

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

EBL (GENOSSENSCHAFT ELEKTRA BASELLAND) AND TUBO SOL PE2 S.L.
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/18/42

PARTIAL DISSENTING OPINION

by
Mr. Bo G.H. Nilsson, Arbitrator

1. I fully concur with my distinguished co-arbitrators on all points regarding jurisdiction.
2. I am further in agreement with them as regards the “claw-back” issue.
3. I am, however, unable to share their views on the principal liability issue whether Spain was in breach of the ECT by failing to afford Claimants FET, by frustrating their reasonable expectations in respect of future revenues.
4. I shall state my essential reasons therefor quite briefly and without going into the complex conclusions on quantum which would have been appropriate, had I not found myself in a minority position.
5. It is in my view clear from the evidence that RD 661/07 was introduced by Spain in order to better incentivize potential investors to commit the considerable capital necessary to construct RE plants, specifically CSP plants. That this was an objective of Spain is evidenced by the CNE Report from February 2007. Article 44.3 of RD 661/07 was thus in my understanding deliberately designed to convey an impression of stability of future income for a particular class of investors, namely those who would register their plant with the RAIPRE within the time window available.
6. This impression in my view follows from a mere reading of the clause. While it does not explicitly exclude alterations to the remuneration scheme outside of the periodic reviews mentioned therein, the exception for said class of investors would have little or no meaning if Spain were to retain for itself unfettered freedom to make such alterations.
7. Regardless of whether Claimants received such or not, it is also apparent from the various promotion materials issued by Spain that Spain indeed wanted to convey an impression of stability of the RE regime in order to attract investments. It seems to me that such deliberate fostering of expectations should not be without legal consequence.
8. As I will not here deal with the issue of quantum, it seems unnecessary to discuss whether and to what extent Spain could have made some changes to the remuneration regime without violating the FET standard. Suffice it to say that the radical changes introduced in my view amounted to a violation.



Mr. Bo G.H. Nilsson
Arbitrator

Date: **JAN 11 2024**