**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**LANDESBANK BADEN-WÜRTTEMBERG ET AL.**
Claimants

and

**KINGDOM OF SPAIN**
Respondent

**ICSID Case No. ARB/15/45**

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# DECISION ON THE RESPONDENT'S APPLICATION FOR RECONSIDERATION OF THE TRIBUNAL'S DECISIONS OF 25 FEBRUARY 2019 AND 11 NOVEMBER 2021 REGARDING THE "INTRA-EU" JURISDICTIONAL OBJECTION

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***Members of the Tribunal***

Sir Christopher Greenwood, GBE, CMG, KC, President of the Tribunal
Dr Charles Poncet, Arbitrator
Professor Thomas Clay, Arbitrator

***Secretary of the Tribunal***
Ms Luisa Fernanda Torres

Date of dispatch to the Parties: 22 February 2023

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## I. INTRODUCTION AND PROCEDURAL HISTORY[1]

1. The present Decision addresses the Respondent's "*Request for Reconsideration of the Tribunal's Decision on Application for Reconsideration dated 11 November 2021*" (the "**Respondent's Request**").

2. The proceedings are brought by Landesbank Baden-Württemberg ("**LBBW**"), HSH Nordbank AG ("**HSH Nordbank**"), Landesbank Hessen-Thüringen Girozentrale ("**Helaba**") and Norddeutsche Landesbank-Girozentrale ("**NORD/LB**") (collectively the "**Claimants**"). LBBW, Helaba and NORD/LB submit that they are public law institutions (*Anstalt des öffentlichen Rechts*) established under the laws of Germany, while HSH Nordbank submits that it is a joint stock company (*Aktiengesellschaft*) incorporated in Germany. Each Claimant maintains that it operates as a commercial bank but also as a *Landesbank* for one or more of the states (*Länder*) of Germany. For the purposes of the present phase of the proceedings, it is not disputed that all the Claimants have German nationality. The Respondent is the Kingdom of Spain ("**Spain**" or the "**Respondent**").

3. On 22 October 2015, the International Centre for the Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") received a Request for Arbitration dated 20 October 2015. The case was registered by the Secretary-General of ICSID on 12 November 2015.

4. The Claimants maintain that the jurisdiction of the arbitration Tribunal is derived from the Energy Charter Treaty (the "**ECT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"), both of which have at all material times been in force for both Germany and Spain.

5. The Respondent has challenged the jurisdiction of the Tribunal on a number of grounds, one of which (the "**Intra-EU Objection**") is that the ECT cannot confer jurisdiction in a case between an investor of one European Union ("**EU**") State and another EU State,

[1] This Section describes the steps in the Procedural History that the Tribunal has deemed relevant for purposes of the present Decision. It does not purport to be an exhaustive narrative of the entire Procedural History up to this point in the arbitration.

because EU law does not permit an EU State to make an offer of arbitration to a national of another EU State.

6. By Procedural Order No. 14 dated 16 October 2018, the Tribunal agreed to a request from the Parties dated 20 September 2018 to bifurcate the proceedings and hear the Intra-EU Objection in a preliminary phase. Both Parties submitted written pleadings on this issue and a hearing was held in London on 20 December 2018.

7. On 25 February 2019 the Tribunal rendered its "*Decision on the 'Intra-EU' Jurisdictional Objection*" (the "**2019 Decision**"). In the 2019 Decision, the Tribunal decided, for the reasons set out in paragraphs 88-194 of that Decision:

> *(1) that the Intra-EU Jurisdictional Objection advanced by the Respondent is rejected;*
> *(2) that the case will now proceed to the next phase, which will deal with all remaining issues not decided in this Decision, in accordance with the Procedural Calendar to be set forth in a subsequent Procedural Order; and*
> *(3) that the costs incurred by the Parties in the present phase of the proceedings will be addressed in the final Award.*[2]

8. This conclusion was based upon the following steps in the reasoning:

   (i) that, after applying the international law principles of treaty interpretation and examining the text and *travaux préparatoires* of the ECT, the Tribunal reached the provisional conclusion that Article 26 of the ECT "*appears to constitute an offer of arbitration by each EU Member State to Investors from any other* [ECT] *Contracting Party without any limitation regarding intra-EU disputes*."[3]

   (ii) that, after considering the Judgment of the Court of Justice of the European Union (the "**CJEU**") in Case C-284/16, *Slovak Republic v. Achmea B.V.*, Judgment of 6 March 2018 (the "***Achmea* Judgment**"),[4] "*there is no conflict between EU law and*

[2] 2019 Decision, para. 202.

