moreover, the tariff adjustments were disproportionate, as they subjected the Gassled owners to an individual and disproportionate burden. The adjustments involved a transfer of substantial values from the Gassled owners to the shippers, including Statoil with the state as its majority shareholder. Since the appellants are the only Gassled owners with no shipper interests, they incur a substantial loss from the tariff reduction instead of enjoying the benefits. The appellants as a group are in fact bearing the entire burden of the tariff adjustments. The Ministry of Petroleum and Energy knew already when approving the transfers that an adjustment of the capital element in the tariff would affect the new owners severely. Yet, the Ministry did not adequately analyse the need for adjustment and the effect such adjustment would have on the appellants. The appellants' unique position as owners without shipper interests was deemed irrelevant. The state's conduct and the nature of the interference suggest that the appellants have been subjected to a burden that cannot be justified in the light of any demonstrated effect in terms of resource management.

(44) In connection with its approval of the transfer of the Gassled ownership interests in 2010-2011, the Ministry should have informed the parties of its interpretation of the rules and of the prospects of tariff adjustments. The Ministry knew that the return in Gassled was approaching the investment value. The Ministry also knew that the parties acquired their Gassled ownership interests in the belief that the tariffs would remain stable throughout the licence period. It was thus contrary to "good governance" when the Ministry started working on the tariffs shortly after having approved the acquisition, without first informing the new owners of its view on the risk of adjustment.

(45) The appellants have submitted this prayer for relief:

"1. Regulations 26 June 2013 no. 792 on the amendment of Regulations 20 December 2002 no. 1724 on the stipulation of tariffs etc. for certain facilities are to be declared invalid.

2. The state represented by the Ministry of Petroleum and Energy is to be held liable for the loss incurred by Solveig Gas Norway AS, Silex Gas Norway AS, Infragas Norge AS and CapeOmega AS as a result of Regulations 26 June 2013 no. 792 on the amendment of Regulations 20 December 2002 no. 1724 on the stipulation of tariffs etc. for certain facilities being declared invalid.

3. Solveig Gas Norway AS, Silex Gas Norway AS, Infragas Norge AS and CapeOmega AS are to be awarded costs before the district court, the court of appeal and the Supreme Court."

(46) The respondent – *the state represented by the Ministry of Petroleum and Energy* – contends the following:

(47) *The legal basis issue*

(48) The Tariff Regulations have their legal basis in section 4-8 subsection 1 of the Petroleum Act, not subsection 2. The amendment in 2013 has its legal basis in the same provision as the Regulations it amends.

(49) It follows from the substantive contents of chapter 9 of the Petroleum Regulations and from the Tariff Regulations that the capital element in the tariffs could be reduced when the prospective return in Gassled had been earned. The amendment of the Regulations was in accordance with the guidelines in section 63 subsection 4 of the Petroleum Regulations as it both considered the requirement of reasonable return and secured optimum resource management.

(50) The principle of regulating tariffs based on return derives from the system when considered in context. Before the establishment of Gassled in 2003, each shipper agreement had to be approved by the Ministry of Petroleum and Energy. The Ministry thus controlled the maximum allowed return through each approval. Some agreements also included separate rules on tariff adjustment in the event of volumes higher than estimated.

(51) The establishment of Gassled and the Tariff Regulations did not entail that the Ministry of Petroleum and Energy renounced its function as a regulator. Such a renouncement would have implied a material change in Norwegian petroleum policy, and it would have had to be presented to the Storting (Norwegian parliament). It is unlikely that the Ministry, without further discussions in the preparatory works, would renounce its right to adjust the tariffs throughout the licence period, i.e. for a period of 26 years. Such a change would also be contrary to the state's exclusive right to manage the resources under section 1-1 of the Petroleum Act.

(52) Under the Tariff Regulations, the individual shipper agreements were no longer subject to the Ministry's approval. When, nevertheless, the Ministry's duty to act as regulator was to be continued also towards Gassled, this duty had to be exercised by amendments to the Tariff Regulations themselves.

(53) Section 4-8 subsection 2 of the Petroleum Act only concerns changes of terms in individual shipper agreements, not the stipulation of new tariffs that will only affect

future agreements. The amendment of the Tariff Regulations involves no such changes, but is rather a general adjustment of the tariffs that will affect future agreements only.

(54) Alternatively, should the Supreme Court find that the correct legal basis for the amendment is section 4-8 subsection 2 of the Petroleum Act, it is not a question of an *adjustment*, but of a *stipulation* of future tariffs. Moreover, the conditions for adjustment are met, since section 4-8 subsection 2 of the Petroleum Act contains the same conditions as section 63 subsection 4 of the Petroleum Regulations.

(55) *ECHR P1-1*

(56) The amendment of the Regulations does not interfere with the appellants' protection of property under ECHR P1-1.

(57) As correctly assumed by the court of appeal, whether or not interference has occurred at all must be determined in the light of the nature of the possession. The state owns the petroleum resources. All activities by private parties are subject to Ministry's approval, including installation and operation of gas transport facilities. The ownership right is positively limited, as the ownership right under the licences is to receive a "reasonable return" on invested capital. It follows from the original approvals that this constitutes a real return of around 7 percent before tax on the invested capital. With the amendment in 2013, the tariffs were adjusted so that the aggregate return corresponds to what follows from the licences, the set of rules and the prospective return.

(58) The establishment of Gassled and the stipulation of the tariffs in 2003 were not based on any assumption of fixed tariffs or on a fixed capital element. The appellants had no legitimate expectation that the tariffs would remain unchanged throughout the entire licence period, i.e. until the end of 2028. The risk of changes was also considered by the appellants during the purchase processes, and the risk of adjustments was explicitly mentioned by the Ministry when approving the transfers.

(59) Should the Supreme Court find that the tariff adjustments are to be regarded as an interference with the protection of property under ECHR P1-1, such interference is legitimate.

(60) The assessment of proportionality must be based on the actual area in which one operates, and the applicable regulatory framework. The Gassled tariffs are stipulated with the main purpose of securing optimum exploitation of Norwegian petroleum resources. The tariff adjustments had no retroactive effect. They were not arbitrary, but in accordance with what the parties could reasonably expect. The parties took a risk when investing in Gassled; they were familiar with the state's established policy that the profit from petroleum activities was to be earned from the fields. They also knew that the Ministry was free to adjust the tariffs, and that the aim was a real return of around 7 percent of the invested capital – which has in fact been obtained for the aggregate investments in Gassled.

(61) It cannot be so that the state ought to have made accurate analyses of the effects on the appellants. The Ministry was not familiar with the commercial assessments forming the basis for the appellants' investments or with the return they expected to obtain when acquiring their ownership interests in Gassled in 2010-2011.

(62) The state represented by the Ministry of Petroleum and Energy has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. The state represented by the Ministry of Petroleum and Energy is to be awarded costs in the Supreme Court."**

(63) *I have concluded* that the appeal must be dismissed.

(64) The appellants contend before the Supreme Court that the amendment of the Tariff Regulations in 2013 went beyond the scope of its legal basis in the Petroleum Act and the Petroleum Regulations. In their view, the tariff reduction is in any case an interference with their right to enjoy their possessions, see ECHR P1-1. In both cases, the amendment is invalid.

(65) *The legal basis issue*

(66) When presenting my view on this issue, I will concentrate on three topics: First, I will examine the basis for stipulating the capital element in the original tariffs applicable for Gassled from 2003. Next, I will consider the legal basis for the amendment in 2013, before considering whether the adjustment of the capital element in 2013 went beyond the scope of this legal basis.

(67) *The stipulation of the tariffs from 2003*

(68) The Tariff Regulations regulate the calculation of the consideration to be paid by third parties for transport of gas in Gassled, based on individual tariffs per volume of gas. The formula itself and the fixed values included therein are dealt with in section 4. The case at hand concerns the provision's item i), which states – in cent [*øre*] per standard cubic meter of gas – the *fixed part of the capital element* in the formula, abbreviated to K.

