

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

_____	)	
REPUBLIC OF GUATEMALA,	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Case No.</b>
	)	
IC POWER ASIA DEVELOPMENT LTD.,	)	
	)	
<b>Respondent.</b>	)	
_____	)	

**PETITION TO RECOGNIZE ARBITRATION AWARD**

Petitioner, Republic of Guatemala (“Guatemala”), by and through the undersigned counsel, hereby files petition this Court for an order and judgment recognizing an arbitration award against IC Power Asia Development Ltd. (“ICPA”) pursuant to 9 U.S.C. § 207, and in support, Guatemala states as follows:

**NATURE OF ACTION**

1. Guatemala brings this action under Section 207 of the Federal Arbitration Act (the “FAA”) and Article III of United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (the “New York Convention”), to recognize an arbitration award (the “Award”) rendered in the United Kingdom on October 7, 2020, by an arbitral tribunal (the “Tribunal”) constituted under the auspices of the Permanent Court of Arbitration (“PCA”) in *IC Power Asia Development Ltd. (Israel) v. Republic of Guatemala*, PCA Case No. 2019-43 (the “Arbitration”).

2. The Award relates to ICPA's acquisition and disposition in New York of certain power transmission assets in Guatemala. ICPA is indirectly owned by Kenon Holdings ("Kenon"), which trades on the New York Stock Exchange (the "NYSE") and has a market capitalization of over USD 2.4 billion. *See Shares information, KENON HOLDINGS*;<sup>1</sup> Kenon Holdings Ltd., Q3 2020 Results and Additional Updates (Nov. 25, 2020).<sup>2</sup>

3. In 2017, ICPA sold, with the assistance of advisors in New York and in agreements governed by New York law, its Guatemalan assets to entities owned by I Squared Capital, a private equity fund headquartered in New York. *See Award*, ¶ 342 (**Exhibit 1**). As a part of the transaction, ICPA retained only its claim against Guatemala. *See Award*, ¶ 344 (**Exhibit 1**).

4. After repeatedly publishing updates on the Arbitration in its filings before the SEC,<sup>3</sup> ICPA lost the Arbitration, and the Tribunal decided that ICPA had to reimburse Guatemala some of its costs and fees. After dismissing all the claims brought by ICPA against Guatemala, the Tribunal ordered ICPA to pay USD 1,803,042.61 to Guatemala for legal costs and expenses incurred in the Arbitration. *See Award* ¶ 644 (**Exhibit 1**). Despite repeated demands, ICPA has refused to honor its obligations. *See Letter from the Ministry of Economy of Guatemala* (Feb. 11,

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<sup>1</sup> <https://www.kenon-holdings.com/investor-relations/share-information.aspx> (last visited December 15, 2021)

<sup>2</sup> [https://www.sec.gov/Archives/edgar/data/0001611005/000117891320003253/exhibit\\_99-1.htm](https://www.sec.gov/Archives/edgar/data/0001611005/000117891320003253/exhibit_99-1.htm)

<sup>3</sup> *See Kenon Holdings Ltd., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1933 (Form 20-F)*, p. 94 (Dec. 31, 2009) <https://www.sec.gov/Archives/edgar/data/0001611005/000117891320001273/zk2024212.htm> ; Kenong Holdings Ltd., Q3 2020 Results and Additional Updates (Nov. 25, 2020) [https://www.sec.gov/Archives/edgar/data/0001611005/000117891320003253/exhibit\\_99-1.htm](https://www.sec.gov/Archives/edgar/data/0001611005/000117891320003253/exhibit_99-1.htm); Kenon Holdings Ltd., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1933 (Form 20-F), p. 86 (December 31, 2018) <https://www.sec.gov/Archives/edgar/data/0001611005/000117891319001062/zk1922527.htm>

2021) (**Exhibit 18**). ICPA has neither challenged the Award nor paid any part of what it owes, forcing Guatemala to expend additional sums to bring this action.

5. Guatemala has further detailed the background of the Petition along with the support for the Petition in its Memorandum of Law in support of this Petition, the contents of which it incorporates into this Petition.