[3] 2019 Decision, para. 132; the Tribunal's consideration leading to this provisional interpretation is set out in paras. 116-131.

[4] **RL-0091**, Judgment of the CJEU, *Republic of Slovakia v. Achmea B.V.*, Case C-284/16, 6 March 2018 (the "***Achmea* Judgment**").

*a finding that Article 26 of the ECT constitutes an offer of arbitration by an EU Member State to an Investor from another EU Member State*."[5] Nevertheless, the Tribunal noted that "*the* [European Commission] *and a majority of EU Member States have reached a different conclusion*" and therefore analysed whether, if such a conflict did exist, it would compel a different interpretation of Article 26 or have the effect of disapplying Article 26 in an intra-EU context.[6]

(iii) that a conflict between EU law and a finding that Article 26 constituted an offer of arbitration even in an intra-EU case did not compel an interpretation different from the provisional one at which the Tribunal had arrived and that "[t]*he proper interpretation of Article 26* [of the ECT] *is that each Contracting Party to the ECT extends to Investors from any other Contracting Party, an offer of arbitration within the limits laid down in that Article*."[7]

(iv) that there was no ground to disapply Article 26 of the ECT in an intra-EU case and that "*if EU law is incompatible with the Tribunal's interpretation of Article 26 ECT, then this Tribunal must accord priority to the ECT, the legal instrument which is the basis for the Tribunal's jurisdiction*."[8]

9. The 2019 Decision was given by the Tribunal as originally constituted (*i.e.* Sir Christopher Greenwood, Mr Rodrigo Oreamuno and Dr Charles Poncet). On 5 February 2021, Mr Oreamuno resigned. On 15 March 2021 the Respondent appointed Professor Thomas Clay as arbitrator. The Tribunal was reconstituted on 17 March 2021.

10. On 2 September 2021 the Grand Chamber of the CJEU gave its Judgment in Case C-741/19 *Republic of Moldova v. Komstroy LLC* (the "***Komstroy* Judgment**"),[9] in which the CJEU expressed the view that "*Article 26(2)(c) ECT must be interpreted as not being applicable*

[5] 2019 Decision, para. 155; the Tribunal's consideration leading to this conclusion is set out in paras. 134-154.

[6] 2019 Decision, para. 155.

[7] 2019 Decision, para. 176; the Tribunal's consideration leading to this conclusion is set out in paras. 156-175.

[8] 2019 Decision, para. 194; the Tribunal's consideration leading to this conclusion is set out in paras. 177-193.

[9] **RL-0232**, Judgment of the CJEU, *Republic of Moldova v. Komstroy LLC*, Case C-741/19, 2 September 2021 (the "***Komstroy* Judgment**").

*to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.*"[10]

11. On 10 September 2021, Spain applied to the Tribunal for leave to introduce into the record the *Komstroy* Judgment on the ground that the Judgment "*finally dissipates any possible doubts*"[11] regarding the intra-EU objection. According to Spain "*the conclusion is very clear: there never was an offer to arbitrate made by Spain to intra-EU investors*."[12]

12. At the invitation of the Tribunal, the Claimants submitted, on 13 September 2021, their response to the application. The Claimants opposed the application on the ground that the Tribunal had already decided the intra-EU objection in its 2019 Decision. They added: "[f]*or the avoidance of doubt, should Spain make any application to re-open a decided jurisdictional objection (which Spain has not), Claimants will oppose any such application*."[13]

13. On 15 September 2021, the Tribunal wrote to the Parties as follows:

> *The Tribunal thanks the Parties for their recent communications regarding the request of the Respondent to introduce as a new authority the judgment of the Court of Justice of the European Union in Republic of Moldova v. Komstroy. This judgment is already well known and has been the subject of extensive comment in legal journals and websites. The Tribunal has, therefore, decided to grant the Respondent's request to admit it.*
>
> *The Tribunal also notes the comment of the Claimants regarding whether the Respondent is seeking to reopen the Tribunal's decision of 25 February 2019. If the Respondent intends to invite the Tribunal to reconsider that decision, it must make a reasoned application to that effect not later than 1 October 2021. Any such application should explain concisely why the Respondent considers that (a) the Decision can be reopened and (b) if so, why it should be reopened. In the event that the Tribunal receives such an application, it will invite a response from the Claimants and will then give its decision on the application. The*

[10] **RL-0232**, *Komstroy* Judgment, para. 66.

