

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**Sevilla Beheer B.V. and others**  
(Claimants)

and

**The Kingdom of Spain**  
(Respondent)

**ICSID Case No. ARB/16/27**

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**DECISION ON THE RESPONDENT'S SECOND REQUEST FOR  
RECONSIDERATION**

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***Members of the Tribunal***

Dr. Raëd M. Fathallah, President of the Tribunal  
Professor Peter Cameron, Arbitrator  
Professor Attila Tanzi, Arbitrator

***Secretary of the Tribunal***

Mr. Marco Tulio Montañés-Rumayor

30 January 2023

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## I. PROCEDURAL HISTORY

1. On 11 February 2022, the Tribunal issued its Decision on Jurisdiction, Liability and the Principles of Quantum (the “**Decision**”), in which the Tribunal, *inter alia*, unanimously held as follows:

[...] the Tribunal has jurisdiction over the Parties and the subject-matter of this dispute with the exception that it has no jurisdiction to determine whether the TVPEE breached Spain’s obligations under the [Energy Charter Treaty (the “**ECT**”)].<sup>1</sup>

2. On 29 June 2022, the Kingdom of Spain (“**Spain**” or the “**Respondent**”) submitted a Request for Reconsideration of the Decision in relation to the Tribunal’s findings on jurisdiction (the “**First Request for Reconsideration**”). In its Request for Reconsideration, the Respondent also sought leave to introduce into the record the following legal authorities: (i) *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V2016/135*, Award, 16 June 2022 and (ii) *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018.
3. On 7 July 2022, further to the Tribunal’s invitation, Sevilla Beheer B.V. and Cordoba Beheer B.V., two private limited liability companies incorporated under the laws of the Netherlands, as well as 57 Spanish companies (the “**Claimants**”) submitted their Response to the Respondent’s Request for Reconsideration (the “**Claimants’ Response**”).
4. On 11 August 2022, the Tribunal issued its decision rejecting the Request for Reconsideration and reserving any decision on costs (the “**Decision on Reconsideration**”).
5. On 27 December 2022, the Respondent submitted another Request for Reconsideration of the Decision in relation to the Tribunal’s findings on jurisdiction (the “**Second Request for Reconsideration**”). In its Second Request for Reconsideration, the Respondent also sought leave to introduce into the record the following documents: the judgment of the Svea Court of Appeal, dated 13 December 2022 (the “*Novenergia*”).

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<sup>1</sup> Decision, Operative Part.

**Judgment**”) and the judgment rendered by the Swedish Supreme Court, dated 14 December 2022 (the “**PL Holdings Judgment**” and collectively the “**Swedish Judgments**”).<sup>2</sup>

6. On 16 January 2023, further to the Tribunal’s invitation, the Claimants submitted their Response to the Respondent’s Second Request for Reconsideration (the “**Claimants’ Second Response**”).

## II. THE PARTIES’ POSITIONS

### A. The Respondent

7. In its Second Request for Reconsideration, the Respondent submits that in its judgment, dated 13 December 2022, the Svea Court of Appeal upheld the appeal brought by Spain to declare the arbitral award rendered in SCC case No. 2015/063 between Novenergia II-Energy & Environment (SCA) (Novenergia) and the Kingdom of Spain (the “**Novenergia II Award**”<sup>3</sup>) “null and void”, on the grounds of lack of jurisdiction of the arbitral tribunal as it was an intra-EU dispute between an investor from a Member State of the European Union and the Kingdom of Spain, an EU Member State.<sup>4</sup>
8. The Respondent further submits that on 14 December 2022 the awards in SCC Case No. 2014/163 between PL Holdings and Poland (the “**PL Holdings Awards**”<sup>5</sup>) were annulled by the Swedish Supreme Court, “which held that this intra-EU arbitration was invalid under EU law and therefore contrary to Swedish international public policy”.<sup>6</sup>
9. The Respondent provides a summary of the holdings of these Swedish Judgments.<sup>7</sup>

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<sup>2</sup> Svea Court of Appeal, Case No. T 4658-18, Judgment, 13 December 2022 (RL-139); Swedish Supreme Court, Case No. T 1569-19, Judgment, 14 December 2022 (RL-140).

