

WHITE & CASE

February 20, 2018

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BY HAND

His Excellency Jimmy Morales
President of the Republic of Guatemala
6ta. Avenida 4-41, Zona 1
Ciudad de Guatemala, Guatemala

The Honorable Acisclo Valladares Urruela
Minister of Economy
8a. Avenida 10-43, Zona 1
Ciudad de Guatemala, Guatemala

Dear Excellencies:

IC Power Asia Development Ltd. ("IC Power" or "Claimant"), an entity constituted under the laws of Israel, hereby submits its Notice of Arbitration against the Republic of Guatemala concerning a dispute arising under the Agreement between the Government of the State of Israel and the Government of the Republic of Guatemala for the Reciprocal Promotion and Protection of Investments (the "Treaty"). Pursuant to the Treaty, the Notice of Arbitration commences arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law. The Notice of Arbitration is accompanied by nineteen (19) exhibits and a courtesy translation into the Spanish language.

Sincerely,



Jonathan C. Hamilton

Partner

T +1 202 626 3638

Enclosures



Under the Arbitration Rules of the United Nations Commission on International Trade Law



IC Power

Asia Development Ltd. (Israel)
Claimant

v.

Republic of

Guatemala

Respondent

NOTICE OF ARBITRATION

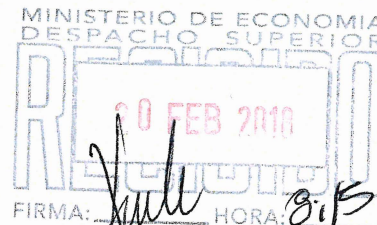
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Washington, D.C. | Mexico City

IC Power Asia Development Lt. (Israel) v. Republic of Guatemala

NOTICE OF ARBITRATION

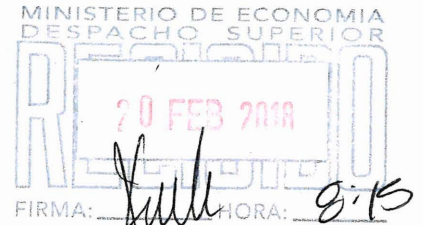
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IC Power Asia Development Lt. (Israel) v. Republic of Guatemala

NOTICE OF ARBITRATION



I. INTRODUCTION

1. IC Power Asia Development Ltd. (“Claimant” or “IC Power”), an entity constituted under the laws of Israel, hereby submits this Notice of Arbitration concerning its dispute with the Republic of Guatemala (“Guatemala” or “Respondent”) arising under the Agreement between the Government of the State of Israel and the Government of the Republic of Guatemala for the Reciprocal Promotion and Protection of Investments (the “Treaty”).¹

2. Claimant entered the Guatemalan energy distribution market in January 2016 through the acquisition of two Guatemalan electricity distribution companies, Distribuidora de Electricidad de Oriente, S.A. (“Deorsa”) and Distribuidora de Electricidad de Occidente, S.A. (“Deocsa” and, jointly with Deorsa, the “Distributors”).

3. During the due diligence process to determine the feasibility of the acquisition, Claimant learned of the existence of two binding tax opinions, one related to Deocsa and one related to Deorsa, issued by the Guatemalan Superintendence of Tax Administration (“SAT”) in February 2015 (the “Binding Tax Opinions”).²

4. Despite the fact that the Binding Tax Opinions remain in force and binding, the SAT and other Guatemalan authorities have taken a series of unjustified measures against the Distributors since at least July 2016 in complete disregard of the mandatory conclusions stated in the Binding Tax Opinions. Those measures have forced the Distributors to make payments of tens of millions of dollars to the SAT and to refrain from claiming legitimate tax deductions

¹ See Agreement between the Government of the State of Israel and the Government of the Republic of Guatemala for the Reciprocal Promotion and Protection of Investments, signed 7 Nov. 2006, in force as from 15 Jan. 2009 (Exh. C-001); see also Israel’s Ministry of Foreign Affairs, *Bilateral Agreements*, available at <http://mfa.gov.il/MFA/AboutTheMinistry/LegalTreaties/Pages/Bilateral-Treaties.aspx> (Exh. C-002) (listing the Treaty’s dates of signature and entry into force as 7 Nov. 2006 and 15 Jan. 2009, respectively); Guatemala’s Ministry of Economy, *Investment Agreements*, available at www.mineco.gob.gt/acuerdos-de-inversion (Exh. C-003) (same).