[11] Letter from the Respondent to the Tribunal, 10 September 2021, para. 3.

[12] Letter from the Respondent to the Tribunal, 10 September 2021, para. 10.

[13] Email from the Claimants to the Tribunal, 13 September 2021.

> *Tribunal has determined on this procedure in order to avoid disruption to the arrangements for the hearing; it is not inviting such an application nor should this direction be regarded as suggesting that the Tribunal has formed any view as to whether such an application should, or should not, be granted.*[14]

14. The Respondent's "*Petition of Reconsideration Regarding the Intra-EU Objection on the Basis of the CJEU Decision in the Case C-741-19, Republic of Moldova*" (the "**Respondent's Petition**") was filed on 1 October 2021. In that Petition, Spain submitted that "*the Tribunal must review its February 25, 2019 Decision and must declare that it lacks jurisdiction for this intra-EU investment arbitration*."[15]

15. In accordance with the instructions of the Tribunal, the Claimants lodged, on 18 October 2019, their Response to the Respondent's Petition (the "**Claimants**' **Response**") in which they requested the Tribunal to render a Decision "*rejecting Respondent's application of 1 October 2021*."[16]

16. On 11 November 2021, the Tribunal issued its "*Decision on the Respondent's Application for Reconsideration of the Tribunal's Decision of 25 February 2019 regarding the 'Intra-EU' Jurisdictional Objection*" (the "**2021 Decision**"). For the reasons set out in paragraphs 26-58 of the 2021 Decision, the Tribunal decided:

> *(i) that the Respondent's Petition to reconsider the 2019 Decision, by which the Tribunal dismissed the Respondent's intra-EU objection, is rejected; and*
>
> *(ii) that the costs incurred by the Parties in relation to the Respondent's Petition will be addressed in the final Award.*[17]

17. On 12 November 2021, the Respondent emailed the Secretary of the Tribunal stating:

> *The Kingdom of Spain takes this opportunity to underline its protest for the Decision on the Request of Reconsideration. It is not understandable that the Decision does not accept the Request for*

[14] Email from the Tribunal to the Parties, 15 September 2021.

[15] Respondent's Petition, para. 156.

[16] Claimants' Response, para. 87.

[17] 2021 Decision, para. 59.

> *Reconsideration while at the same time it acknowledges that the* Komstroy *decision is a new fact that would have changed some of the February 25, 2019 Decision's holdings related to the Achmea ruling.*[18]

18. The Tribunal held a hearing (by videoconference) on the remaining jurisdictional objections and the merits of the case between 4-8 April 2022. At the hearing, Spain repeated its objection that the Tribunal should have reopened the 2019 Decision and upheld Spain's Intra-EU Objection.[19]

19. On 1 August 2022, the Respondent filed its First Post-Hearing Brief. In its First Post-Hearing Brief, the Respondent again referred to the Intra-EU Objection, drawing attention to the award of the arbitral tribunal in *Green Power Partners K/S and SCE Solar Don Benito APS v. Spain* ("***Green Power***"),[20] which according to Spain reached a conclusion, that could not be disregarded by the present Tribunal, that the ECT could not provide jurisdiction between an investor from one EU State and another EU State.[21] The Respondent returned to this issue in its Second Post-Hearing Brief dated 9 December 2022.[22]

20. Following the close of the post-hearing briefing, on 27 December 2022, the Respondent submitted the Respondent's Request, seeking to reopen the 2021 Decision in light of a judgment of the Svea Court of Appeal on 13 December 2022,[23] and a judgment of the Swedish Supreme Court delivered on 14 December 2022.[24]

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[18] Email from the Respondent to the Tribunal, 12 November 2021.

[19] **RD-001-01**, Respondent's Opening Statement: Jurisdiction, Slide 2; Transcript Day 1, ENG, p. 110, line 20 to p. 112, line 1.

[20] **RL-0236**, *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. 2016/135, Award, 16 June 2022 ("***Green Power***").

[21] Respondent PHB1, paras. 19-25.

[22] Respondent PHB2, paras. 14-26.

[23] **RL-0253**, Judgment in Case T 4658-18, *Kingdom of Spain v. Novenergia II - Energy & Environment (SCA), SICAR*, 13 December 2022 ("***Novenergia* Judgment**").

[24] **RL-0254**, Judgment in Case T 1569-19, *Republic of Poland v. PL Holdings S.à.r.l.*, 14 December 2022 ("***PL Holdings* Judgment**").