(69) According to the Tariff Regulations' preamble, they were adopted "with a legal basis in section 10-18 subsection 1 and section 4-8 of Act 29 November 1996 no. 72 relating to petroleum activities and section 70 of Regulations 27 June 1997 no. 653 to Act relating to petroleum activities". Section 10-18 of the Petroleum Act gives the King a general regulatory competence within the scope of the Petroleum Act. Section 4-8 of the Petroleum Act is headed "Use of facilities by others". When the Tariff Regulations were adopted in 2002, section 4-8 read as follows:

> **"The Ministry may decide that facilities comprised by sections 4-2 and 4-3, and which are owned or used by a licensee, may be used by others, if so warranted by considerations for efficient operation or for the benefit of society, and the Ministry deems that such use would not constitute any unreasonable detriment of the licensee's own requirements or those of someone who has already been assured the right of use. Nevertheless, natural gas undertakings and eligible customers domiciled in an EEA State shall have a right of access to upstream pipeline networks, including facilities supplying technical services incidental to such access. The Ministry stipulates further rules in the form of regulations and may impose conditions and issue orders relating to such access in the individual case.**
>
> **Any agreement on the use of facilities comprised by sections 4-2 and 4-3 shall be submitted to the Ministry for approval unless otherwise decided by the Ministry. The Ministry may on approving an agreement according to the first sentence, or in the event that no such agreement is reached within a reasonable period of time, as well as in the**

> **case of an order according to subsection 1, stipulate tariffs and other conditions or subsequently alter the conditions that have been agreed, approved or stipulated, to ensure that projects are completed with due regard to concerns relating to resource management and that the owner of the facility is provided with a reasonable profit taking into account, among other things, investments and risks."**

(70) Section 4-8 *subsection 1 second sentence* on the right of access to upstream pipeline networks for natural gas undertakings and eligible customers domiciled in an EEA State, was added to the Act in 2002 to ensure the implementation of Article 23 of the EU's Gas Market Directive on third parties' right of access to upstream gas pipeline networks, see Proposition No. 81 (2001–2002) to the Odelsting, page 3–4. At the same time, the Ministry was authorised to stipulate "further rules in the form of regulations" and to "impose conditions and issue orders relating to such access in the individual case", as set out in section 4-8 *subsection 1 third sentence*. As set out in the preparatory works, the amendment was "of a technical nature", which would be "of no material significance to applicable Norwegian petroleum policy", see Proposition No. 81 (2001–2002) to the Odelsting, page 4.

(71) The statement of the legal basis for the Tariff Regulations refers to section 4-8 without specifying whether it concerns subsection 1 or 2. Since only subsection 1 contains an express legal basis for the Regulations, and since this legal basis concerns such upstream gas pipeline networks as are regulated in the Tariff Regulations, I find it clear that the legal basis for adopting the Tariff Regulations in 2002 was section 4-8 *subsection 1 third sentence*.

(72) Section 4-8 subsection 1 third sentence of the Petroleum Act, together with section 10-18 subsection 1, also forms the legal basis for chapter 9 of the Petroleum Regulations headed "Access to upstream gas pipeline networks" and adopted by royal decree on 20 December 2002. Section 70 of the Petroleum Regulations, included in the new chapter 9, authorises the Ministry to provide further rules on the access to upstream gas pipeline networks comprised by chapter 9. The fact that section 70 itself, which forms part of the legal basis for the Tariff Regulations, has its legal basis in section 4-8 subsection 1 third sentence of the Petroleum Act, confirms that the Tariff Regulations are not based on section 4-8 subsection 2, but on subsection 1 third sentence.

(73) Chapter 9 of the Petroleum Regulations regulates, in section 63, the stipulation of tariffs for the primary market, which formed the basis for the stipulation of the original Gassled tariffs from 2003. The provision's subsections 1-4 read, and still read, as follows:

> **"Tariffs by agreement in the primary market shall be in accordance with the provisions made in and in accordance with this chapter.**
>
> **Tariffs shall be paid for the user's right to the capacity in upstream gas pipeline networks regardless of whether this capacity is actually exploited.**
>
> **The tariff consists of a capital element and an operating element.**
>
> **The capital element is stipulated by the Ministry. In that regard, the Ministry shall ensure that optimum resource management is considered. The capital element shall also be stipulated so that the owner may expect a reasonable return on invested capital. Other particular concerns may also be taken into account."**

(74) I emphasise section 63 *subsection 4*, concerning the capital element. When stipulating the tariffs, as the wording instructs, optimum resource management must be considered. At

the same time, the capital element must be stipulated so that "the owner may expect a reasonable return on invested capital". "Other particular concerns" may also be taken into account.

(75) The principles for stipulation of tariffs in section 63 subsection 4 of the Petroleum Regulations must be read in the light of the established assumption already when the Tariff Regulations were adopted in 2002 that the tariffs were to be *based on return*. This implied that the owners during the licence period, as a starting point, were to earn back their invested capital in addition to receiving a reasonable return, but not more. This was originally outlined in Report No. 46 (1986–1987) to the Storting, page 67:

> **"Transport must in principle been seen as a means. A transport system is to ensure that gas is transported to the market from fields considered worthy of developing for socio-economically reasons.**
>
> **The size of the transport tariffs may influence many different aspects of the petroleum activities:**
>
> **a) the profitability of developing marginal fields;**
> **b) the utilisation of the final reserves in producing fields;**
> **c) the coordination of different field developments and swap arrangements for deliveries between fields;**
> **d) the distribution of the profit between the transport systems and the different fields; and**
> **e) investments in the transport systems.**
>
> **The transport structure should create as little distortion as possible in relation to what is optimally profitable from a socio-economic perspective. It should not prevent fields from being developed if they are socio-economically profitable, but nor should it subsidise a development.**
>
> **Excessive tariffs will lead to a premature stoppage of production on a field. It will be profitable for society to recover a larger part of the final reserves than what commercial criteria would dictate if tariffs were too high.'**

(76) I also refer to Proposition No. 85 (1987–1988) to the Storting, page 15, on the development and operation of the pipeline network *Zeepipe*, which sets out that the Ministry stipulated the return to "a maximum of 7 percent before tax". And in Recommendation No. 301 (1987–1988) to the Storting, page 2, it is set out that the return in Zeepipe was estimated to "a maximum of 7 percent before tax" based on "the concept that the companies' profit from the petroleum activities should be earned from the fields and not from the transport systems". It is undisputed that this concerned *a real return*.

(77) The principles from Zeepipe were also applied in connection with subsequent licences for establishment of other systems. The tariff regulation mechanisms varied if the shipped volumes were higher than estimated. For some systems, it had been decided that the tariffs should be materially reduced if the transported volumes exceeded the estimates on which the tariffs were based. For other systems, it had been decided that the tariffs should be recalculated if the volumes exceeded the estimates. The Ministry would also consider the prospective return in connection with its approval of new shipper agreements. Hence, as written on page 75 of the court of appeal's judgment, it was "a common feature of all the systems from and including Zeepipe that the total return throughout the licence period would be around 7 percent before tax, or slightly higher".