² See Opinion OPI-2015-08-01-000025 of the Superintendencia de Administración Tributaria, Intendencia de Asuntos Jurídicos, Departamento de Consultas, Unidad de Consultas Tributarias y Aduaneras, dated 9 Feb. 2015 (“Deocsa Binding Tax Opinion”) (Exh. C-004); Opinion OPI-2015-08-01-000024 of the Superintendencia de Administración Tributaria, Intendencia de Asuntos Jurídicos, Departamento de Consultas, Unidad de Consultas Tributarias y Aduaneras, dated 9 Feb. 2015 (“Deorsa Binding Tax Opinion”) (Exh. C-005).

without having been afforded due process. As a result, Claimant has not been able to enjoy the full benefit of its investment.

5. Guatemala thereby breached its obligations under the Treaty as set forth herein and caused Claimant significant damages, giving rise to a dispute between Claimant and Guatemala under Article 8 of the Treaty. Despite Claimant's good faith efforts at amicable settlement, this dispute remains unresolved.

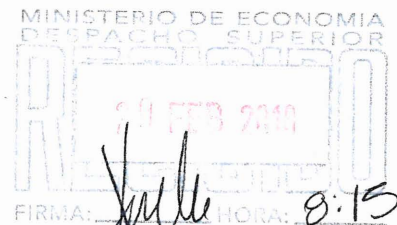
6. In accordance with Article 8.2(e) of the Treaty, Claimant hereby confirms its consent and requests that the dispute be settled by an arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules"). As per Article 3.2 of the UNCITRAL Arbitration Rules, this arbitral proceeding is deemed to commence on the date on which this Notice of Arbitration is received by Guatemala.

II. THE PARTIES

A. Claimant

7. Claimant in this proceeding is:

IC Power Asia Development Ltd.
45 Rothschild Boulevard
Tel-Aviv, 6578403
Israel



8. Claimant is represented by, and requests that correspondence be addressed to:

Jonathan C. Hamilton
Rafael Llano
White & Case LLP
701 Thirteenth Street N.W.
Washington, D.C. 20005
United States of America
Tel: +1 (202) 626-3600
jhamilton@whitecase.com
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B. Respondent

9. Respondent is the Republic of Guatemala. To Claimant's knowledge, Respondent's contact information is as follows:

The Honorable Acisclo Valladares Urruela
Minister of Economy of the Republic of Guatemala
8a. Avenida 10-43, Zona 1
Ciudad de Guatemala, Guatemala

His Excellency Jimmy Morales
President of the Republic of Guatemala
6ta Avenida 4-41, Zona 1
Ciudad de Guatemala, Guatemala



III. AGREEMENT TO ARBITRATE

10. Article 8 of the Treaty provides in relevant part:

1. Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled by negotiations.

2. If a dispute under paragraph 1 of this Article cannot be settled within six (6) months of a written notification of this dispute, it shall be on the request of the investor settled as follows: ...

(e) by an ad hoc arbitration tribunal, which is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six (6) months of the date of selection of the Chairman, and the arbitral panel shall render its written and reasoned decisions within two (2) months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

3. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

...

11. Claimant is a legal entity “incorporated, constituted or otherwise duly organized under the legislation of [Israel],” and, therefore, an “investor” within the meaning of the Treaty.⁴ Claimant had an investment in Guatemala in the form of, *inter alia*, “rights derived from stocks, shares”⁵ in the Distributors throughout the time of Guatemala’s wrongful measures and until December 2017 when it transferred its ownership interest in the Distributors to a third party.

³ Treaty, Article 8.3 (Exh. C-001).

⁴ Treaty, Article 1(d)(2)(i) (Exh. C-001); Certificate of Incorporation of IC Power, dated 13 Jan. 2010 (Exh. C-006).

⁵ Treaty, Article 1(a)(2) (Exh. C-001).