21. At the invitation of the Tribunal, the Claimants responded on 16 January 2023 (the "**Claimants' Opposition**"), opposing the request.

22. On 20 January 2023, the Tribunal invited a second round of submissions from each Party. The Respondent replied on 27 January 2023 (the "**Respondent's Reply**"). The Claimants then responded on 3 February 2023 (the "**Claimants' Rejoinder**").

## II. THE ARGUMENTS OF THE PARTIES

### A. THE RESPONDENT

23. The Respondent maintains that the Tribunal should reconsider its 2021 Decision and, by logical extension, its 2019 Decision. It bases its request, first, on the two Swedish judgments referred to above.

24. In the first judgment, that of the Svea Court of Appeal in *Kingdom of Spain v. Novenergia II*, rendered on 13 December 2022,[25] the Court annulled the arbitration award in *Novenergia v. Spain*, SCC Case No. V (2015/063).[26] The *Novenergia* tribunal, whose seat was in Sweden, had held that Article 26 of the ECT afforded it jurisdiction in proceedings between a Luxembourg company and Spain. The Court of Appeal, however, held that, following the judgment of the CJEU in *Komstroy,* it was clearly established that in EU law, which formed part of the law of Sweden, Article 26 of the ECT could not constitute a basis for jurisdiction in an "intra-EU" case. It therefore annulled the award.

25. The second judgment was that of the Supreme Court of Sweden in *Republic of Poland v. PL Holdings*, rendered on 14 December 2022.[27] In that judgment the Supreme Court annulled the arbitration award in *PL Holdings S.a.r.l v. Republic of Poland*, SCC Case No. V (2014/163).[28] The *PL* tribunal, whose seat was in Sweden, had held that it had

[25] **RL-0253**, *Novenergia* Judgment.

[26] **CL-0053**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration 2015/063, Final Award, 15 February 2018.

[27] **RL-0254**, *PL Holdings* Judgment.

[28] **CL-0041**(f), *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Arbitration No. V 2014/163, Partial Award, 28 June 2017.

jurisdiction in proceedings between a Luxembourg company and Poland under a bilateral investment treaty ("**BIT**") between Belgium and Luxembourg, on the one hand, and Poland on the other. The CJEU subsequently ruled that, following the judgment in *Achmea*, EU law precluded jurisdiction.[29] In light of that ruling, the Supreme Court held that the award had to be annulled.

26. According to Spain,[30] these two judgments, together with the rulings of the CJEU in *Achmea*, *Komstroy* and *PL Holdings*, leave no room for doubt that EU law prohibits EU Member States from concluding an agreement – whether on the basis of a BIT or the ECT – to confer upon an arbitration tribunal jurisdiction in an investment case between an EU Member State and an investor of another EU Member State.[31]

27. In its Reply, Spain also refers to the award of the tribunal in *Green Power*, delivered on 16 June 2022.[32] In that award, the tribunal upheld the "intra-EU" objection submitted by Spain and held that Article 26 of the ECT could not constitute a basis for jurisdiction in a case brought by two Danish companies against Spain.[33]

28. Spain also relies on the dissenting opinion of Professor Giorgio Sacerdoti in the Decision on Reconsideration, dated 20 October 2022, in *Portigon AG v. Kingdom of Spain* ("***Portigon***").[34] In that case, Spain had sought to reopen the earlier decision of the Tribunal that Article 26 of the ECT conferred jurisdiction in an arbitration between a German company and Spain. The majority of the Tribunal refused the request but Professor

[29] **RL-0255**, Judgment of the CJEU, *Republic of Poland and PL Holdings Sàrl*, Case C-109/20, 26 October 2021

[30] Respondent's Request, paras. 8-17; Respondent's Reply, paras. 26-50.

[31] *See* Respondent's Request, paras. 31-33; Respondent's Reply, paras. 30-31.

[32] **RL-0236**, *Green Power*.

[33] Respondent's Reply, paras. 7-17.

[34] **RL-0250**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Request for Reconsideration, 20 October 2022 ("***Portigon, Reconsideration***"); **RL-0251**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Dissenting Opinion of Arbitrator Giorgio Sacerdoti, 20 October 2022 ("***Portigon, Reconsideration Dissent***"). The original decision on jurisdiction is at **RL-0248**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Jurisdiction, 20 August 2020 ("***Portigon, Jurisdiction***") and Professor Sacerdoti's partial dissenting opinion is at **RL-0249**, *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Partial Dissenting Opinion of Arbitrator Giorgio Sacerdoti, 20 August 2020 ("***Portigon, Jurisdiction Dissent***"). *See* Respondent's Reply, paras. 18-24.