<sup>3</sup> *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018.

<sup>4</sup> Second Request for Reconsideration, para. 2.

<sup>5</sup> *PL Holdings S.à.r.l. v Republic of Poland, SCC Case No. V 2014/163 (PL Holdings v Poland)*, Partial Award, 28 June 2017 and Final Award, 28 September 2017.

<sup>6</sup> Second Request for Reconsideration, para. 3.

<sup>7</sup> Second Request for Reconsideration, paras. 6-17.

10. The Respondent then turns to discussing the grounds and standard for reconsideration of decisions rendered within the ICSID framework and concludes that “the Tribunal should have no doubts that its own decision can be reopened and reconsidered”.<sup>8</sup>
11. The Respondent argues that the value of the Swedish Judgments is “undeniable”, as it is “the first time that a European country has succeeded in annulling an award on the grounds of lack of jurisdiction [...] in an intra-EU dispute under the ECT.”<sup>9</sup> The Respondent also draws the Tribunal’s attention to a recent partial dissenting opinion issued by Professor Giorgio Sacerdoti in *Portigon AG v. Kingdom of Spain* (ICSID Case No. ARB/17/15) in which Professor Sacerdoti concluded that the tribunal lacked jurisdiction to hear an intra-EU dispute.<sup>10</sup>
12. Spain accordingly requests that the Tribunal allow the introduction of the Swedish judgments into the record with a view to reconsidering its Decision and declare that it lacks jurisdiction over these proceedings.<sup>11</sup>

## **B. The Claimants**

13. The Claimants submit that Spain’s Second Request for Reconsideration falls short of the legal standard for reconsideration,<sup>12</sup> as neither the *Novenergia* Judgment nor the *PL Holdings* Judgment “constitute an exceptional circumstance that would have led the Tribunal to a different conclusion on jurisdiction”.<sup>13</sup>
14. As regards the *PL Holdings* Judgment, the Claimants submit that it was “rendered in circumstances which bear no resemblance to this case”.<sup>14</sup> Specifically, the Claimants emphasize that the PL Holdings awards were issued under the 1987 BIT between Belgium/Luxembourg and Poland (not the ECT) and pursuant to the rules of the

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<sup>8</sup> Second Request for Reconsideration, paras. 18-30, referring to *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 (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018; *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

<sup>9</sup> Second Request for Reconsideration, para. 31.

<sup>10</sup> Second Request for Reconsideration, para. 3.

<sup>11</sup> Second Request for Reconsideration, para. 37.

<sup>12</sup> As regards the legal standard for reconsideration, the Claimants refer to their previous submissions and the Tribunal’s Decision on Reconsideration. See Claimants’ Second Response, paras. 7-11.

<sup>13</sup> Claimants’ Second Response, para. 3.

<sup>14</sup> Claimants’ Second Response, para. 13.

Arbitration Institute of the Stockholm Chamber of Commerce (the “**SCC Arbitration Rules**”).<sup>15</sup> The Claimants state that the Swedish courts eventually decided to set the award aside in view of its alleged inconsistency with EU law (in particular, Article 267 and 344 TFEU as interpreted in *Achmea*).<sup>16</sup>