12. Guatemala gave its offer and consent to arbitrate in Article 8 of the Treaty, and Claimant has accepted Guatemala's offer.

13. Claimant notified Guatemala in writing of the existence of a dispute under the Treaty by way of a Notification of Dispute dated 23 May 2017 ("Notification of Dispute"), received by Guatemala's Ministry of Economy on 29 May 2017.⁶ The Notification of Dispute invited Guatemala to engage in consultations and negotiations with a view to resolving the dispute amicably. More than six months have passed since Guatemala's receipt of the Notification of Dispute and the dispute has not been resolved.

IV. THE DISPUTE

A. The Investment in Guatemala

14. Claimant entered the Guatemalan market of energy distribution in January 2016 through the acquisition of 90.62% of the shares of Deorsa and 92.68% of the shares of Deocsa. The investment in the Distributors was made with the objective of establishing a long-term presence in the Guatemalan market and of expanding and improving the quality of the services provided to the more than 10 million Guatemalan citizens that directly benefit from the services of the Distributors.

15. The acquisition of the Distributors started in early 2015 with an assessment of the commercial opportunity, followed by a due diligence process to determine the feasibility of the acquisition. This process revealed the existence of the Binding Tax Opinions, issued while the Distributors were under the control of their previous owner, and included consultations with Guatemalan legal and tax counsel.

16. The Binding Tax Opinions ratified the approach proposed by the Distributors concerning two tax deductions that resulted from the acquisition of the Distributors by their previous owner in 2011, namely, the amortization of the goodwill generated by the acquisition, and the interest expenses on the loans used to acquire the Distributors. As the SAT expressly confirmed in the Binding Tax Opinions, the right to claim these deductions was transferred to the Distributors when the local entities that had acquired the Distributors were merged into the Distributors.⁷

17. Pursuant to Guatemalan law, the Binding Tax Opinions remained binding on the SAT and not subject to challenge or appeal. The Binding Tax Opinions remained valid at the time of Claimant's investment in Guatemala.

⁶ IC Power Notification of Dispute to Guatemala, dated 23 May 2017 (Exh. C-007) (bearing a stamp by Guatemala's Ministry of Economy showing its receipt of the Notification on 29 May 2017).

⁷ See Deocsa Binding Tax Opinion at 12 (Exh. C-004); Deorsa Binding Tax Opinion at 12 (Exh. C-005).



B. Guatemala Impaired the Investment

18. In January 2016, a new President came into power in Guatemala.

19. In March 2016, the government appointed a new head for the SAT. It has been widely reported that since then the SAT has used criminal complaints and *ex parte* interim measures unreasonably to achieve its tax collection goals.

20. On 26 July 2016, Claimant and the Distributors learned that the accounts of the Distributors had been frozen as part of a criminal complaint (the "Criminal Complaint") filed by the SAT against the Distributors on 21 July 2016.⁸ In the Criminal Complaint, the SAT charged the Distributors with tax fraud for the years 2011 and 2012 in connection with the two deductions that the SAT had approved in the Binding Tax Opinions.

21. In a matter of days, and without having been provided an opportunity to be heard as to the merits of the Criminal Complaint, the Distributors were forced to make payments to the SAT of approximately US\$ 16.9 million in allegedly unpaid taxes for tax years 2011 and 2012,⁹ and to agree to pay a further amount of interest and fines within 60 days in order to have the *ex parte* freezing order lifted and to avoid measures that would impair their control over their business.

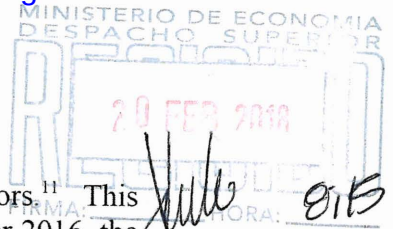
22. Under the threat of initiation of further criminal complaints and the imposition of additional fines and interest, the Distributors also revised their tax statements and made payments to the SAT of approximately US\$ 31.3 million in allegedly unpaid taxes for tax years 2013, 2014, and 2015, and agreed not to claim the deductions (approved in the Binding Tax Opinions) for subsequent years.¹⁰