Sacerdoti dissented on the ground the judgment of the CJEU in *Komstroy* precluded jurisdiction.

29. In the light of these decisions, Spain argues that the Tribunal must reconsider its 2021 Decision not to reopen the 2019 Decision rejecting the "Intra-EU" objection.

30. Spain denies that the matter is *res judicata*, relying, *inter alia*, on an observation by the tribunal in *Cavalum SPGS SA v. Kingdom of Spain* ("***Cavalum***") in a decision, dated 10 January 2022, on a request to reconsider an earlier ruling that the tribunal possessed jurisdiction.[35] In its decision, the *Cavalum* tribunal stated that "*the principle of* res judicata *is confined to the effect of a decision in one proceeding in another proceeding*."[36] Accordingly, Spain argues that the Tribunal has the power to rectify what it sees as the error which the Tribunal made earlier.[37]

## B. THE CLAIMANTS

31. The Claimants much shorter submissions[38] maintain that the earlier decisions of the Tribunal should not be reopened. They argue that the Respondent seeks to reopen the 2019 Decision for a second time, and that the 2019 Decision is *res judicata,* as the Tribunal stated in its 2021 Decision.[39] That means that the 2019 Decision can be reopened only on the narrow grounds set out in Article 51(1) of the ICSID Convention.[40] According to the Claimants, Spain's request does not meet the conditions for reopening the 2019 Decision.

32. The Claimants maintain that the two Swedish decisions are not "*of such a nature as decisively to affect*" the 2019 Decision, as required by Article 51 ICSID Convention.[41] According to the Claimants, the two Swedish decisions are based on EU law and the fact that EU law is part of the law of Sweden applicable to arbitrations with their seat in

[35] **RL-0256**, *Cavalum SGPS S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, 10 January 2022 ("***Cavalum***").

[36] **RL-0256**, *Cavalum*, para. 71.

[37] Respondent's Request, para. 30.

[38] The Claimants' submissions come to a total of eight pages, whereas those of the Respondent amount to twenty-one.

[39] Claimants' Opposition, paras. 1, 3, referring to paras. 26-44 of the 2021 Decision.

[40] Claimants' Opposition, paras. 4-5.

[41] Claimants' Opposition, para. 6.

Sweden.[42] As such they cannot affect the jurisdiction of the present Tribunal which is governed by the ICSID Convention and public international law and is not seated in an EU Member State.[43] Moreover, the Claimants add, that the Swedish decisions would at best be "*legal authorities*" and not "*new facts*" as required by Article 51 of the ICSID Convention.[44]

33. The Claimants also dismiss the authority of the *Green Power* award and Professor Sacerdoti's dissenting opinion in *Portigon*. Neither is a new "fact" which could justify reopening the 2019 Decision.[45] The Claimants dismiss *Green Power* as "*an outlier*" among the large number of awards and decisions which have upheld jurisdiction in "intra-EU" cases, and argue that it is distinguishable because that tribunal was seated in Sweden and bound to apply Swedish law.[46] Professor Sacerdoti's opinion is a dissent; the tribunal in *Portigon* having decided by a majority to reject Spain's request to reopen the question of jurisdiction.[47]

## III. THE DECISION OF THE TRIBUNAL

34. The Tribunal begins by noting that, although the Respondent's Request is that the Tribunal reconsider its 2021 Decision, Spain is by implication asking the Tribunal also to reconsider the 2019 Decision.

35. It is appropriate for the Tribunal to begin by considering whether or not it has the power to accede to Spain's Request. The Tribunal has already considered that question at length in paragraphs 26-48 of its 2021 Decision, in which it concluded that the 2019 Decision was *res judicata* and could be reopened only on the relatively narrow grounds set out in Article 51(1) of the ICSID Convention, namely:

[42] Claimants' Opposition, paras. 8-11. *See also*, Claimants' Rejoinder, paras. 3-5.
[43] *See* Claimants' Opposition, para. 11.
[44] Claimants' Rejoinder, para. 6.
[45] Claimants' Opposition, para. 13. *See also*, Claimants' Rejoinder, para. 7.
[46] Claimants' Opposition, para. 14; Claimants' Rejoinder, para. 8 and footnote 3.
[47] Claimants' Rejoinder, para. 8.

