INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

INFRACAPITAL F1 S.À R.L. AND INFRACAPITAL SOLAR B.V.

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/16/18

DECISION ON RESPONDENT'S SECOND REQUEST FOR RECONSIDERATION

Members of the Tribunal
Mr. Eduardo Siqueiros T., President
Prof. Peter D. Cameron
Mr. Luis González García

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 19 August 2022

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Except for the terms defined below, or otherwise indicated otherwise in this Decision, all other terms defined in the Decision on Jurisdiction, Liability and Directions on Quantum and used herein shall have the same meaning ascribed to them therein.

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Claimants	Infracapital F1 S.à.r.l. and Infracapital Solar B.V.
Claimants' Response	The response to the Second Request for Reconsideration submitted by Claimants on 21 July 2022, entitled "*Claimants' Response to Respondent's Comments on Respondent's Second Request for Reconsideration"*.
Decision	Decision on Jurisdiction, Liability and Directions on Quantum, dated 13 September 2021
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965
Second Request for Reconsideration	The request submitted by Respondent on 24 June 2022 entitled "*Respondent's Request for Reconsideration of the Tribunal's Decisions of 13 September 2021 and 1 February 2022 on the basis of The Green Power Award*" for the Tribunal to declare its lack of jurisdiction for this case.
Respondent	Kingdom of Spain
First Decision on Reconsideration	Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, dated February 1, 2022
Decisions	Jointly, the Decision and the First Decision on Reconsideration
Green Power Award	Award issued in the case *Green Power Partners K/S and SCE Solar Don Benito v. Kingdom of Spain*, SCC-2016/135, dated 16 June 2022
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce

I. PROCEDURAL HISTORY

1. On 13 September 2021, the Tribunal issued its Decision on Jurisdiction, Liability and Directions on Quantum (hereinafter the "**Decision**").

2. On 15 October 2021, the Kingdom of Spain (the "**Respondent**") submitted a request entitled "*Respondent's Petition of Reconsideration Regarding the Intra-EU Objection and the Merits on the basis of the CJEU Decision in the Case C-741/19,* Republic of Moldova*, ECLI:EU:C:2021:655*" to declare the Tribunal's lack of jurisdiction for this case (the "**First Request for Reconsideration**"), along with a Consolidated List of Legal Authorities, and legal authorities RL-0151 to RL-0184. The decision mentioned involved the case *Republic of Moldova v Komstroy LLC* (the "***Komstroy* Judgment**").[1]

3. On November 12, 2021, Infracapital F1 S.à.r.l. and Infracapital Solar B.V ("**Claimants**") submitted their response, entitled "*Claimants' Response to Respondent's Petition for Reconsideration Regarding the Intra-EU Objection and the Merits*", along with an Index of Legal Authorities submitted with Claimants' response, and legal authorities CL-213 to CL-226.

4. On 1 February 2022, the Tribunal issued the Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits (the "**First Decision on Reconsideration**") whereby, for the reasons stated therein, the Tribunal rejected the First Request for Reconsideration.

5. On 24 June 2022, Respondent submitted a request entitled "*Respondent's Request for Reconsideration of the Tribunal's Decisions of 13 September 2021 and 1 February 2022 on the basis of The Green Power Award*" to declare the Tribunal's lack of jurisdiction for this case (the "**Second Request for Reconsideration**"), along with a Consolidated List of Legal Authorities, and legal authorities RL-0186 to RL-0187. The decision mentioned involved the award rendered in the case *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain* (the "***Green Power* Award**").[2]

6. On 24 June 2022, the Tribunal invited Claimants to submit any comments to the Second Request for Reconsideration by 25 July 2022.

7. On 21 July 2022, Claimants submitted their response entitled "*Claimants' Response to Respondent's Comments on Respondent's Second Request for Reconsideration*" (hereinafter "**Claimants' Response**").

[1] **RL-0151**, European Union Court of Justice Judgment of 2 September 2021 in the case C-741/19, *Republic of Moldova v. Komstroy LLC.*

[2] **RL-0186** *Green Power Partners K/S and SCE Solar Don Benito v. Kingdom of Spain*, SCC-2016/135, Award, 16 June 2022 ("***Green Power* Award**").