(78) In other words, the tariff regime for gas pipelines and associated installations before Gassled was established was based on a general system involving return regulated based on the assumption that profits were mainly to be earned from the fields, not through infrastructure ownership. Proposition No. 36 (2000-2001) to the Storting on the partial privatisation of Statoil, says the following on page 98:

> **"The economies of scale that result from transporting gas by pipeline are so great that it constitutes a natural monopoly. Natural monopolies cannot be permitted to exploit their strong position towards the users, but they are operated with a view to a regulated return on the capital invested.**
>
> **The return on the pipelines are therefore regulated by the authorities. Tariffs in newer pipelines are stipulated on the basis of required a real return on the total capital of around 7 percent before tax, with a possibility of minor additional revenues to stimulate increased exploitation and cost-effective operation."**

(79) It is indisputable that this system was continued under the Tariff Regulations 2002, and so that the starting point was still a real return throughout the licence period of around 7 percent before tax, in line with the stipulation of tariffs in Zeepipe. I refer to the following passages in section 3 of the royal decree dated 18 December 2002 relating to the amendment of the Petroleum Regulations:

> **"The cost structure in gas transport is characterised by large establishment costs and low operating costs. The development of pipelines is capital-intensive. The economies of scale that result from transporting gas by pipeline are so great that it constitutes a natural monopoly. Natural monopolies cannot be permitted to exploit their strong position towards the users, but they are operated with a view to a regulated return on the capital invested. The return on the pipelines is therefore regulated by the authorities. Tariffs in newer pipelines are stipulated on the basis of a required a real return on the total capital of about 7 percent before tax, with a possibility of minor additional revenues to stimulate increased utilisation and cost-effective operation.**
>
> **The transport system for natural gas shall contribute to good resource management. It must arrange for optimum exploration of natural gas resources through safe and efficient supply of natural gas from the Norwegian shelf at the lowest possible costs. At the same time, the industry must have incentives to make the right additional investments in the transport system.**
>
> **The gas transport system must appear neutral compared to players who need to transport natural gas. Natural gas undertakings and eligible customers shall have a right of access on non-discriminating, objective and transparent terms. Emphasis is placed on simplicity and clarity in order to reduce administration and transaction costs.**
>
> **The new chapter in the Petroleum Regulations sets out the main principles for the new access regime. The principles on which the rights of use are based will apply to all upstream pipeline networks and facilities for the processing of natural gas on the Norwegian continental shelf, as well as the landing terminals. For the part of the transport system included in the new, uniform ownership structure, Gassled, the plan is to regulate the tariffs in a separate regulation. The current principles for stipulating tariffs that give the owners a reasonable return while also preventing additional profits from being taken from the pipelines will continue to apply. The Ministry can issue supplementary provisions in regulations adopted by the Ministry or in the form of individual decisions."**

(80) As the final subsection sets out, the general aim was to continue stipulating the tariffs based on return. As for Gassled in particular, the royal decree says the following in section 5:

> **"The uniform gas transport system, Gassled, is used by parties other than its owners. It is therefore important that the Ministry stipulate the tariffs for this part of the gas activities to ensure that users have access on equal terms. The tariff payments will go to the owners of Gassled via Gassco, and will be consistent with the Ministry's previously stipulated permitted total return on the investments in the pipeline system. The Ministry will stipulate tariffs for Gassled in a separate regulation. It will be up to the Ministry to decide whether tariffs should be stipulated in other existing pipelines that are not comprised by Gassled, and for any pipelines, processing facilities and transport installations associated with Gassled."**

(81) I highlight the Ministry's statement that the tariffs, as they were stipulated in connection with the establishment of Gassled, correspond with the Ministry's *previously stipulated, permitted total return* on the investments in the pipeline system. The statement confirms the Ministry's intention to continue adjusting the tariffs based on return.

(82) The Ministry's statement that the tariffs corresponded with the previously stipulated, permitted total return is also sustained by the correlation between the tariffs and the valuation of Gassled when established in 2003. This is referred to in section 3.3 of the Ministry' explanation for amending the Tariff Regulations in 2013:

> **"The gas transport systems that were incorporated into Gassled upon its establishment (the original transport systems) are Norpipe, Vesterled, Statpipe, Zeepipe, Franpipe, Europipe II, Åsgard Transport and Oseberg Gas Transport. Each company was given an ownership interest in the new joint venture. The ownership interests were based on each partner receiving an expected cash flow with a net present value corresponding to what they could have expected as partners in the original systems if Gassled had not been established. On this basis, the value of the individual systems was calculated as a discounted cash flow based on the tariffs originally stipulated for each of the systems and expected future gas volumes. These values then made the basis for the terms of trade and the ownership interests in Gassled.**
>
> **The tariff level in most of the original systems was stipulated to provide the owners with a real return on the total capital of around 7 percent before tax. A higher return was stipulated in the case of Statpipe, for which approval was granted before the 7 percent rate became administrative practice. The cash flow the owners could expect from these systems was thus determined by a tariff based on return assumed in the original approvals. The use of this cash flow when calculating the exchange values in connection with the establishment of Gassled was thus based on the prospective return on the historical investments. These values were incorporated into the agreement by which Gassled was established and reflected in the capital tariffs stipulated in the Tariff Regulations 2002."**

(83) Yet, the appellants have submitted that the system of adjusting the tariffs once the prospective return had been obtained was abandoned with the establishment of Gassled, and that the individual subsystem at the time was valued based on the belief that the tariff for this subsystem would remain unchanged throughout the licence period. I do not share this view, as it would have implied that the individual ownership interests in Gassled did not reflect the relative values between the ownership interests prior to the establishment. The fact that it was assumed in the valuation of the individual subsystem in 2002 that the tariff would be reduced when the prospective return had been obtained, is also demonstrated by the coherence between the method used in the subsequent tariff reduction and the alternative approach, which was to expect a real return of around 7 percent on the investment value when Gassled was established in 2003. The two different approaches give in principle the same result in terms of when the prospective return would be obtained with the volumes agreed. That could not have been the case if, when Gassled was established, it had not also been considered that the tariffs for each

subsystem would be reduced when the prospective return for each system had been obtained.

(84) I will summarise what I have said under this section in three points: The Tariff Regulations were adopted with a legal basis in section 10-18 subsection 1 and section 4-8 subsection 1 third sentence of the Petroleum Act and section 70 of the Petroleum Regulations. The capital element was fixed in accordance with section 63 subsection 4 of the Petroleum Regulations. The aim was to continue, with Gassled, the established goal of a real return of around 7 percent on invested capital.

(85) *The legal basis for adjusting the tariffs in 2013*

(86) The Tariff Regulations themselves do not contain any mechanism for tariff adjustment in the event of changed premises, for instance if the shipped volume should exceed the prospective volume. The capital element is thus fixed, in the sense that any adjustment will have to take place by amending the very Regulations within the scope of their legal basis, i.e. section 4-8 subsection 1 third sentence and section 10-18 subsection 1 of the Petroleum Act, and chapter 9 of the Petroleum Regulations, primarily section 70, cf. section 63.

(87) The question now is whether, beyond the scope in the original legal basis, *special limits* apply to the right to adjust the capital element in the Tariff Regulations as the Ministry of Petroleum and Energy did in 2013. Here, it must be noted that the amendment of the Regulations only concerns *future* agreements entered into after 1 July 2013 on shipment after 1 October 2016. It does not interfere with agreements already entered into, or agreements entered into on shipment after 1 October 2016.

(88) I find it clear, based on prior events and the implementation of the tariff regime under Gassled, that the assumption was that the tariffs could be adjusted based on return. In the opposite case, the establishment of Gassled would in fact represent a fundamental regulatory change, with a capital element that stayed the same even if increased shipment volumes gave a higher return during the licence period than the prospective return of around 7 percent. Nowhere is it stated that one assumed, or even expected, such a system shift. The Tariff Regulations 2002 can thus not be interpreted as giving the companies a right to demand the same tariffs throughout the entire licence period. And it has been clarified by the court of appeal's judgment, which has not been appealed on this point, that the state was also under no contractual obligation to keep the tariffs unchanged.