(i) that a new fact has been discovered;

(ii) that this fact is of such a nature as decisively to affect the outcome;

(iii) that the fact was unknown at the time that the decision was rendered; and

(iv) that the ignorance of the fact on the part of the party seeking revision was not due to negligence on its part.

36. The Tribunal notes that the distinguished *Cavalum* tribunal has taken a different view as regards the scope of *res judicata* (*see* paragraph 30, above) in the only judicial or arbitral pronouncement on the subject referred to by Spain which post-dates the Tribunal's 2021 Decision. The present Tribunal is more disposed to follow the view of the International Court of Justice in the *Bosnia Genocide* case, namely that *res judicata* can apply within a single set of proceedings so that a decision on jurisdiction constitutes *res judicata* for the purpose of the later proceedings in the same case.[48]

37. Any difference between the present Tribunal and the *Cavalum* tribunal may, however, be of little practical significance. After its statement on the ambit of *res judicata*, the *Cavalum* tribunal went on to say:

> *If a decision is made on a preliminary issue of law which is intended to be final, the mere fact that it may have been erroneous may not be a sufficient ground for re-opening the decision. Similarly, the emergence of new evidence or changed circumstances may not in themselves justify the re-opening of issues which have been the subject of argument and decision. The Tribunal agrees with the* Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Company Ltd *tribunal that 'a decision of an ICSID tribunal cannot be considered merely a draft that can be reopened at will.*'[49]

38. The *Cavalum* tribunal went on to say that "*inspiration may be derived from the ICSID Convention, Article 51,*"[50] that the application of the principles in Article 51(1) to a request

[48] **CL-0168**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, 26 February 2007, para. 140.

[49] **RL-0256**, *Cavalum*, para. 75.

[50] **RL-0256**, *Cavalum*, para. 76.

to reopen a decision based on new legal authorities "*must be approached with great caution*"[51] and concluded that:

> *The mere fact that a subsequent legal authority suggests that a tribunal's decision on the law may have been wrong is not sufficient to justify reconsideration, for otherwise there would be no finality. What must be shown is that the subsequent legal development not only undermines the Tribunal's legal conclusion, but shows that it was wholly wrong. It must be a decisive legal authority which, if it had existed at the time of the decision, would plainly have led to a different conclusion.*[52]
>
> *That, in the Tribunal's view, is the relevant and appropriate touchstone, namely, some development (such as a relevant and controlling judgment or award) of such a nature as would have decisively affected a pre-final-award decision (of whatever character), had it been known to the tribunal at the time of the decision.*[53]

39. The *Cavalum* tribunal thus adopted an approach which was in substance the same as that of the present Tribunal in its 2021 Decision. Applying that test to Spain's request to reopen the *Cavalum* decision on jurisdiction on the basis of the *Komstroy* decision, the *Cavalum* tribunal unanimously rejected that request.[54]

40. The present Tribunal came to the same conclusion in its 2021 Decision.

41. The question, therefore, is whether Spain has now produced, in the words of the *Cavalum* tribunal, "*some development (such as a relevant and controlling judgment or award) of such a nature as would have decisively affected a pre-final-award decision (of whatever character), had it been known to the tribunal at the time of the decision*."[55] The Tribunal considers that neither the two Swedish judgments, nor the arbitral authorities – *Green Power* and the Sacerdoti dissent in *Portigon* – come anywhere near meeting that standard.

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[51] **RL-0256**, *Cavalum*, para. 78.
[52] **RL-0256**, *Cavalum*, para. 80.
[53] **RL-0256**, *Cavalum*, para. 81.
[54] **RL-0256**, *Cavalum*, para. 99.
[55] **RL-0256**, *Cavalum*, para. 81.

42. The two Swedish judgments are applications of EU law as part of the law of Sweden to arbitrations which have their seat in Sweden. The decision of the Svea Court of Appeal in the *Novenergia* case was primarily based upon the ruling of the CJEU in *Komstroy*, a ruling which the Tribunal has already decided in its 2021 Decision does not warrant reopening its 2019 Decision on Jurisdiction.[56] The Court of Appeal stated that:

> […] *the CJEU in Komstroy reiterated its position in Achmea that, according to the settled case law of the Court, an international treaty may not interfere with the allocation of powers fixed by the EU treaties and thus on the autonomy of the EU legal system.* […] *It was against this background that the CJEU ruled that article 26.2 c)* [of the ECT] *does not apply to disputes between a Member State and an investor from another Member State.*
>
> *The Court of Appeal concludes that the reasons used by the CJEU as the basis for its assessment are of a general nature and considers that they do not leave room for any other conclusion when, as in this case, Swedish law is applicable to the proceedings.*[57]
>
> […]
>
> *As provided above, according to section 33, paragraph 1, item 1 of the SAA, the lack of arbitrability must be derived from Swedish law for an award to be considered invalid. The principle of the primacy of EU law and the requirement for effective impact means, according to the Court of Appeals opinion, that the impediment set up by the CJEU must be equated with an impediment according to Swedish law in the sense referred to in section 33, paragraph 1, item one of the SAA.*[58]

43. These passages make clear, first, that the Court of Appeal (correctly) regarded the *Komstroy* Judgment as being based upon the principles of the autonomy of the EU legal system and the primacy of EU law. While the EU treaties are international law agreements, the principles in question, which have been developed by the CJEU over time and later codified in the EU treaties, possess a constitutional character and are applied by the CJEU

[56] The Court of Appeal also referred to the judgment of the CJEU in *PL Holdings* but as that case concerned a BIT and the Court of Appeal was dealing with a case in which jurisdiction had been asserted on the basis of the ECT, it was the *Komstroy* precedent which was more directly relevant.

[57] **RL-0253**, *Novenergia* Judgment, unofficial translation provided by the Respondent, p. 36.

[58] **RL-0253**, *Novenergia* Judgment, unofficial translation provided by the Respondent, p. 37.

outside the context of general international law. They have been developed and applied without regard to the broader obligations of EU Member States under international law. The obligations of an EU Member State under the ECT – an international agreement to which many of the parties are not Member States of the EU – cannot be determined by reference to the primacy or autonomy of EU law but have to be determined by reference to the principles of international law regarding conflicting treaty obligations.

44. Secondly, the passages quoted make clear that the Court of Appeals considered that it was applying not international law but Swedish law, of which EU law is an integral and supreme part, to determine the arbitrability of proceedings which were subject to Swedish law because they have their seat in Sweden. It was not purporting to apply those principles to an ICSID arbitration, nor could it do so.

45. The Tribunal takes note of Spain's objection (in its email of 12 November 2021, paragraph 17, above), that the Tribunal should not, in its 2021 Decision, have refused to reopen the 2019 Decision when it had stated that the *Komstroy* Judgment would have affected part of the reasoning of the Tribunal in the 2019 Decision. The Tribunal considers that this objection is based upon a misunderstanding of both the 2019 Decision and the 2021 Decision. In the 2019 Decision, the Tribunal held, first, that the *Achmea* Judgment was not applicable to an arbitration under the ECT (paragraphs 134-155). Had the *Komstroy* Judgment been available at the time of the 2019 Decision, it would undoubtedly have affected the reasoning of this part of the 2019 Decision. However, the Tribunal went on to examine the position if the *Achmea* principle *was* applicable to ECT arbitration (paragraphs 155-194), and concluded that, even if that were the case, the Tribunal would nevertheless have jurisdiction as a matter of public international law, whatever the position under EU law might be. The *Komstroy* Judgment does not and could not affect that issue. It was for that reason (reaffirmed in paragraph 55 of the 2021 Decision) that the Tribunal held that the *Komstroy* Judgment would not have affected the outcome of the 2019 Decision.

46. The judgment of the Svea Court of Appeal is an application of the *Komstroy* Judgment on EU law within Swedish law as the law of the seat in *Novenergia.* As such, it adds nothing to what the CJEU said in *Komstroy*. It is in no way a controlling decision which would

have affected the outcome of the jurisdictional proceedings which culminated in the 2019 Decision, because that Decision was based on general international law, not EU law. While the EU treaties are part of international law, they cannot override the obligations assumed by the EU Member States, and the EU itself, when they became party to a multilateral treaty, the ECT, to which a large number of non-EU States are also parties.

47. The judgment of the Swedish Supreme Court has even less of a claim to be a "*controlling decision*" with regard to the issue determined by the Tribunal in its 2019 Decision. It deals with the effects of the *Achmea* Judgment on an arbitration based upon a BIT, which are reinforced, as a matter of EU law, by the judgment of the CJEU in *PL Holdings*. For the reasons given in the 2019 Decision, arbitration under the ECT differs from that under a BIT and a judgment on a BIT arbitration cannot therefore be a controlling factor in the present case. Moreover, the judgment of the Supreme Court is again an instance of the application of EU law as part of Swedish law. The present arbitration is held under the ICSID Convention. It is not seated in any State and the reasoning in the two Swedish cases is therefore inapplicable.