II. THE PARTIES' POSITIONS

A. RESPONDENT'S POSITION

8. Respondent submitted the Second Request of Reconsideration in respect of (a) the Decision and (b) the Decision on the First Request for Reconsideration which, in Respondent's view, should be reconsidered on the basis of the similarities of this case and the *Green Power* case because, in both instances, the Claimants are companies from EU Member States (Luxembourg and Netherlands in this case, whereas Denmark in the *Green Power* case) whose claim was directed against another EU Member State (Kingdom of Spain).

9. Respondent argues that the recent *Green Power* Award calls into question the Tribunal's decision on the intra-EU jurisdictional objection, and insists on the relevance of the dispute between an investor of an EU Member State and a Member State of the European Union, and consequently the relevance of European Union law, its fundamental principles and characteristics, to the dispute and the Tribunal's jurisdiction.[3]

10. Respondent contends that the Tribunal can reconsider the Decisions when "… *in view of new evidence the content of those Decisions could certainly be affected*",[4] and argues that decisions rendered in an arbitration proceeding prior to an award do not constitute *res judicata* in such a way as to prevent the Tribunal from reviewing it, in view of new evidence submitted to it after the date of its Decision.[5]

11. In this connection, Respondent draws support from the *Standard Chartered Bank v. TANESCO* Award,[6] where the tribunal indicated that: "*Decisions of tribunals are of course binding within the scope of the proceedings, but this does not make them res judicata. That is so with procedural orders and provisional measures as pointed out earlier. An essential feature of res judicata is that the judgment in question produces effects on the parties outside the proceedings in which it is granted. But decisions of tribunals only have effect within the proceedings until they have been incorporated into the final award".*[7]

12. Further, Respondent cites "reasons of efficiency and procedural economy" for allowing a tribunal to reconsider previously adopted decisions as stated by the *Standard Chartered Bank v. TANESCO* tribunal:[8] "*[…] The Tribunal also takes the view that exercising a power to reopen in certain limited circumstances has practical advantages. It avoids having the Tribunal decide issues on the merits on the basis of a decision which has been seriously*

[3] Second Request for Reconsideration, ¶¶ 7 and 25.
[4] Second Request for Reconsideration, ¶ 24.
[5] Second Request for Reconsideration, ¶ 23.
[6] Second Request for Reconsideration, ¶¶ 23 and 24, citing **RL-0187** *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20), Award, 12 September 2016, ("***Standard Chartered Bank v. TANESCO* Award**") ¶ 313 Note: Although Respondent attached as an exhibit to its Second Request for Consideration the *Standard Chartered Bank v. TANESCO* Award, it was originally introduced by Claimants into the record as **CL-213**).
[7] **RL-0152**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20), Decision on the Application of Annulment, 22 August 2018, ("***Standard Chartered Bank v. TANESCO*, Decision on Annulment**") ¶ 319.
[8] *Standard Chartered Bank v. TANESCO Award*, ¶ 320.

called into question, and then have the parties wait until the whole matter has been included in its final award before having its decision reopened or subject to annulment, thus potentially wasting the time and expense that has been incurred since the Tribunal became aware that its decision could be called into question. Efficiency grounds alone suggest that there may be circumstances where a tribunal should consider reopening a decision that it has made."[9] (emphasis added by Respondent).

13. Respondent indicates that the *Green Power* tribunal found by unanimity that it lacked jurisdiction to hear a dispute involving European law – such as is the case of a claim based on the ECT– brought by a European investor against a European State regarding subsidies to the renewable energy producers which are according to EU Law state aid (i.e., a basic and fundamental institution of EU Law), and adds that the conclusion of such tribunal was "… *reached on the understanding that accepting its jurisdiction would violate European Union law and the autonomy of that body of law, to which both parties to the arbitration are subordinate".*[10]