## **PARTIES**

6. Petitioner Guatemala is a foreign state and was the respondent in the Arbitration.

7. Respondent ICPA is a private limited liability company incorporated in Israel. *See* Award, ¶ 100 (**Exhibit 1**). ICPA was the claimant in the underlying Arbitration.

## **JURISDICTION**

### **I. Personal Jurisdiction**

8. ICPA is subject to the personal jurisdictions of this Court. Under New York’s long-arm statute, a court “may exercise general jurisdiction over a defendant under N.Y.C.P.L.R § 301 or specific jurisdiction under...N.Y.C.P.L.R. § 302.” *Hecklerco, LLC v. YuuZoo Corp. Ltd.*, 252 F. Supp. 3d 369, 376 (S.D.N.Y. 2017). This Court has both general and specific jurisdiction over ICPA.

9. New York’s long arm statute allows a court to assume general personal jurisdiction over a foreign corporation if its contacts with the “[s]tate are so ‘continuous and systematic’ as to render [it] essentially at home in the forum [s]tate.” *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. —, 131 S.Ct. 2846, 2851 (2011)) (internal quotation marks omitted). A foreign corporation can be subject to the general jurisdiction of the forum state even where it conducts its business through an agent. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000). As explained further in the

accompanying Memorandum of Law, this Court has general personal jurisdiction over ICPA because ICPA conducted substantial business in New York both in-person and through its agent, IC Power Pte. Ltd—a company established for the sole purpose of “serv[ing] as the holding company of” ICPA. *See* IC Power Pte. Ltd., Registration Statement Under the Securities Act of 1933 (Form F-1), p. 1 (Aug. 31, 2015).<sup>4</sup>

10. This Court also has specific personal jurisdiction over ICPA. In New York, a court may assume specific personal jurisdiction over a foreign corporation where: i) the corporation “transacts any business within the state” (N.Y. C.P.L.R. § 302(a)(1)); and ii) the exercise of such jurisdiction is consistent with due process. *Hunter v. Shanghai Huangzhou Elec. Appliance Mfg. Co.*, 505 F.Supp.3d 137, 145 (N.D.N.Y. 2020). A single transaction could satisfy the first prong so long as “there is a substantial relationship between the transaction and the claim asserted.” *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140 (N.Y. 2006).

11. Here, this Court has specific personal jurisdiction over ICPA because the Award arose out of investments acquired by ICPA in New York and ICPA’s bargained-for right to bring the underlying arbitration against Guatemala, a right granted by a contract negotiated through extensive connections to New York and governed by New York law. This is consistent with due process. ICPA could have foreseen being subject to the jurisdiction of this Court when it acquired its investments in New York and brought the claim it retained.

## **II. Subject matter jurisdiction**

12. Guatemala brings this proceeding under Chapter 2 of the FAA, 9 U.S.C. §§ 201 *et seq.*, and Article III of the New York Convention, to confirm, recognize and enforce the Award, which was rendered in the United Kingdom.

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<sup>4</sup> <https://www.sec.gov/Archives/edgar/data/1649678/000119312515307805/d81507df1.htm>

13. This Court has subject matter jurisdiction over this proceeding pursuant to 9 U.S.C. § 203, which provides that the “district courts of the United States . . . have original jurisdiction over” any “action or proceeding falling under the [New York] Convention.” An award “falls under the [New York] Convention” if the arbitral award arose “out of a legal relationship, whether contractual or not, which is considered as commercial” and the arbitration involves at least one foreign party. *See* 9 USC § 202. The Award “falls under the Convention” because both parties to the Arbitration are foreign and the Award pertains to ICPA’s provision of electric distribution services through its investments in Guatemala, a quintessentially commercial relationship.

#### VENUE

14. Venue is proper in this Court “because under the [New York] Convention, in the absence of an agreement to the contrary, venue is proper in any court that has subject matter jurisdiction.” *Linsen Int’l Ltd. v. Humpuss Sea Transp. PTE LTD*, No. 09 CIV. 10393 GBD, 2011 WL 1795813, at \*2 (S.D.N.Y. Apr. 29, 2011) (citing 9 U.S.C. § 204); *see also Sistem Muhendislik Insaat Sanayi Ve Ticaret, A.S. v. Kyrgyz Republic*, No. 12-CY-4502 (ALC), 2016 WL 5793399, at \*4 (S.D.N.Y. Sept. 30, 2016), *aff’d*, 741 F. App’x 832 (2d Cir. 2018) (same). As explained above in Section II, this Court has subject matter jurisdiction pursuant to Section 203 of the FAA. *See* 9 U.S.C. § 203.