(89) The appellants contend before the Supreme Court that the capital element can only be adjusted under section 4-8 *subsection 2* of the Petroleum Act, and that the provision's conditions for adjustment are not met. When the Tariff Regulations were amended in 2013, section 4-8 subsection 2 read as follows:

> **"Any agreement on the use of facilities comprised by sections 4-2 and 4-3 shall be submitted to the Ministry for approval unless otherwise decided by the Ministry. The Ministry may on approving an agreement according to the first sentence, or in the event that no such agreement is reached within a reasonable period of time, as well as in the case of an order according to subsection 1, stipulate tariffs and other conditions or subsequently alter the conditions that have been agreed, approved or stipulated, to ensure that implementation of projects is carried out with due regard to concerns relating to resource management and that the owner of the facility is provided with a reasonable profit taking into account, among other things, investments and risks."**

(90) The appellants have held that section 4-8 subsection 2 contains an express and well-founded provision regulating the right to adjust, and that any adjustment of the tariffs beyond the legal basis in section 4-8 subsection 2 is a violation of the legitimacy requirement and the protection of property implicit in the conditions for adjustment under subsection 2. The appellants find it significant that Gassled was established as a "negotiated licence", as a "package", and that the Tariff Regulations were individually designed for the Gassled owners.

(91) My disagreement with the appellants' submission that section 4-8 subsection 2 of the Petroleum Act is the only legal basis for amending the Regulations, is primarily due to the following:

(92) Section 4-8 subsection 2 concerns, according to a direct linguistic interpretation of its wording, adjustment of agreed tariffs, tariffs in approved individual agreements and tariffs stipulated through orders in individual cases, i.e. tariffs that are already in use under a shipper agreement. Section 4-8 subsection 2 does not address, according to its wording, adjustment of *generally stipulated* tariffs for *future* agreements. While section 4-8 subsection 1 concerns the authority to stipulate general tariffs in the future, subsection 2 concerns the right to *adjust* tariffs with effect for shipper agreements already entered into. This is likely to include adjustments with effect for individual agreements entered into under the Tariff Regulations on standard terms and conditions, even if the adjustment is in the form of regulations.

(93) The prior events and background of the provision support the understanding of the relationship between section 4-8 subsections 1 and 2 that I consider the more likely based on the wording. I emphasise in particular the new regime established with Gassled for third parties' access to upstream gas pipeline systems, where the individual transport agreements were no longer subject to the approval of the Ministry of Petroleum and Energy under section 4-8 subsection 2. New shipper agreements were to be entered into in accordance with an approved standard agreement for transport of gas in Gassled, based on applicable tariffs under the Tariff Regulations, cf. section 65 of the Petroleum Regulations.

(94) The passage in section 4-8 subsection 2 that the Ministry may "alter the conditions that have been agreed, approved or stipulated" was first included in the Petroleum Act six months after the establishment of Gassled, see Act of 27 June 2003 no. 68. The preparatory works to this amendment confirm that the legislature did not intend to further restrict the Ministry's right to adjust the general tariffs stipulated with a legal basis in section 4-8 subsection 1 third sentence. The background is set out in Proposition No. 46 (2002–2003) to the Odelsting, page 15:

> **"As mentioned, agreements [on the use of facilities by third parties] are normally entered into for a long period of time. Circumstances can therefore arise that entail a significant change in the situation that prevailed when the conditions were approved or stipulated. This can result in previous agreements and approved or stipulated conditions having unintended and disadvantageous economic effects.**
>
> **This was the case for the Ula field. A drastic fall in oil prices meant that a substantial proportion of the revenues from the production was spent on covering the tariffs for transport to shore. The negotiations between the licensees involved did not lead to an adjustment of the tariffs. The result was that it was considered whether to shut down production earlier than planned. In such case, resources that it would be profitable to recover from a socio-economic perspective would be lost.**

> **The Ministry considered it clear that the tariff level was an obstacle to responsible exploitation of the resources in the Ula field. Responsible exploitation indicated significantly reducing the transport tariff. The Ministry believed that such a reduction could be carried out without the pipeline owner being denied reasonable return in the future.**
>
> **On this basis, the Ministry made a decision to reduce the tariff …**
>
> **The Ministry now sees a need to clarify the right to intervene if previously stipulated tariffs and conditions constitute an unreasonable obstacle to the implementation of otherwise socio-economically profitable projects. It is therefore proposed that it be specified in the Act that the Ministry can adjust already approved or stipulated tariffs and other terms and conditions for the use of facilities covered by section 4-2 and section 4-3. It is a condition, however, that this legal authority only be used to ensure that socio-economically profitable projects are implemented or initiated, while also ensuring that the owner of the infrastructure in question is ensured a reasonable profit based on its overall investments and previous revenues…**
>
> **This right of reversal will be a result of the state's general right and duty to regulate commercial activities. [...] Normally, it will also be possible for already established conditions for the use of facilities by others to be reversed pursuant to the right to reverse administrative decisions that follows from general principles of administrative law and non-statutory principles of administrative law relating to reversal. The Ministry thus finds that it will not be in contravention of Article 97 of the Norwegian Constitution to apply the law in relation to tariffs and conditions already approved or stipulated by the Ministry. It is therefore proposed that the new provision also apply in relation to tariffs and conditions that have been approved or stipulated before the amendment enters into force."**

(95) Hence, the amendment of 2003 was based on the Ula experiences, and the Ministry had found it necessary to interfere with effect for shipper agreements already entered into. Nothing in these preparatory works suggests that the legislature intended, with the adding of section 4-8 subsection 2, also to regulate the Ministry's authority to amend the Tariff Regulations. The fact that the adjustment provision in section 4-8 subsection 2 relates to interference with shipper agreements already entered into, and not general tariffs for future shipper agreements, also seems to be assumed in Proposition No. 48 (2008–2009) to the Odelsting, page 3–4.

(96) The appellants have submitted in the alternative that there is both an "order" under section 4-8 subsection 1 and an "approval of agreement" under subsection 2, both through the Ministry's approval of the very Gassled establishment with effect from 2003. In that case, that would constitute independent bases for applying section 4-8 subsection 2. Already from my expressed understanding of the provision, its background, assumptions and system, it is clear that I cannot endorse this.

(97) Against this background, I conclude that the Ministry was entitled to amend the Tariff Regulations within the scope of their original legal basis, i.e. section 10-18 subsection 1 and section 4-8 subsection 1 third sentence of the Petroleum Act and section 70 of the Petroleum Regulations. Section 4-8 subsection 2 did not set any independent limits of significance to the right to make the relevant adjustments.

(98) *Is the amendment in 2013 in accordance with section 63 of the Petroleum Regulations?*

(99) As it appears from the linkage I have previously described between section 4-8 subsection 1 third sentence of the Petroleum Act and chapter 9 of the Petroleum Regulations, that

any adjustment of the capital element in the Tariff Regulations must be in accordance with the guidelines in section 63 subsection 4 of the Petroleum Regulations. The Ministry *must* "ensure that optimum resource management is considered" and the capital element *must* be stipulated so that the owners may expect "reasonable return on invested capital". "Other particular concerns" *may* also be taken into account.