14. Respondent summarizes the findings of the *Green Power* Award:

    a) The tribunal analysed the intra-EU objection raised by Spain in its *ratione personae* and *ratione voluntatis* aspects and, in relation to the latter, the tribunal analysed the absence of consent to arbitrate intra-EU disputes and the absence of such consent to arbitrate intra-EU disputes under the ECT;

    b) The *Green Power* tribunal clarified that this question cannot be analysed only from the perspective of what it deems as "rigid" categories of European law or public international law, as it could lead to the exclusion of rules *en bloc*, and hence, the tribunal must determine whether Article 26 ECT can operate in the "complex relations between Spain and Denmark"[11];

    c) According to Respondent, the *Green Power* tribunal gives particular relevance to the fact that in accordance with Article 1.3 ECT the European Union has the character of a REIO based, *inter alia*, on an economic integration agreement as foreseen in Article 25 ECT. Since the EU has always been based on an economic integration agreement the Tribunal cannot follow the argument of the claimants in that case in the event that a disconnection clause was necessary.[12]

    d) Respondent argues that the *Green Power* tribunal concluded that Article 1(3) ECT both entails a recognition by all contracting states of the transfer of competences between Member States and the Union, and expressly recognizes the "binding" character of decisions of the Union institutions on the Member States in matters governed by the ECT, which includes both State aid issues and the recognition of the inter-se applicability of the provisions of Article 344 TFEU.[13]

[9] Second Request for Reconsideration, ¶ 24, citing **RL-0187** *Standard Chartered Bank v. TANESCO Award*, ¶ 320.
[10] Second Request for Reconsideration, ¶ 7.
[11] Second Request for Reconsideration, ¶ 9, citing **RL-0186** *Green Power* Award, ¶ 170.
[12] Second Request for Reconsideration, ¶ 11, citing *Green Power* Award, ¶ 352.
[13] Second Request for Reconsideration, ¶ 11, citing *Green Power* Award, ¶ 355.

e) According to Respondent, the *Green Power* tribunal identified three "powerful grounds" in favor of the application of *Achmea*: (i) it is clear that in *Achmea* the CJEU, sitting as Grand Chamber, clarified that EU Law was to be applied in order to address the validity of offers to arbitrate intra-EU disputes;[14] (ii) *Achmea* also explained that Articles 267 and 344 TFUE, upon proper interpretation, are incompatible with intra-EU arbitration clauses, regardless of whether they are referred to a State-State dispute or an investor-State dispute, and regardless of whether they are entailed in a bilateral treaty or a multilateral one;[15] and (iii) *Achmea* also highlighted the relevance of the "rationale" behind its conclusions which is the autonomy of EU Law.[16]

f) Respondent further indicates that the *Green Power* tribunal concludes that, since *Achmea,* the interpretation of the CJEU has been crystal clear, but that notwithstanding, if there might be some doubts, the interpretation is even clearer since *Komstroy*. Citing the *Green Power* tribunal, "*since Komstroy there should be no doubts so as to the lack of jurisdiction of arbitral tribunals to hear intra-EU disputes. The Tribunal agrees with the Kingdom of Spain that paragraph 66 of the Komstroy ruling is uncontestable*".[17]

g) In light of such reasons, Respondent adds, the *Green Power* tribunal upheld the intra-EU *ratione voluntatis* jurisdictional objection raised by Respondent and declared that it had no jurisdiction to hear the case.[18]

15. Respondent contends that the *Green Power* tribunal explained that this analysis is not an issue of *lex arbitri* and hence this approach is also applicable to ICSID cases that are analogous.[19]

16. Respondent concludes that this Tribunal should reconsider the Decisions in light of the *Green* Award where the tribunal declared the lack of jurisdiction to hear an intra-EU dispute after having performed "… *an in-depth analysis of the nature and status of the Parties in dispute (i.e., a European investor vs. an EU Member State) as members of a REIO such as the European Union and the value that this has for purposes of the ECT*".[20]

B. CLAIMANTS' POSITION

17. In essence, Claimants believe the Second Request for Reconsideration submitted by Respondent falls short of the legal standard established by this Tribunal in the Decision on the First Request for Reconsideration as it fails to engage with the Tribunal's findings, and consequently Spain's Second Request for Reconsideration should be promptly dismissed,[21] specifically requesting the Tribunal to:

[14] Second Request for Reconsideration, ¶ 14, citing *Green Power* Award, ¶ 422
[15] Second Request for Reconsideration, ¶ 14, citing *Green Power* Award, ¶¶ 424-425
[16] Second Request for Reconsideration, ¶ 14, citing *Green Power* Award, ¶¶ 426 et seq.
[17] Second Request for Reconsideration, ¶ 15, citing *Green Power* Award, ¶ 438.
[18] Second Request for Reconsideration, ¶ 19.
[19] Second Request for Reconsideration, ¶ 20.
[20] Second Request for Reconsideration, ¶ 26.
[21] Claimants' Response, ¶ 2.