15. As to the *Novenergia* Judgment, the Claimants argue that although it concerns an ECT award, the findings of the Svea Court of Appeal are still irrelevant to this Tribunal, because the *Novenergia* Award was rendered by a Stockholm seated tribunal, under the SCC Arbitration Rules and subject to the provisions of the Swedish Arbitration Act.<sup>17</sup> The Claimants emphasize that the Svea Court of Appeal referred to the CJEU’s position expressed in *Achmea* and *Komstroy*, and found that the “reasons used by the CJEU as a basis for its assessment are of a general nature and consider[ed] that they do not leave room for any other conclusion when, as in this case, Swedish law is applicable to the proceedings”. As a result, the Svea Court of Appeal concluded that “[s]ince the impediments to arbitration set up by the CJEU must be equated with impediments in Swedish law”, the matter could not have been resolved by arbitration, such that the underlying award should be annulled.<sup>18</sup>
16. Referring to the Decision on Reconsideration, the Claimants argue that these new Swedish Judgments have no impact on these proceedings, as the Tribunal – constituted under the ICSID Convention – is not required to apply Swedish law “in any shape or form”.<sup>19</sup>
17. Furthermore, the Claimants submit that neither the *Novenergia* Judgment nor the *PL Holdings* Judgment constitute “new facts”, as they do not contain anything new on the intra-EU debate that has not been already addressed by the Parties and discussed at length by the Tribunal.<sup>20</sup> According to the Claimants, Spain has equally failed to demonstrate that in light of the Swedish Judgments the Tribunal’s findings on

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<sup>15</sup> Claimants’ Second Response, para. 13.

<sup>16</sup> Claimants’ Second Response, para. 13.

<sup>17</sup> Claimants’ Second Response, para. 13.

<sup>18</sup> Claimants’ Second Response, para. 14, *referring to* Svea Court of Appeal, Case No. T 4658-18, Judgment, 13 December 2022 (RL-139), p. 36 (PDF, p. 82), p. 41 (PDF, p. 87).

<sup>19</sup> Claimants’ Second Response, para. 15.

<sup>20</sup> Claimants’ Second Response, para. 17.

jurisdiction were “wholly wrong”.<sup>21</sup> The Claimants also argue that the Respondent’s position that it had to face a “tremendous injustice” by having to litigate this intra-EU matter is devoid of any merit, as the Swedish courts’ conclusions “cannot affect the Claimants’ legitimate rights to have their claim resolved through the ICSID arbitration.”<sup>22</sup>

18. The Claimants accordingly request that the Tribunal dismiss Spain’s Request, confirm that its Decision stands in its entirety and order Spain to cover the costs incurred by the Claimants in responding to Spain’s Second Request.<sup>23</sup>

### III. THE TRIBUNAL’S ANALYSIS

19. As a preliminary matter, the Tribunal would like to make an observation regarding the manner in which Spain’s Second Request for Reconsideration has been presented to the Tribunal. As summarized above, in its Second Request for Reconsideration Spain relied on two judgments issued by the Svea Court of Appeal and the Swedish Supreme Court. Even though both documents submitted in support of the Second Request for Reconsideration are national judicial decisions, the Respondent has not properly requested leave to submit those additional exhibits before annexing them to its Second Request for Reconsideration in violation of paragraph 17.4 of Procedural Order No. 1, which provides as follows:

17.4. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, save under exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other party.

17.4.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.

17.4.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.<sup>24</sup>

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<sup>21</sup> Claimants’ Second Response, para. 19.

<sup>22</sup> Claimants’ Second Response, para. 20.

<sup>23</sup> Claimants’ Second Response, para. 22.

<sup>24</sup> Procedural Order No. 1 (emphases added).



20. The Claimants have also noted that “even though Spain seeks leave from the Tribunal to introduce the Swedish judgments onto the record [...], Spain has already filed and assigned authority numbers to the *Novenergia* and *PL Holdings* Judgments”.<sup>25</sup>
21. Although the Tribunal does not condone such procedural behavior, it will nevertheless analyze Spain’s Request for Reconsideration taking into account that both Swedish Judgments are widely reported legal developments that became publicly available over the last few weeks. The Tribunal believes that, as a matter of procedural efficiency, it would be more beneficial to address the impact of the two Swedish Judgments on these proceedings.
22. As regards the substance of Spain’s Second Request for Reconsideration, in its earlier Decision on Reconsideration, the Tribunal found that “it may only be appropriate to reconsider a pre-award decision in exceptional circumstances.”<sup>26</sup> The Tribunal also concluded that the conditions that would justify revision under Article 51 of the ICSID Convention may be applied by analogy”.<sup>27</sup>
23. Having considered the Parties’ positions,<sup>28</sup> the Tribunal does not see the need to revise its findings regarding the legal standard for reconsideration of pre-award decisions under the ICSID Convention and the ICSID Arbitration Rules that have been set out at paragraphs 22-28 of the Decision on Reconsideration.
24. In view of the applicable legal standard, the Tribunal is also not convinced that the Respondent’s Second Request for Reconsideration should be granted.
25. First of all, as it has been rightly pointed out by the Claimants, both the *Novenergia* Judgment as well as the *PL Holdings* Judgment were issued under Swedish law and in

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<sup>25</sup> Claimants’ Second Response, para. 2, footnote 1.