(100) In its thorough explanation for the amendment provided on 26 June 2013, the Ministry of Petroleum and Energy stated the following regarding the basis for the amendment:

> **"3.2 Regarding resource management considerations**
>
> **The tariff regime for gas infrastructure on the Norwegian continental shelf was designed out of resource management concerns. An important principle in the resource management is that as much as possible of the profit is earned from the fields and not from the infrastructure. The decision to stipulate new tariffs in Gassled is a concrete follow-up of this.**
>
> **Good resource management through low tariffs has been an important framework condition for the development and use of Norwegian gas infrastructure. This was established already in Report No. 46 (1986–87) to the Storting in which it was also emphasised that transport must be seen as a means and not an objective in resource management, and that the infrastructure should therefore give rise to as little conflict as possible between socio-economic and commercial profit. These concerns have been essential to the development and use of the gas transport system. This was stressed in the preparatory works to the Petroleum Act and has been repeated in a number of subsequent reports and propositions to the Storting.**
>
> **Low tariffs reflect the low socio-economic cost of transportation and processing in Gassled, and the stipulation of new, lower tariffs will thus lead to greater concurrence between commercial and socio-economic considerations. This will facilitate good resource management.**
>
> **The tariff level in Gassled is relevant to all decisions that may affect gas production from fields that are, and discoveries that may be, connected to Gassled. This applies to both gas fields and oil fields containing gas, and is relevant to decisions in all phases of the petroleum activities: exploration, development, operation and tail-end production. New, lower tariffs will reduce costs and contribute to the recovery of a higher proportion of the petroleum resources.**
>
> **Developments on the Norwegian continental shelf indicate that the Gassled tariffs will become increasingly important in our resource management. A major part of the resources that are least costly to recover has already been recovered. In new areas further north on the continental shelf, the distance to the market is greater and, seen in isolation, the costs of transportation will therefore be higher. Lower tariffs in Gassled thus become even more important for good resource management.**
>
> **It is important in relation to resource management that the regulation also provides incentives for the development of infrastructure. It is therefore a main concern for the authorities to balance the need for low tariffs with the need to have a tariff level that provides incentives for new investments in infrastructure. When the owners, on the basis of signed transport agreements, achieve the assumed return on historical investments, general resource management considerations indicate that new, lower tariffs will be stipulated for new transport agreements.**
>
> **3.3 More on the achieved return**
>
> **Gassled currently consists of the gas transport systems that were incorporated into Gassled upon its establishment on 1 January 2003, and the transport systems that have been incorporated into Gassled after that date.**

…

Gassco's calculations show that, based on the transport agreements entered into, the present value of tariff revenues from the capital element for the original transport systems during the period 2003–2028 will exceed the values in the establishment agreement. Hence, the original transport systems will yield the return assumed in the licences.

The following systems have been incorporated into Gassled since its establishment in 2003: Kollsnes, the facilities for CO2 removal at Kårstø, the Langeled transport system, the Tampen Link, the Kvitebjørn gas pipeline, the Norne gas pipeline, Etanor and the Gjøa gas pipeline.

...

On the basis of transport agreements entered into, the return on the investments in the Langeled system will be in accordance with the principles for a a real return on the total capital of 7 percent before tax. For area F (the Tampen Link), area G (the Kvitebjørn gas pipeline), area H (the Norne gas pipeline) and area I (the Gjøa gas pipeline), a real return of 7 percent before tax will not be achieved on the basis of transport agreements entered into.

To sum up, investments in the systems that currently make up areas A–E in Gassled, including the Langeled system, will yield the prospective return based on transport agreements entered into. Based on transport agreements entered into, areas F–I will yield a real return of less than 7 percent.

As explained in the consultation memo, based on transport agreements entered into, the a real return that will be achieved in all Gassled areas, from investments started in Norpipe until 2028, are estimated to 10.5 percent before tax. For all areas for which new, reduced tariffs have been stipulated, it is estimated that the a real return on historical investments will be at least 7 percent by 2028.

3.4 Regarding the stipulation of new tariffs

Low tariffs reflect the low socio-economic cost of transport and processing in Gassled. The stipulation of new, reduced tariffs thus facilitates good resource management. As described in section 3.3, with the exception of certain tariff areas, the return on facilities in Gassled based on transport agreements entered into will exceed what was assumed when the respective capital tariffs were stipulated. A significantly reduced capital element can therefore be stipulated for new transport agreements.

The Ministry has assumed that the capital element is to be stipulated so that the tariffs will provide Gassled's owners with a reasonable profit on future transport agreements as well. It has been emphasised that Gassled is a key part of the infrastructure on the Norwegian continental shelf and represents substantial utility value for the oil and gas producers. The Ministry has taken account of the risk that the owners of Gassled will take as a result of new transport agreements. The Ministry has also taken account of the uncertainty regarding the extent of new capacity bookings and hence the amount of revenues that may be expected from new transport agreements.

...

The Ministry has considered postponing the effective date of new tariffs. The stipulation of new, lower tariffs will have a positive resource effect in the short term. This is particularly relevant to decisions relating to producing fields. In the case of many decisions relating to exploration, development, improved recovery and production, a certain amount of time will lapse from the decision is made until the produced gas is to be transported and processed. The resource management effects of low tariffs will therefore be gradually more pronounced with the passage of time. Following on an

> **overall assessment, the Ministry has decided to postpone the effective date for the new tariffs, so that they will apply to volumes to be transported and processed from the 2016 gas year (i.e. from 1 October 2016) under transport agreements entered into after the entry into force of the amendment (1 July 2013).**
>
> **Stipulating new tariffs now creates predictability relating to future tariff levels. Users can thereby use this as the basis for their decisions."**

(101) The core of the Ministry's arguments, as it appears from what I have quoted, is that lower tariffs generally give better exploitation of the Norwegian oil and gas resources. The established return assumptions also suggested that the capital elements could now be materially reduced. In my view, this is in accordance with the guidelines in section 63 subsection 4 of the Petroleum Regulations. Hence, as I understand the provision, when stipulating the general tariffs it is not a question of demonstrating that lower tariffs will give better exploitation in *specific* projects. The provision instructs, as expressed by the court of appeal, that "the *concern* for optimum resource management" is a "*general* guideline for the exercise of discretionary judgment", see also section 1-2 subsection 2 of the Petroleum Act. Moreover, my perception is that a real return of around 7 percent on invested capital constitutes the established standard for "a reasonable return on invested capital" pursuant to section 63 subsection 4 of the Petroleum Regulations.

(102) The Ministry's considerations in connection with the drafting of the amendment within the scope of section 63 subsection 4 – for instance regarding the date of implementation, the size of the tariff reduction and the need for transition rules – are not as such subject to legal review. However, the appellants have submitted, as they did in their consultation response to the Ministry prior to the amendment in 2013, that there is no legal basis for completely disregarding the costs incurred by the companies when acquiring ownership interests in Gassled in 2010–2011. Regarding the significance of these purchase prices, the Ministry says the following about the amendment:

> **"In its long-term and steady management practice, which has been reflected in a number of reports and propositions to the Storting, licences and comments to section 63 of the Petroleum Regulations, the Ministry has assumed that the tariffs give a real return of around 7 percent before tax on the total capital. The basis of return (the total capital) is the historical investments in the physical gas infrastructure. Subsequent transfers of ownership interests between companies are insignificant to the basis of return. The consideration agreed between the sellers and the buyers of ownership interests in Gassled and the values assumed by the private parties for the terms of trade at the implementation of new systems in Gassled, are thus not relevant to the basis of return.**

(103) The Ministry thus found that the purchase prices would have had no relevance to the stipulation of the capital element. This opinion is fully compatible with the wording in section 63 subsection 4 of the Petroleum Regulations. It has also – as reflected in what I have just quoted – been expressed on a number of occasions, as a permanent perception. As I understand it, the Ministry's interpretation of the Petroleum Regulations is an almost necessary regulatory consequence of the chosen tariff regime based on return.

(104) The Ministry may legally have had the *opportunity*, when stipulating new tariffs, to consider to some extent – as a special circumstance – the valuation of Gassled reflected in the purchase prices in 2010-2011, see section 63 subsection 4 of the Petroleum Regulations last sentence. But in my view, the Ministry was clearly under no obligation to consider these purchase prices when stipulating the new tariffs, and the choice not to do so seems well founded: It is hard to understand why entirely commercial transactions

carried out by the owners, to realise a profit or release capital, should influence the tariff level or in fact limit the Ministry's regulatory authority to adjust the tariffs.

(105) My conclusion is thus that the amendment of the Tariff Regulations is in accordance with the legal basis in the Petroleum Act and the Petroleum Regulations.