(a) dismiss Respondent's Second Request for Reconsideration;

(b) confirm that the Decision stands in its entirety, and that the *Green Power* Award would have no influence on the outcome of the Decision; and

(c) order Respondent to cover the costs incurred by the Claimants in responding to the Second Request for Reconsideration.[22]

18. Claimant's position is addressed in two fronts:

(a) The legal standard set out by the Tribunal means that decisions can be reconsidered but *only* under exceptional circumstances; and

(b) The *Green Power* Award does not warrant reconsideration of the Decision.

The legal standard set out by the Tribunal: decisions can be reconsidered but *only* under exceptional circumstances

19. Claimants recall that the Tribunal found that it has the authority to re-examine its Decision but that any reconsideration exercise should be strictly limited to the revision mechanism established by Article 15 of the ICSID Convention for the review of awards and, further, that under Article 51, an award can be reviewed upon "*the discovery of some fact of such nature as decisively to affect the award*" and "*provided that when the award was rendered that fact was unknown to the Tribunal and the applicant, and that the applicant's ignorance of that fact was not due to negligence"*.[23]

20. Thus, Claimants contend that Respondent is required to demonstrate in its Second Request for Reconsideration, that the *Green Power* Award constitutes: (a) the discovery of a fact; (b) that the fact was unknown to the Tribunal – and that that lack of knowledge [of Respondent] was not the result of negligence; and (c) that the new fact would have decisively affected the Decision.[24]

21. In connection with the first element, Claimants contend that the *Green Power* Award would qualify as a "new fact", since the Tribunal has found that new facts are not strictly limited to factual issues but also involve issues of law. Regarding the second, Claimants agree that it is clear that the *Green Power* Award did not exist at the time of the Decision, and therefore amounts to a newly discovered fact. [25]

22. It is with respect to the third element [that the new fact would have decisively affected the Decision] that, according to Claimants, Respondent fails. This follows, because Respondent must demonstrate that that the *Green Power* Award constitutes a legal development of such decisive nature, that it would have led the Tribunal to a different conclusion on jurisdiction, had it been available to the Tribunal at the time of the Decision, and Claimants contend that

[22] Claimants' Response, ¶ 22.
[23] Claimants' Response, ¶ 5, making reference to the First Decision on Reconsideration, ¶¶ 86, 87 and 94.
[24] Claimants' Response, ¶ 6.
[25] Claimants' Response, ¶ 7.

Respondent made no effort to explain in the Second Request for Reconsideration how the *Green Power* Award meets the standard.[26]

The *Green Power* Award does not warrant reconsideration of the Decision.

23. Claimants start by arguing that the *Green Power* Award was rendered in an arbitration brought under the SCC Rules and seated in Stockholm which, according to the *Green Power* tribunal, attracted the application of the *lex loci arbitri*, including EU law, to the assessment of jurisdiction.[27] Further, Claimants contend that the tribunal in *Green Power* emphasized throughout its award that there is a "*significant difference*" between non-ICSID arbitrations such as those under the SCC Rules and ICSID arbitrations.[28] The *Green Power* tribunal found that ICSID arbitrations do not have a legal seat and, therefore, to assess jurisdiction, ICSID tribunals do not apply the *lex loci arbitri*, but rather the ICSID Convention and the relevant treaty, and therefore specifically distanced itself from ICSID arbitration and from the findings made by this Tribunal in particular in its Decision.[29]

24. Claimants also contend that Respondent itself pleaded that the fact that it was an arbitration conducted under the SCC Rules, seated in Sweden, distinguished it "*from other arbitration proceedings … governed by the ICSID Convention and not subject to the domestic* lex arbitri *of the seat in an EU Member State*" and that "*ICSID awards* [were] *therefore less relevant for the present proceedings*."[30] In Claimants' view, Spain cannot now argue that this Tribunal should reconsider its finding on jurisdiction because of the *Green Power* Award.