23. The Distributors subsequently made several attempts to obtain from the SAT the calculations underlying the amounts claimed for interest and fines for tax years 2011 and 2012. The SAT repeatedly refused to provide the calculations, and criminal court hearings concerning the issue were repeatedly rescheduled. Eventually, a criminal court hearing concerning the calculations was scheduled for 29 December 2016, however, that hearing never took place. Instead, without any notification to or knowledge by the Distributors, an *ex parte* hearing was held on 12 December 2016 at which, at the SAT's request, the

⁸ SAT's Criminal Complaint against Deocsa and Deorsa, dated 21 July 2016 (Exh. C-008).

⁹ See Communication from Deocsa and Deorsa to the Criminal Judge regarding payment of alleged back taxes for years 2011 and 2012, dated 11 Aug. 2016 (Exh. C-009).

¹⁰ See Receipt of Deocsa rectification payment to the SAT for 2013, dated 19 Aug. 2016 (Exh. C-010); Receipt of Deorsa rectification payment to the SAT for 2013, dated 19 Aug. 2016 (Exh. C-011); Receipt of Deocsa rectification payment to the SAT for 2014, dated 9 Aug. 2016 (Exh. C-012); Receipt of Deorsa rectification payment to the SAT for 2014, dated 9 Aug. 2016 (Exh. C-013); Receipt of Deocsa rectification payment to the SAT for 2015, dated 9 Aug. 2016 (Exh. C-014); Receipt of Deorsa rectification payment to the SAT for 2015 (Exh. C-015).



criminal court ordered the appointment of receivers for the Distributors.¹¹ This forced the Distributors to pay to the SAT on the next day, 13 December 2016, the full amount of the interest and fines that the SAT had demanded, which totaled approximately US\$ 25 million.¹²

24. To date, the criminal court has not made any determination as to the amount of interest and fines, and the SAT and other authorities have refused to provide the legal basis for demanding payment of the interest and fines.

25. As a consequence of Guatemala's foregoing conduct, the Distributors were compelled to make payments to the SAT totaling approximately US\$ 73.2 million in connection with tax years 2011 to 2015 and not to claim deductions for subsequent tax years.

26. While the Distributors have made the payments and refrained from claiming legitimate deductions under protest and subject to a final determination of the amounts due (if any), the Guatemalan authorities have indicated that they consider at least some of the payments as final and unrecoverable.

27. Almost nineteen months have passed since the initiation of the Criminal Complaint. No evidence of wrongdoing has been found. The SAT has refused to provide the Distributors with a copy of the full administrative file that formed the basis for the Criminal Complaint. Yet, the criminal investigation remains open, with no progress, and Guatemala has not returned the payments it forced the Distributors to make.

28. Notably, at no point have the Binding Tax Opinions been rendered null, or even challenged in court.

29. In summary, at harm to Claimant, Guatemala forced the Distributors to make payments of tens of millions of dollars in allegedly unpaid taxes, interest, and fines, and to refrain from claiming legitimate deductions by means of an unsubstantiated Criminal Complaint that is in complete disregard of the Binding Tax Opinions. Guatemala did not conduct a proper investigation or provide the Distributors an opportunity to be heard. In addition, Guatemala disregarded fundamental rules that guarantee taxpayers the right to challenge tax determinations without having to pay the taxes claimed or provide guarantees.¹³ By the foregoing measures, Guatemala has prevented Claimant from realizing the full benefit of its investment in the Distributors and caused Claimant significant damages.

¹¹ See Communication by the Criminal Court to the Director of the Criminal Justice Administration ordering the appointment of a receiver for Deocsa and Deorsa, dated 12 Dec. 2016 (Exh. C-016).

¹² Receipt of Deorsa payment to the SAT regarding fines and interest for 2011 and 2012, dated 13 Dec. 2016 (Exh. C-017); Receipt of Deocsa payment to the SAT regarding fines and interest for 2011 and 2012, dated 13 Dec. 2016 (Exh. C-018).

¹³ See, e.g., Constitution of the Republic of Guatemala, dated 17 Nov. 1993, Art. 28.