<sup>26</sup> Decision on Reconsideration, para. 28.

<sup>27</sup> Decision on Reconsideration, para. 28 referring to *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Award, 12 September 2016, para. 322; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 94; *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, para. 76; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020, para. 91; *Infracapital FI S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent’s Request for Reconsideration Regarding the Intra-EU Objection and the Merits, 1 February 2022, para. 84.

<sup>28</sup> Second Request for Reconsideration, paras. 18-30.

relation to arbitration proceedings seated in Sweden. The Tribunal has already ruled in its Decision on Reconsideration that the present arbitration is not subject to a *lex arbitri* of any particular State.<sup>29</sup> These proceedings are governed by the ICSID Convention and the ICSID Arbitration Rules including in relation to the grounds for annulment of an ICSID Award (see Article 52 of the ICSID Convention). As it was put by the *Belenergia v. Italy* tribunal, the ICSID Convention “establishes a self-contained system independent from national legal systems”.<sup>30</sup>

26. The Tribunal has also explained in its Decision when deciding on the Intra-EU Objection that the question whether it has jurisdiction must be established, first and foremost, pursuant to the terms of Article 26(1)-(5) of the ECT as interpreted pursuant to Articles 31 and 32 of the VCLT.<sup>31</sup> The Tribunal has equally addressed the possibility of taking EU law into account for the purposes of interpreting Article 26 of the ECT.<sup>32</sup> The Tribunal thus amply addressed the law governing its jurisdiction and these proceedings. Swedish law including the jurisprudence of the Svea Court of Appeal and the Swedish Supreme Court does not form part of it.
27. Secondly, both the *PL Holdings* Judgment and the *Novenergia* Judgment were issued under Swedish law and in accordance with the principles governing the relationship between the EU and its Member States. In the *Novenergia* Judgment, the Svea Court of Appeal has unambiguously stated that the CJEU jurisprudence must be followed as a matter of Swedish law:

[...] the Court of appeal concludes that the reasons used by the CJEU as a 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”.<sup>33</sup>

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<sup>29</sup> Decision on Reconsideration, para. 30.

<sup>30</sup> *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 339 – referred to by the Claimants in their Response at footnote 34.

<sup>31</sup> *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022.

<sup>32</sup> *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 652.

<sup>33</sup> Svea Court of Appeal, Case No. T 4658-18, Judgment, 13 December 2022 (RL-139), p. 36 (PDF, p. 82) (emphasis added).

28. The Svea Court of Appeal thus concluded that the “impediments to arbitration set up by the CJEU must be equated with impediments in Swedish law”.<sup>34</sup> This ultimately caused the Svea Court of Appeal to set the *Novenergia* Award aside.
29. This Tribunal has already addressed the question whether the CJEU’s *Achmea* and *Komstroy* can be considered as “impediments” to its jurisdiction in view of the applicable law and has come to a different conclusion.<sup>35</sup> The Respondent has not demonstrated why this conclusion should be reconsidered in view of the *Novenergia* Judgment.
30. The *PL Holdings* Judgment appears to be even more remote from these proceedings. Indeed, as explained by the Claimants, the underlying arbitration was initiated under the 1987 Belgium/Luxembourg-Poland BIT (i.e. not the ECT) and was seated in Stockholm. Poland initiated annulment proceedings in relation to the *PL Holdings* Awards before the Svea Court of Appeal, which dismissed Poland’s application in accordance with the Swedish Arbitration Act on the grounds that the investor and Poland were not prevented from entering into an *ad hoc* arbitration agreement, which existed in that case because Poland had failed to raise its intra-EU objection in a timely manner.<sup>36</sup> Poland subsequently appealed this decision before the Swedish Supreme Court, which eventually requested the CJEU to issue a preliminary ruling on the question of whether EU law (specifically, Articles 267 and 344 of the TFEU as interpreted in *Achmea*) must be interpreted as precluding national legislation that allows initiating an arbitration on the basis of an *ad hoc* arbitration agreement between a Member State and an investor, such as the one determined by the Svea Court of