25. Claimants argue that, even though Respondent claims that the fact that the arbitration was seated in an EU Member State was not "*decisive* [to the tribunal] *to reach its conclusion*", that it did not have jurisdiction, because it also considered that EU law was relevant to determine jurisdiction, as a matter of international law, that the Tribunal has already determined that EU law was not part of the law applicable to the dispute.[31]

26. Further, Claimants contend that, even though the *Green Power* Award constitutes a "new fact", it does not contain anything that is "new" that has not already been addressed by the Parties, adding that Respondent itself acknowledged that: "[a]*ll these arguments have been raised by the Kingdom of Spain before this honorable Tribunal".*[32] They add that these

[26] Claimants' Response, ¶ 8.
[27] Claimants' Response, ¶ 11, making reference to *Green Power* Award, ¶¶ 160-166.
[28] Claimants' Response, ¶ 11, making reference to *Green Power* Award, ¶¶ 160-162, 175 and 439-441, and footnote 171.
[29] Claimants' Response, ¶ 11, making reference to *Green Power* Award, ¶ 439, where the tribunal stated: "… [The *Infracapital v Spain* and *Sevilla Beheer v Spain*] cases are ICSID arbitrations and, as a result, the reasoning did not take into account the relevance for jurisdictional matters of the applicable law attracted by the selection of the seat in an EU Member State […] Unlike the tribunals in *Infracapital v Spain* and *Sevilla Beheer v Spain*, this Tribunal considers that EU law is part of the law applicable to the determination of jurisdiction. For these reasons, the Tribunal considers the reasoning of those ICSID tribunals on this issue inapposite for the present purposes". (Emphasis in the quote by Claimants).
[30] Claimants' Response, ¶ 12, making reference to *Green Power* Award, ¶ 137.
[31] Claimants' Response, ¶ 14.
[32] Claimants' Response, ¶ 17, making reference to the Second Request for Reconsideration, ¶ 17.

arguments have been addressed already by the Tribunal in the Decision and, "… *after careful consideration, it decided that it had jurisdiction over the dispute*".[33]

27. Finally, Claimants address the alleged "inconsistency" that Respondent alleges would occur if this Tribunal were to disregard "the conclusions reached by the *Green Power* Tribunal …" and argues that this case is not a Stockholm seated arbitration, and therefore the *Green Power* Award is not relevant for that reason alone.[34]

III. THE TRIBUNAL'S ANALYSIS

A. ADMISSIBILITY OF RESPONDENT'S REQUEST

28. The Tribunal needs to first address whether the Second Request for Reconsideration is available to Respondent before it examines the merits of such request. In its First Request for Reconsideration, the Tribunal identified two thresholds to decide whether or not the request was admissible: (i) whether under the ICSID Arbitration Rules there was an impediment, and (ii) assuming the ICSID Arbitration Rules allowed for such reconsideration, whether the conditions thereto were met by Respondent's request.

29. Respondent has not submitted an extended analysis nor support for the admissibility of its Second Request for Reconsideration; it simply states that "… *[a]s the Tribunal will be aware, neither the ICSID Convention or Arbitration Rules expressly contemplate the possibility that the Tribunal may reconsider a decision. However, while the ICSID Convention or Arbitration Rules do not expressly contemplate such a possibility, neither do they expressly prohibit it",*[35] and quoted certain paragraphs of the *Standard Chartered Bank v. TANESCO* Award, to support its position that the Tribunal can reconsider the Decisions because they are not *res judicata*.

30. The Tribunal shall examine the Second Request for Reconsideration in light of Respondent's brief arguments.

31. As the Tribunal noted in its First Decision on Reconsideration, neither the ICSID Convention nor the ICSID Arbitration Rules define the meaning of an "award". However, it is possible to identify the meaning of "award" by reading Rule 47 of the ICSID Arbitration Rules (The Award), which provides that an award shall be in writing and shall contain, *inter alia,* "*the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."*[36] This Tribunal interprets this to mean that an award must address and decide on a final basis <u>every</u> issue in conflict brought to it by the parties in the

[33] Claimants' Response, ¶ 18.
[34] Claimants' Response, ¶ 19.
[35] Second Request for Reconsideration, ¶ 21.
[36] Rule 47(1)(i) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"). Article 51(1) of the ICSID Convention provides: "*Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."*

relevant case, and therefore discerns that the Decision is not an "*award*" insofar as it deals only with jurisdiction, liability and provides certain guidelines on *quantum*. It does not deal finally with each, and all the issues brought to the Tribunal by the Parties.[37]

32. The Tribunal also notes that Rule 16 of the ICSID Arbitration Rules (Decisions of the Tribunal) generically refers to "*decisions*", to describe all decisions made throughout an arbitral proceeding, without establishing any difference between decisions of a procedural nature or those of substance. Thus, the Decisions could be well placed within this term.