(106) *ECHR P1-1*

(107) The heading of ECHR P1-1 is "Protection of property". The article reads:

> **"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."**

(108) Pursuant to section 2 of the Human Rights Act, P1-1 applies as Norwegian law. In the event of conflict, it even prevails over other legislation, see Article 92 of the Constitution and section 3 of the Human Rights Act, cf. the Grand Chamber judgment Rt-2015-421 paragraph 53 (*Grimstvedt*).

(109) The Supreme Court has dealt with the protection of property under P1-1 in several rulings. I will base myself on the general account by the justice delivering the leading opinion in the Grand Chamber judgment HR-2016-304-S paragraphs 40–46 (*Guldberg*), cf. HR-2016-389-A paragraphs 119–120 (*Hagen*).

(110) The ECtHR has, since its plenary judgment 23 September 1982 *Sporrong and Lönnroth v. Sweden*, stressed that P1-1 contains "three distinct rules" – see paragraph 61: The "principle rule" is of a general nature, and states that everyone is entitled to peaceful enjoyment of property, see subsection 1 first sentence. The "deprivation rule" subjects deprivation of possessions to certain conditions, see subsection 1 second sentence. The "control rule" recognises the states' need and right to control the use of property in accordance with the general interest of the community, see subsection 2.

(111) In ECtHR case law, it has often been repeated that the three rules expressed in P1-1 are intertwined; the deprivation rule and the control rule concern different forms of interference with the owner's enjoyment of his rights and must therefore be interpreted and applied in the light of the principle rule. I mention as an example judgment 14 April 2015 *Chinnici v. Italy (no. 2)* paragraph 29, with further references to previous case law. In a number of cases, the ECtHR has also expressed that interference with the owner's enjoyment of his rights, to avoid conflict with P1-1, must be in *accordance with the law*, pursue a *legitimate purpose* and be *proportionate*. This applies even if the deprivation rule or control rule becomes applicable, see judgment 16 November 2010 *Perdigão v. Portugal* paragraph 67. In the case at hand, it is clear that the control rule is the relevant one.

(112) In *Chinnici v. Italy* paragraph 32 it is emphasised that the proportionality principle, which is central in the Convention as a whole, aims to ensure a fair balance between the general interest of the community making basis for the measure on one side and the anticipation of protection of basic rights on the other. The interference will be disproportionate and

thus contrary to the Convention, if the owner must bear "an individual and excessive burden":

> **"A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden ..."**

(113) The criterion "an individual and excessive burden" used in *Chinnici v. Italy* has been used in several earlier plenary and Grand Chamber cases. I highlight judgment 23 September 1982 *Sporrong and Lönnroth v. Sweden* paragraph 73, judgment 21 February 1986 *James and others v. the United Kingdom* paragraph 50, judgment 16 November 2010 *Perdigão v. Portugal* paragraph 67 and judgment 29 March 2010 *Depalle v. France* paragraph 83. In the French versions of the these judgments, the wording "une charge spéciale et exorbitante" is used. In Norwegian, the expression *"en individuell og overdreven byrde"* might cover it, cf. page 27 of Norwegian Official Report NOU 2013: 11, where *"en individuell og urimelig byrde*" is used.

(114) It has been set out in case law of both the ECtHR and the Supreme Court, as part of the proportionality assessment, that interference with the protection of property, must be *neither arbitrary nor unforeseeable*, see the ECtHR Grand Chamber judgment 19 June 2006 *Hutten-Czapska v. Poland* paragraph 168, and the Supreme Court Grand Chamber judgment Rt-2015-421 paragraph 57 (*Grimstvedt*). The ECtHR has in several recent judgments summarised certain aspects of this protection against arbitrary and unforeseeable interference in a "good governance" condition. The most recent example for the time being is judgment 12 June 2018 *Beinarovič and others v. Litauen* paragraph 139, presenting this as a demand that the authorities – when an issue in the general interest of the community affects fundamental human rights, including those involving property – act in good time and in an appropriate and above all consistent manner.

> **"The Court has on many occasions emphasised the particular importance of the principle of 'good governance'. It requires that where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner"**

(115) P1-1 provides protection against inference with *possessions* ("biens"). In the grand chamber judgment 29 March 2010 *Brosset-Triboulet and others v. France* paragraph 65–66, the ECtHR states the following on the contents of this expression:

> "**65. The Court reiterates that 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 from 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. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 …**
>
> **66. The concept of 'possessions' is not limited to 'existing possessions' but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and legitimate expectation of obtaining effective enjoyment of a property right ... A legitimate expectation of being able to continue having peaceful enjoyment of a possession must have a 'sufficient basis in national law ... "**

(116) According to this and other judgments, the protection of what the ECtHR refers to as a "legitimate expectation" ("l'espérance légitime") does not concern the very wish, hope or expectation of future income, see judgment 24 September 2012 *Malik v. the United Kingdom* paragraph 89–93. If this expectation of enjoyment of a possession is to be comprised by P1-1, it must have a sufficient basis in national law ("une base suffisante en droit interne"). Here, I refer to the Grand Chamber judgment 28 September 2004 *Kopecký v. Slovakia* paragraphs 47–52 and to the Supreme Court plenary judgment Rt-2013-1345 paragraphs 143–144 (*structure quota*).

(117) Case law shows that the protection under P1-1 may, depending on the circumstances, concern the economic interest relating to current commercial activities, including the expectation of continued operation pursuant to licences or permissions granted under public law. Relevant in this regard are judgment 7 July 1989 *Tre Traktörer AB v. Sweden* paragraph 53, judgment 18 February 1991 *Fredin v. Sweden* (No. 1) paragraph 40, judgment 29 November 1991 *Pine Valley Developments Ltd and others v. Ireland* paragraph 51, judgment 19 January 2017 *Werra Naturstein GmbH & Co. KG v. Germany* paragraph 37 and judgment 7 June 2018 *O'Sullivan McCarthy Mussel Development Ltd v. Ireland* paragraphs 85–89, with further references.

(118) The case at hand raises two issues under P1-1: whether the tariff adjustment is an *interference with protected possessions* and whether, in that case, the interference is *disproportionate*.

(119) *Is the tariff reduction an "interference" with "possessions" protected under EMK P1-1?*

(120) The appellants have, through the joint venture Gassled, undivided ownership interests in the upstream gas pipeline network with associated processing facilities constituting Gassled. Although the state has ownership rights to the petroleum resources, and an exclusive right to manage the resources and regulate the extraction and transport of Norwegian petroleum, the appellants' ownership interests in Gassled are possessions of such a nature that they are comprised by P1-1.

(121) The economic motivation of owning interests in Gassled is not primarily related to the facility itself. The value lies in the licences granted to Gassled under section 1-3 and section 4-3 of the Petroleum Act to operate the physical facilities during the entire licence period throughout 2028, and which – with the approval of the Ministry of Petroleum and Energy under section 10-12 – were transferred from the original owners to the current owners in 2010-2011. The positive economic current value of the ownership in Gassled lies in fact in the expectations that the licences will generate future shipment revenues. I take it that these licences are possessions within the meaning expressed in P1-1, cf. the Supreme Court plenary judgment Rt-2013-1345 paragraph 145 (*structure quota*).

(122) In the rather unique and thoroughly regulated field we are dealing with, there is a close connection between the physical facilities and the revenue flow rendered possible by the licences. The ownership of the pipeline network is a prerequisite for the licences and the shipment revenues they in turn generate. Moreover, revenues are required for the owners to fulfil their responsibilities as owners of the physical facilities – with regard to operational risk, liability in the case of damage to surroundings and obligations at the expiry of the licence period.