48. The Tribunal thus rejects Spain's argument that the two Swedish judgments justify reopening the 2021 and 2019 Decisions.

49. Turning to the *Green Power* award, the Tribunal notes that the arbitration in this case was also seated in Sweden and thus subject to mandatory provisions of Swedish law, which includes EU law. The *Green Power* tribunal referred on a number of occasions to the importance of this fact,[59] which, as already explained, has no relevance to an ICSID arbitration. Nevertheless, it must be recognized that much of the reasoning in *Green Power* is cast in broader terms and that the tribunal in that case plainly took a different view of the law from that adopted by the present Tribunal in its 2019 Decision. Yet, the award in *Green Power* is an outlier which stands in stark contrast to the very large number of awards cited by the Claimants which have reached the same conclusion as that of the present Tribunal. Against that background, it cannot in any sense be said that the award in *Green Power* satisfies the test laid down in *Cavalum* of being "*a decisive legal authority which,*

[59] *See, e.g.*, **RL-0236**, *Green Power*, para. 475.

*if it had existed at the time of the decision, would plainly have led to a different conclusion*" (see paragraph 38, above).[60]

50. The same is true of the dissenting opinion of Professor Sacerdoti in *Portigon.* It is difficult to see how a dissenting opinion, however well-reasoned, could ever meet the test in *Cavalum*. It is not, however, necessary for the Tribunal to decide that question because, with all due respect for the careful analysis set out by Professor Sacerdoti, the Tribunal is not persuaded that that analysis would have altered its conclusions in the 2019 Decision. Professor Sacerdoti asserts that "*ICSID tribunals have no competence to challenge* [the] *holdings by the CJEU in Achmea and Komstroy*."[61] This is true in the sense that an ICSID tribunal must defer to the CJEU on the interpretation of EU law. That is not, however, the issue on which the present Tribunal has decided to dismiss the "intra-EU" jurisdictional objection. In taking that decision, the Tribunal did not in any way challenge the decisions of the CJEU as to EU law; what it did was to decide that, even allowing for those decisions, applying international law as a whole, the "intra-EU" objection failed.

51. In its Request, Spain appealed to "*the courage of the Tribunal*" and argued that "[t]*he Arbitral Tribunal must assess its lack of jurisdiction to hear this intra-EU dispute as other Arbitral Tribunals or arbitrators have done*."[62] The Tribunal is well aware of the depth of Spain's feelings on this subject, which is why it has gone to greater lengths in analysing the authorities on which Spain has relied in seeking, for a second time, to reopen a decision on the "intra-EU" jurisdictional objection than those authorities properly merit. The Tribunal took its 2019 Decision after careful analysis of the arguments of the Parties and the European Commission. It did so in a preliminary decision because both Parties had expressly asked it to do so. When Spain applied in 2021 to reopen that Decision, the Tribunal again engaged in a careful analysis of the arguments of the Parties and the significance of the *Komstroy* Judgment. After yet another exchange of arguments on this subject, the Tribunal has again concluded that there is no basis for reopening its decision as nothing that Spain has said and nothing in the cases on which it has relied would have

[60] **RL-0256**, *Cavalum*, para. 80.

[61] **RL-0251**, *Portigon*, *Reconsideration Dissent*, para. 57.

[62] Respondent's Request, para. 34.

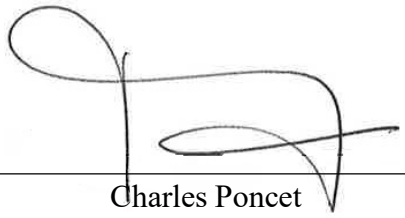
affected the outcome of the 2019 Decision. It is not a matter of courage but of faithfulness to well established legal principles.

## IV. DECISION

52. For the reasons given above, the Tribunal DECIDES:

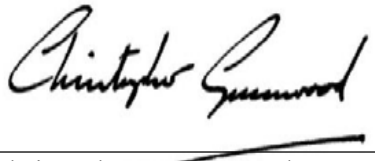
(i) that the Respondent's Request to reconsider the 2019 Decision, by which the Tribunal dismissed the Respondent's intra-EU objection, and the 2021 Decision declining to reopen that ruling, is rejected; and

(ii) that the costs incurred by the Parties in relation to the Respondent's Request will be addressed in the final Award.



Charles Poncet
Arbitrator

Prof. Thomas Clay
Arbitrator



Sir Christopher Greenwood, GBE, CMG, KC
President of the Tribunal