33. For the same reasons stated in its First Decision on Reconsideration, the Tribunal believes that the Decisions are of such substance as to qualify for reconsideration. Indeed, ICSID tribunals have the authority to re-examine a decision when some fact of decisive importance is discovered on a point already decided by a tribunal. Given the exceptional nature of the remedy, the Tribunal confirms that the strict conditions required by Article 51 of the ICSID Convention for the review of awards should equally apply, by analogy, to pre-award decisions;[38]

34. The First Decision on Reconsideration set out the legal standard that a request shall meet to warrant reconsideration. It concluded that reconsideration of a decision would only be justified in exceptional circumstances:[39]

> *"Respondent is required to demonstrate: (a) the discovery of a fact; that such fact was unknown to the Tribunal, and the applicant's lack of knowledge not being the result of negligence; and (b) that the new fact would have decisively affected the Decision".*

35. The Tribunal will now examine:

    a) whether the *Green Power* Award constitutes a "fact",

    b) whether the *Green Power* Award constitutes a "new fact", i.e., whether it was known to both the Tribunal and the Respondent before the Decisions were issued; and

    c) whether the fact is *"of such nature as decisively to affect*" the Decisions.

36. In respect to the *first,* the Tribunal equally concludes –as it did in its First Decision on Reconsideration – that discovery of "facts" should not be strictly limited to factual situations that do not comport with the record but also involve issues of law. In line with the conclusions in the First Decision on Reconsideration, the *Green Power* Award would qualify as a "fact".

[37] First Decision on Reconsideration, ¶ 80.
[38] The Tribunal notes that the Parties do not dispute that Article 51 of the ICSID Convention may be a useful guidance by analogy to the present situation.
[39] First Decision on Reconsideration, ¶ 88

37. *Second*, from the mere fact that the *Green Power* Award was issued on 16 June 2022, it is clear that it did not exist at the time of the Decisions; it was unknown to both the Tribunal and the Respondent, and therefore it amounts in effect to a "newly discovered fact".

38. The *third* requirement involves a determinative element, i.e., whether the outcome of the Decisions would have been substantially different, had the *Green Power* Award been available and known to the Tribunal. In other words, whether such award qualifies as a legal development which undermines the Tribunal's legal determination on jurisdiction. The Tribunal believes that the exceptional character of reconsideration means that a subsequent legal authority that arrives at a different interpretation of the law does not necessarily justify reconsideration. In this respect, the Tribunal agrees with the *Cavalum* tribunal which observed that for a legal development to be exceptional "[*i]t 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*"[40]

B. WHETHER THE *GREEN POWER* AWARD WARRANTS THE RECONSIDERATION OF THE DECISIONS

39. For the reasons stated below, the Tribunal determines that the *Green Power* Award –had it been known to it before issuing the Decision or the First Decision on Reconsideration– would not have provided elements to the Tribunal to resolve the issue of jurisdiction in a different manner.

40. The basis for this determination is two-fold: (a) the seat of arbitration of this case is Washington, D.C., United States of America, and the case is subject to the ICSID Convention and Arbitration Rules, and (b) there are no new arguments available to the Tribunal to find that its determination on jurisdiction in the Decision, and the First Decision on Reconsideration should be modified. Both are examined below.

41. The *Green Power* Award was rendered in an arbitration that has substantial differences from this case. It was brought under the SCC Rules and the seat of arbitration was Stockholm, Sweden in terms of Article 26(4)(c) ECT.[41] In examining the law applicable to its jurisdiction, the *Green Power* tribunal acknowledged the differences between ICSID proceedings and those of the *Green Power* case. For one, there is the fact that the seat of arbitration was outside the European Union. The *Green Power* tribunal further acknowledged that the claimants in such case "*could have opted for an ICSID arbitration under Article 26(4)(a)(i) ECT*", but opted instead to conduct the proceedings under SCC Rules and later agreed to setting the seat of the arbitration in Stockholm.[42] According to the *Green Power* tribunal, the application of the local *lex arbitri* was one of the considerations Claimants took into account when it opted for SCC arbitration in Stockholm.[43]

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[40] **CL-227**, *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, ¶ 80.
[41] *Green Power v Spain*, Award, ¶ 6.
[42] *Green Power v Spain*, Award, ¶¶ 159-162
[43] *Green Power v Spain*, Award, ¶ 163.