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<sup>34</sup> Svea Court of Appeal, Case No. T 4658-18, Judgment, 13 December 2022 (RL-139), p. 41 (PDF, p. 87) (emphasis added).

<sup>35</sup> Decision, paras. 655-676.

<sup>36</sup> Claimants’ Second Response, para. 13.

Appeal.<sup>37</sup> The CJEU answered the question in the affirmative<sup>38</sup> and that led the Swedish Supreme Court to the conclusion that the *PL Holdings* award had to be annulled for breach of public policy protecting the Swedish legal order:

An arbitral award made on the basis of a clause such as that at issue must be regarded as having been made unlawfully, since it is incompatible with the fundamental rules and principles governing the legal order in the Union and, therefore, in Sweden. [...] It follows from the foregoing that the maintenance of the arbitral awards in question would be manifestly incompatible with the principles of the legal order in Sweden. The special arbitration award and the final arbitration award must therefore be declared null and void pursuant to Article 33(1)(2) [of the Swedish Arbitration Act].<sup>39</sup>

31. These considerations are clearly inapplicable in the case at hand for the reasons set out above and in the Tribunal's Decision on Reconsideration.<sup>40</sup> As in the *Novenergia* proceedings, the *PL Holdings* arbitration was subject to the supervisory jurisdiction of the Swedish courts, whereas this Tribunal is only subject to the rules and procedures enshrined in the ICSID Convention and the ECT.
32. Finally, in support of its Second Request for Reconsideration the Respondent has also referred to the dissenting opinion issued by Professor Giorgio Sacerdoti in *Portigon AG v. Kingdom of Spain* (ICSID Case No. ARB/17/15).<sup>41</sup> The Tribunal recalls that it has previously addressed and dismissed arguments similar to those discussed by Professor Sacerdoti.<sup>42</sup>

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<sup>37</sup> The question referred was as follows: "Do Articles 267 and 344 TFEU, as interpreted in [the judgment of 6 March 2018, *Achmea* (C- 284/16, EU:C:2018:158)], mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor – where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States – by virtue of the fact that the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?" See CJEU, Judgment of the Court (Grand Chamber) in Case C-109/20, *Poland v PL Holdings Sàrl*, 26 October 2021, para. 33.

<sup>38</sup> The CJEU found that "Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles." See CJEU, Judgment of the Court (Grand Chamber) in Case C-109/20, *Poland v PL Holdings Sàrl*, 26 October 2021.

<sup>39</sup> Swedish Supreme Court, Case No. T 1569-19, Judgment, 14 December 2022 (RL-140), p. 23 (PDF, p. 43).

<sup>40</sup> Decision on Reconsideration, paras. 29-37.

<sup>41</sup> Respondent's Second Request, para. 35.

<sup>42</sup> See Decision, paras. 613-678.

33. The Tribunal therefore concludes that Spain has failed to demonstrate that the new authorities referred to in its Second Request for Reconsideration constitute exceptional circumstances that may cause the Tribunal to change its findings on jurisdiction.

#### IV. DECISION

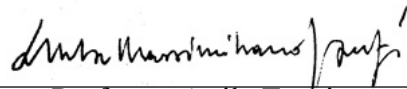
34. For the above reasons, the Tribunal decides:

- (1) To reject the Second Request for Reconsideration;
- (2) To confirm its Decision; and
- (3) To reserve any decision on costs until the Award in these proceedings.



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Professor Peter D. Cameron  
Arbitrator



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Professor Attila Tanzi  
Arbitrator



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Dr. Raed M. Fathallah  
President of the Tribunal