(123) The ownership of the physical facilities and the right to control and operate them with regard to shipment revenues generated by the licences granted under the Petroleum Act, must be considered in context under P1-1. The question is which legitimate expectations the Gassled owners had to the future economic exploitation of their ownership, given the overall regulatory set of rules that applied, cf. judgment 7 June 2018 *O'Sullivan McCarthy Mussel Development Ltd v. Ireland paragraphs* 86–89 and 104.

(124) The Gassled owners had a legitimate expectation to be able to demand fixed tariffs for *volumes already booked*. This was also fully recognised through the transition rules provided when the tariffs were reduced in 2013. As I have previously said regarding the regulatory set of rules, the Gassled owners had no legitimate expectation that the tariffs for *future agreements*, which is the case here, would remain unchanged. Moreover, it appears from the court of appeal's findings of fact, which has not been appealed, that the companies knew that the tariffs were based on return and that they could be adjusted. Hence, the appellants had no legitimate expectation of receiving the tariffs stipulated in the Tariff Regulations throughout the entire licence period. However, thanks to a well-established regulatory regime, the owners did have a legitimate expectation of receiving the original tariffs *until the return suggested otherwise*, cf. judgment 6 February 2018 *Kristiana Ltd v. Lithuania paragraphs* 90–91.

(125) The *general principles* in the tariff regime based on return had been implemented already when Gassled was established in 2003. They were known to both the previous and the new owners. And with the clarity obtained at this point, the court of appeal's statement that the tariff adjustments in 2013 were a "direct consequence of the applicable regulatory regime" was indeed to the point. It is also natural to suggest, as done by the state before the Supreme Court, that this is in fact what governs what the owners could reasonably expect with regard to future shipment revenues: Since the owners could not expect revenues exceeding the scope of the return regime on which the Tariff Regulations were based, a future tariff adjustment consistent with this regime is not an interference with a legitimate expectation that can be asserted under P1-1.

(126) I support this argument to a large extent, cf. the ECtHR dismissal order 17 December 2013 *Crash 2000 OOD v. Bulgaria* paragraph 57 and judgment 30 January 2018 *Cassar v. Malta* paragraph 44. I am, however, somewhat reluctant. My doubt is based on the following:

(127) Already from the establishment of Gassled in 2003 and until the amendment of the Tariff Regulations in 2013, it was uncertain *how* the Ministry specifically would fix the individual components in the tariff regime based on return, in order to determine the need for adjustments. And it had not been clarified – or communicated to the owners – what was the precise basis for the calculation of the prospective total return, neither in figures nor in method. There was also no system for measuring the return to determine when tariff adjustments should be considered and how substantial they should be, or for communicating any of this to the owners. The Ministry itself, as I understand, did not have full insight until in 2012. According to information presented, it was not until 2003 that the Ministry started using Gassled's investment value to measure whether the prospective return had been obtained. I refer to what I have said about this connection in my examination of the basis for stipulating the original Gassled tariffs in 2003.

(128) The court of appeal has found reason to "to criticise the authorities for not having established a system for measurement and registration of the return in Gassled, and for

not having clarified earlier that the investment value could be used as a basis for estimating the return". My point is not to clarify whether there is reason to criticise the Ministry. Prior to the acquisition of the Gassled ownership interests in 2010–2011, all owners had also been shippers, and such balanced ownership limited the need for supervision and follow-up. The system was practically self-regulating as the owners, because they also were shippers, had no interest in high tariffs. The transition to an unbalanced ownership in 2010–2011 created a new situation.

(129) When I mention the regulatory drawbacks with regard to predictability and transparency, it is because these may help determining what the appellants could reasonably have expected with regard to continuing to demand the tariffs stipulated in the Tariff Regulations. I refer in particular to the appellants' limited possibilities of perceiving that the prospective return had in fact already been obtained when they acquired their ownership interests and that they had to be prepared for a swift and substantial reduction of the capital element, with tariffs reduced accordingly for new agreements. In that sense, I agree with the court of appeal that it was "difficult to know when to expect a tariff adjustment, especially for the new owners entering in 2010–2011", and "which adjustments, in that case, would be made".

(130) From this perspective, it seems problematic to use the amended Tariff Regulations from 2013 to measure what the owners – during the period prior to the amendment – could reasonably expect with regard to revenues under future contracts, and let this determine the applicability of P1-1. That is in fact what one does if concluding that any expectation of revenues under future contracts beyond the scope of the amended Tariff Regulations was only a loose hope of future revenues without protection under P1-1.

(131) The significance of this objection is nevertheless uncertain. The Ministry's solution entailed, as I have accounted for, that the original tariffs could be demanded for far larger volumes than those required to obtain the prospective return. It might be asked whether this, in any case, has been duly compensated.

(132) I will leave open the question whether an interference with an ownership interest protected under P1-1 has taken place, as in my view, such interference would under no circumstances be disproportionate, see the Supreme Court judgment Rt-2008-1747 paragraph 44 (*Hopen*).

(133) *Is the interference disproportionate?*

(134) Assuming that the tariff adjustment in 2013 is an interference with a legitimate expectation on the part of the appellants to be able to enter into new shipper agreements based on the original tariffs exceeding the period permitted, the question is whether such interference is *disproportionate.*

(135) This must be determined bearing in mind that the Ministry of Petroleum and Energy's decision to reduce the tariffs was based on a politically established principle for Norwegian petroleum management from the 1980s, i.e. that the concern for sound exploitation of the Norwegian oil and gas resources indicates that the majority of the profit is earned from the fields, and not from the transport infrastructure. This system fulfils legitimate societal needs which neither the Supreme Court nor the ECtHR has reason to review in a case like the one at hand, see the Supreme Court Grand Chamber

judgment HR-2016-304-S paragraph 56 and the ECtHR judgment 22 May 2018 *Zelenchuk and Tsytsyura v. Ukraine* paragraph 100.

(136) Also, the assessment must include the fact that the tariff adjustment in 2013 was within the scope of an established and well-known regulatory regime, see judgment 7 June 2018 *O'Sullivan McCarthy Mussel Development Ltd v. Ireland paragraphs* 90 and 104. The ratio between the original tariffs and the new and lower tariffs is thus a poor indication. The issue is, as I see it, primarily whether the tariff adjustment, given the systemic weaknesses I have addressed as concerns predictability and transparency, represented – within the meaning of the Convention – an individual and excessive burden to the appellants.

(137) My firm opinion that the tariff reduction in 2013 did not constitute such a disproportionate measure as P1-1 prohibits is due to the appellants' knowledge of the tariff regime and the risk of adjustments, of the Ministry of Petroleum and Energy's decision and of the fact that the adjustment has not affected the appellants particularly harshly. I will detail this in three points:

(138) *Firstly*: It is essential that the appellants, when acquiring their ownership interests in Gassled in 2010–2011, knew that the tariffs were based on return and that a regulatory risk was attached thereto, for instance with regard to the practical implications of the return assumption. This knowledge radically diminishes the protection under the Convention, see the Supreme Court judgment Rt-2008-1747 paragraph 70 (*Hopen*). Here, I refer to my comments on whether, at all, the tariff adjustment is an interference with the protection of property under P1-1.

(139) The assessment of the regulatory risk was, moreover, an important part of substantial *due diligence* work carried out both by the seller and the buyer prior to the transactions. Large resources were used on extensive external professional advice, in particular with regard to the legal aspects of the tariff regime. The agreed terms and tariffs have allowed the buyers to manage the regulatory risk, and any uncertainty associated with the lack of predictability and transparency. In this regard, the appellants also had to consider the increased exposure associated with not being shippers, as they would not – as opposed to the sellers and other owners – receive any compensatory benefits from reduced tariffs.