42. It is clear that the selection of the seat in Sweden, an EU Member State, attracted the application of EU law. This fact was also acknowledged by the *Green Power* tribunal when it determined that "… *[the] Tribunal considers that the relevance and application of EU law to certain questions arising in these proceedings is inescapable, regardless of whether such law is characterized as part of international law or as part of domestic law*" and resolved that it should therefore be applied to determine jurisdiction.[44]

43. The *Green Power* tribunal concluded that "… *interpreting Article 26 ECT without resorting to EU law is inconclusive in the circumstances of this case*",[45] and later found that Swedish law recognizes the primacy of EU law.[46]

44. This Tribunal notes that the *Green Power* Award specifically examined the issues on jurisdiction of this case (made available by the claimants in the *Green Power* case), and also acknowledged that since this particular case was an ICSID arbitration "… *the reasoning did not take into account the relevance for jurisdictional matters of the applicable law attracted by the selection of the seat in an EU Member State*", and concluded that the reasoning of the Decision "*on this issue* [is] *inapposite for present purposes*."[47]

45. Therefore, the Tribunal finds that the differences in seat of arbitration and arbitration rules between the *Green Power* case and this particular case do not justify a different conclusion on the findings on the applicability of EU law to determine jurisdiction of this Tribunal in the Decision.

46. In any event, and with due respect to the *Green Power* tribunal, this Tribunal strongly disagrees that a tribunal is required, under Article 26 ECT, to interpret and apply EU law. As already concluded in the Decision, the Tribunal's jurisdiction was to be determined by applying Article 26 ECT, as interpreted pursuant to the VCLT, and not EU law. The Tribunal concluded that: "*the ordinary meaning of the terms of Article 26, 'in their context' and 'in the light of its object and purpose' as required interpretation under the VCLT leads to conclude that the jurisdiction of the Tribunal derives from the ECT itself*."[48] The Tribunal concluded that EU law was not part of the question of jurisdiction. This was reiterated in the First Decision on Reconsideration, where the Tribunal concluded that "*EU law is not applicable to jurisdiction. As a result, the Komstroy Judgment is irrelevant to the question of jurisdiction. The applicable law to jurisdiction and the merits of the dispute is international law, and not principles of sub-systems of international law such as EU treaties*".[49] The same conclusion applies to the *Green Power* Award.

47. In this regard, the Tribunal agrees with the Claimants that although the *Green Power* Award is a *new fact,* it does not contain anything *new* that has not already been extensively pleaded by the disputing parties.

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[44] *Green Power v Spain*, Award, ¶¶ 170-172
[45] *Green Power v Spain*, Award, ¶ 412.
[46] *Green Power v Spain*, Award, ¶ 475.
[47] *Green Power v Spain*, Award, ¶ 439.
[48] Decision, ¶ 294.
[49] First Decision on Reconsideration, ¶ 107.

48. Furthermore, the Tribunal finds that the elements provided by Respondent in respect to the *Green Power* Award do not offer any compelling arguments to modify or even consider modifying the Decisions. The Tribunal confirms that it addressed all arguments submitted by Respondent on the subject in its Decision,[50] later transcribed in the First Decision on Reconsideration.[51] The Tribunal finds it unnecessary to repeat them.

IV. DECISION

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

(1). To reject Respondent's Second Request for reconsideration of the Decision on Jurisdiction, Liability and Directions of Quantum issued by the Tribunal on 13 September 2021, and the Decision on Respondent's First Request for Reconsideration dated 1 February 2022.

(2). That any determination of costs shall be made in the Award.

Prof. Peter D. Cameron
Arbitrator

Mr. Luis González García
Arbitrator

Mr. Eduardo Siqueiros T.
President of the Tribunal

[50] Decision, ¶¶ 289-306.
[51] First Decision on Reconsideration, ¶ 117.