C. Guatemala Violated the Treaty

30. Through the foregoing acts, Guatemala has breached several of its obligations under the Treaty, including without limitation as summarized below.

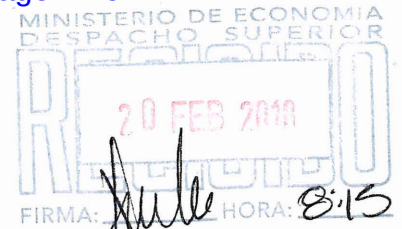
31. *Lack of fair and equitable treatment.* Article 2.2 of the Treaty provides that “[i]nvestments made by investors of each Contracting Party shall be accorded fair and equitable treatment.” This provision requires Guatemala to respect the legitimate expectations on the basis of which the investment in the Distributors was made, to observe due process, and not to act in an arbitrary, unjust, idiosyncratic, discriminatory or non-transparent manner. Guatemala violated these obligations by, *inter alia*, disregarding the Binding Tax Opinions (which remain in force) and using a criminal proceeding to force the Distributors to make payments to the SAT of tens of millions of dollars without regard to law or basic principles of fairness and due process.

32. *Unreasonable measures.* Article 2.2 of the Treaty provides that “[n]either Contracting Party shall in any way impair by unreasonable measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.” Guatemala’s acts described above are in violation of its foregoing obligation as well.

33. *Failure to accord most favored nation and national treatment.* Pursuant to Article 3 of the Treaty, Guatemala assumed the obligation not to treat the investments of Israeli investors less favorably than investments of its own investors or those of any third state, and not to treat investors of Israel less favorably than its own investors or those of any third state as regards the management, maintenance, use, enjoyment or disposal of their investments. To the extent that Guatemala has provided more favorable treatment to any other company, such as by allowing it to claim the benefit of similar deductions as those that Guatemala denied to the Distributors, Guatemala has violated this obligation.

34. *Expropriation.* Article 5 of the Treaty provides that “[i]nvestments of investors of the Home Contracting Party shall not be nationalized, expropriated or subject to measures having effect equivalent to nationalization or expropriation.” Through the measures described above, Guatemala violated this obligation by depriving Claimant of the benefit of its investment in the Distributors and of the Binding Tax Opinions.

35. *Observance of commitments.* By way of the most-favored-nation provisions of Article 3 of the Treaty, in conjunction with the provisions of other investment treaties concluded by Guatemala, such as the bilateral investment treaties concluded between Guatemala and Argentina, Belgium, Finland, Germany, and Korea, Guatemala is required to observe commitments entered into with regard to investments of Israeli investors. By its conduct described above concerning the Binding Tax Opinions, Guatemala violated this obligation.



D. Consultations Did Not Resolve the Dispute

36. Claimant made efforts to resolve the dispute amicably over the past eighteen months, including by way of communications and meetings with government authorities. Despite Claimant's good faith efforts, the Guatemalan authorities have not taken any meaningful steps to resolve the dispute.

V. PROCEDURAL MATTERS

A. Applicable Rules

37. This arbitration is governed by the UNCITRAL Arbitration Rules pursuant to Article 8.2(e) of the Treaty.

B. Constitution of the Arbitral Tribunal

38. The Treaty refers at Article 8.2(e) to the constitution of the "arbitral panel" and the "selection of the Chairman" of the panel. Accordingly, the arbitral tribunal shall be composed of three arbitrators.

39. Pursuant to the UNCITRAL Arbitration Rules, Claimant will appoint one arbitrator and Guatemala has the right to appoint another arbitrator and the two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If any party fails to appoint its arbitrator or the two arbitrators are unable to agree on the appointment of the presiding arbitrator, any party may request the appointing authority to appoint such arbitrator.

C. Language of the Proceeding

40. Claimant proposes that English be the language of this arbitration, but that no translation be required of documents the originals of which are either in the English language or in the Spanish language.