(140) I do not know whether the development after the transfer of ownership interests in Gassled became fundamentally different from what the appellants had pictured at the time of the acquisition. But if so: The fact that a well-known risk is realised for one of the parties to a contract cannot be given much weight in a proportionality assessment under P1-1. The parties themselves may consider the risk in their negotiations on price and other terms. I refer to judgment 2 July 2013 *Nobel and others v. the Netherlands* paragraph 39, judgment 15 December 2015 *Matczyński v. Poland* paragraph 106 and judgment 6 February 2018 *Kristiana Ltd v. Lithuania paragraph* 110.

(141) *Secondly:* Considering the values involved, and the authorities' view of the significance of a functioning adjustment system based on return, it was reasonable to expect – as I have already mentioned – that the Ministry of Petroleum and Energy, in cooperation with Gassco, had arranged for a more transparent and predictable system at the establishment of Gassled. But when the Ministry eventually learned that the prospective return had been obtained, the tariff issue was handled in a manner to which I have no objections. In this regard, it should be noted that the Ministry of Petroleum and Energy, as a regulatory

authority, had and was bound to have a more detached role in the commercial transactions involving the ownership interests in Gassled.

(142) Prior to the tariff regulation in 2013, a consultation round was launched, at which also the appellants gave their views. Then, it was not asserted that the proposed adjustment would be inconsistent with P1-1. The appellants neither requested nor facilitated specific analyses of the effects for them. All comments the appellants had made to the proposal were quoted, assessed and commented by the Ministry. This includes the submission that the Ministry could not disregard the consideration the appellants had paid for their ownership interests in Gassled. The arguments read:

> **"The commercial terms for the transfer of ownership interests in Gassled are a matter between buyers and sellers. New Gassled partners carry the risk of the assumptions they made when they acquired their ownership interests in Gassled.**
>
> **In the contact between the Ministry and the companies in connection with approval pursuant to section 10-12 of the Petroleum Act for the transfer of ownership interests in Gassled to Infragas, Njord, Silex and Solveig, the Ministry expressed on a general basis that the tariffs in Gassled could be changed.**
>
> **In the Ministry's transfer approvals, Gassled's importance to Norwegian resource management was expressly stated, and it was pointed out that the authorities place great emphasis on ensuring that regulation and ownership of Gassled serves resource management considerations at all times. In the above-mentioned approvals, the Ministry also referred to the important petroleum policy consideration that as much as possible of the profit from the petroleum activities shall be taken out on the fields and not in the infrastructure, and that the Ministry regulates the return in the system, based on resource management considerations and to ensure incentives for necessary investments. In this connection, the Ministry expressly stated that it could make changes to the tariffs as stipulated in the Tariff Regulations.**
>
> **When the transfers were approved in 2011, the Ministry had no concrete plans to change the tariffs.**
>
> **In a letter of 24 August 2012, the Ministry announced that it had initiated work assessing the tariff level in Gassled as set out in the Tariff Regulations. On 20 September, the Ministry approved the transfer of minor ownership interest to Solveig. It was then, as in connection with the previous approvals in 2011, stated that the Ministry would be able to adjust the tariffs in accordance with the Tariff Regulations. Furthermore, an explicit reference was made to the Ministry's letter of 24 August 2012."**

(143) The Ministry's explanation in favour of the tariff adjustments is exhaustive. It shows that the decision has been made in line with the legal basis, as I have presented earlier in my opinion. In this regard, it is of interest that section 63 subsection 4 of the Petroleum Regulations facilitates a balancing between the general interest of the community and ownership interests that is in fact related to the balancing under P1-1.

(144) Nothing in the court of appeal's findings of fact or in the material presented before the Supreme Court suggests that the Ministry has based its decision on illegitimate considerations, neither with regard to the time of the tariff adjustment nor with regard to its implications. Also, it appears that the consultation responses from the Gassled owners had a direct effect on the stipulation of the new tariffs: The Ministry decided to postpone the implementation to 1 October 2016, and it was decided that the old tariffs were to be continued for the Gassled areas where the prospective return had not yet been secured.

(145) *Thirdly:* The tariff adjustments in 2013 were drafted so that the appellants were not particularly harshly affected. Here, I have noted the following four circumstances:

(146) Most of the capacity until the licence period expires at the end of 2028 had already been booked before 1 July 2013. These agreements are not affected at all by the tariff adjustments. The total tariff revenues for the shipper agreements already entered into are massive – approximately NOK 112 billion (2012). The exemption of the future agreements is the primary reason why the appellants, despite the tariff reduction, have stated that they will at least obtain a real return on their respective purchase prices of 4.5 – 5 percent before tax. The appellants have chosen not to present their own individual calculations.

(147) The new capital element was not adjusted to zero, although the prospective return had indeed been obtained. The owners will still have substantial income under new shipper agreements – previously estimated to almost NOK 10 billion (2012) throughout the remaining licence period.

(148) All operating costs during the licence period will be covered by separate components in the tariff formula, despite the reduced capital element, and the tariff formula will give a real return of around 7 percent on new integrity investments in accordance with the established prospective return. The information presented in the case indicates substantial amounts, and that this element will constitute an increasing part of the future tariffs.

(149) The Ministry postponed the implementation of the tariff regulation until shipments after 1 October 2016. This constituted, according to information presented, a compensatory value for the appellants of approximately NOK 5 billion (2012).

(150) Against this background, there is no basis for concluding that the tariff regulation in 2013 was a disproportionate interference with the appellants' right to protection of property under ECHR P1-1.

(151) *Conclusive remarks*

(152) In my view, the amendment of the Tariff Regulations in 2013 had its legal basis in section 10-18 subsection 1 and section 4-8 subsection 1 third sentence of the Petroleum Act and section 70 of the Petroleum Regulations, and the adjustment of the capital element in the tariff formula was in accordance with the guidelines in section 63 subsection 4 of the Petroleum Regulations. As the adjustment was not an interference with the appellants' protection of property under ECHR P1-1, there is no basis for declaring the amendment invalid.

(153) Against this background, the appeal must be dismissed.

(154) The state has demanded costs before the Supreme Court. The case has not raised any doubt, and I cannot see other reasons for deviating from the main rule in section 20-2 subsection 1 of the Dispute Act that the successful party is entitled to compensation for its costs from the opposite party.

(155) The cost claim totals NOK 4 620 175, divided on NOK 1 803 800 to advocates at the Attorney-General and NOK 2 816 375 to advocates at Michelet and Co Advokatfirma AS. VAT is added on the latter amount. The case involves substantial sums, and the appellants have instituted a massive case. Also, in the light of the fees calculated by the

appellants, the state's claim is well founded and must be accepted, see section 20-5 subsection 1 of the Dispute Act.

(156) The state has notified the Supreme Court of the court of appeal's error of basing its costs decision on the assumption that the state may deduct VAT on the costs for legal advice from private law firms. I consider this a circumstance to be assessed by the court of appeal within the scope of the rules on rectification in section 19-8 of the Dispute Act.

(157) I vote for the following

J U D G M E N T :

1. The appeal is dismissed.

2. For the costs of the case before the Supreme Court, CapeOmega AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS are jointly and severally to pay to the state represented by the Ministry of Petroleum and Energy NOK 5 324 269
– fivemillionthreehundredandtwentyfourthousandtwohundredandsixtynine –
within 2 – two weeks of the service of this judgment.

(158) Justice **Kallerud:** I agree with the justice delivering the leading opinion in all material respects and with his conclusion.

(159) Justice **Falch:** Likewise.

(160) Justice **Ringnes:** Likewise.

(161) Justice **Endresen:** Likewise.

(162) Following the voting the Supreme Court gave the following:

J U D G M E N T :

1. The appeal is dismissed.

2. For the costs of the case before the Supreme Court, CapeOmega AS, Solveig Gas Norway AS, Silex Gas Norway AS and Infragas Norge AS are jointly and severally to pay to the state represented by the Ministry of Petroleum and Energy NOK 5 324 269
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within 2 – two weeks of the service of this judgment.