D. Place of Arbitration

41. Claimant proposes that the place of arbitration be Miami, Florida, United States of America.

VI. REQUEST FOR RELIEF

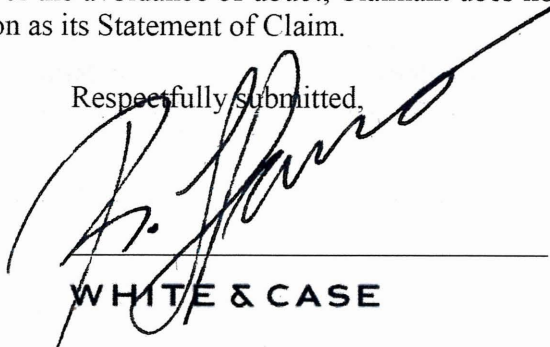
42. Claimant requests that the arbitral tribunal issue an award ruling that Guatemala violated the Treaty and ordering Guatemala to pay Claimant damages incurred by Claimant as a consequence of Guatemala's breach of the Treaty, with compound interest until payment, as well as all costs incurred by Claimant in connection with this proceeding, and such further or other relief as may be appropriate. Claimant anticipates that the approximate base amount of its damages will be in the range of the unjustified payments extracted by Guatemala from the Distributors, *i.e.*, approximately US\$ 70 million before interest and costs, with the damage amount and potential additional damages (such as in

relation to the deductions not claimed) to be specified at a later stage of this proceeding.

43. In good faith and in the spirit of cooperation, Claimant continues to invite Guatemala to achieve a negotiated resolution to this dispute.

44. Claimant reserves its right to amend or supplement this Notice of Arbitration, to make additional claims, and to request such additional or different relief as may be appropriate. For the avoidance of doubt, Claimant does not elect to treat this Notice of Arbitration as its Statement of Claim.

Respectfully submitted,



WHITE & CASE

Washington, D.C. | Mexico City

Counsel to IC Power

20 February 2018



IC Power Asia Development Ltd. (Israel) v. Republic of Guatemala**Notice of Arbitration**Index of Exhibits

MINISTERIO DE ECONOMIA
 REGISTRO SUPERIOR
 20 FEB 2018
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No.	Document	Date
C-001	Agreement between the Government of the State of Israel and the Government of the Republic of Guatemala for the Reciprocal Promotion and Protection of Investments	2006-11-07
C-002	Israel's Ministry of Foreign Affairs, <i>Bilateral Agreements</i>	Undated
C-003	Guatemala's Ministry of Economy, <i>Investment Agreements</i>	Undated
C-004	Opinion OPI-2015-08-01-000025 of the Superintendencia de Administración Tributaria, Intendencia de Asuntos Jurídicos, Departamento de Consultas, Unidad de Consultas Tributarias y Aduaneras	2015-02-09
C-005	Opinion OPI-2015-08-01-000024 of the Superintendencia de Administración Tributaria, Intendencia de Asuntos Jurídicos, Departamento de Consultas, Unidad de Consultas Tributarias y Aduaneras	2015-02-09
C-006	Certificate of Incorporation of IC Power	2010-01-13
C-007	IC Power Notification of Dispute to Guatemala	2017-05-23
C-008	SAT's Criminal Complaint against Deocsa and Deorsa	2016-07-21
C-009	Communication from Deocsa and Deorsa to the Criminal Judge regarding payment of alleged back taxes for years 2011 and 2012	2016-08-11
C-010	Receipt of Deocsa rectification payment to the SAT for 2013	2016-08-19
C-011	Receipt of Deorsa rectification payment to the SAT for 2013	2016-08-19
C-012	Receipt of Deocsa rectification payment to the SAT for 2014	2016-08-09
C-013	Receipt of Deorsa rectification payment to the SAT for 2014	2016-08-09
C-014	Receipt of Deocsa rectification payment to the SAT for 2015	2016-08-09
C-015	Receipt of Deorsa rectification payment to the SAT for 2015	2016-08-09
C-016	Communication by the Criminal Court to the Director of the Criminal Justice Administration ordering the appointment of a receiver for Deocsa and Deorsa	2016-12-12
C-017	Receipt of Deorsa payment to the SAT regarding fines and interest for 2011 and 2012	2016-12-13
C-018	Receipt of Deocsa payment to the SAT regarding fines and interest for 2011 and 2012	2016-12-13
C-019	Power of Attorney	2018-02-08