#### BACKGROUND

15. On February 20, 2018, ICPA<sup>5</sup> initiated the Arbitration against Guatemala pursuant to Article 8(2)(e) of the Bilateral Investment Treaty between Guatemala and Israel (“Guatemala-Israel BIT”). *See* Notice of Arbitration, ¶ 6 (**Exhibit 3**). The Arbitration arose out of a dispute

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<sup>5</sup> Up until March 2016, ICPA was known as I.C. Power Ltd. *See* Certification of Company Name Change (Mar. 28, 2016) (**Exhibit 2**).

relating to ICPA's "investment in the energy distribution market of Guatemala, through the purchase of two Guatemalan companies, Distribuidora de Electricidad de Oriente, S.A. ("DEORSA") and Distribuidora de Electricidad de Occidente, S.A. ("DEOCSA")." Award, ¶ 3 (**Exhibit 1**). ICPA alleged that Guatemala's tax measures on these companies violated its obligations under the Guatemala-Israel BIT. *See* Notice of Arbitration, ¶¶ 3-5 (**Exhibit 3**).

16. On November 14, 2019, the Tribunal was constituted. The Tribunal was composed of Professor Albert Jan van den Berg, Professor Guido S. Tawil, and Professor Raúl Emilio Vinuesa. *See* Award, ¶¶ 15-16, 22 (**Exhibit 1**). The Arbitration was seated in the United Kingdom and conducted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013 (the "UNCITRAL Rules"). *See* Award, ¶¶ 9-10 (**Exhibit 1**).

17. Through several rounds of written and oral submissions, the Parties presented their respective arguments. Between May 2019 and March 2020, ICPA and Guatemala submitted their written submissions on jurisdictional and substantive issues. *See* Award, ¶¶ 19-63 (**Exhibit 1**). The Tribunal then held hearings from July 13-18, 2020, and the following month the Parties filed their post-hearing brief and written submissions on costs. *See* Award, ¶¶ 94-96 (**Exhibit 1**).

18. On October 7, 2020, the Tribunal issued the Award. The Tribunal rejected ICPA's claims in their entirety and ordered ICPA to pay Guatemala USD 243,826.92 for arbitration costs and USD 1,559,215.69 for legal costs. *See* Award, ¶ 655 (c)-(d) (**Exhibit 1**). Despite repeated demand, ICPA has not paid.

**COUNT I: RECOGNITION OF ARBITRATION AWARD PURSUANT TO 9 U.S.C. § 207**

19. Guatemala incorporates the foregoing paragraphs as though restated fully herein, including its Memorandum of Law in support of this Petition.

20. The United States and the United Kingdom, the seat of the Arbitration, are contracting parties to the New York Convention. The New York Convention is implemented in the United States through Chapter 2 of the FAA. *See* 9 U.S.C. § 201*et seq.*

21. The FAA requires district courts to enforce an arbitration award “falling under the [New York] Convention” unless one of the grounds for refusal of recognition and enforcement enumerated in the New York Convention exists. *See* 9 U.S.C. § 202; 9 U.S.C. § 207. As explained further in the accompanying Memorandum of Law, the Award falls under the Convention because it arose out of commercial legal relationships between foreigners. *See* 9 U.S.C. § 202. In addition, none of the grounds for refusing enforcement under the New York Conventions exists in the present case.

22. Article IV(1)(a) of the New York Convention permits a party to “obtain the recognition and enforcement” of an award by providing “(a) [t]he duly authenticated original award or a duly certified copy thereof; [and] (b) [t]he original agreement [to arbitrate] referred to in article II or a duly certified copy thereof.” *See* New York Convention, art. IV. Certified copies of the Award and the agreement to Arbitrate are submitted herewith. *See* Award, (**Exhibit 1**); Notice of Arbitration (**Exhibit 3**); **Cutz Declaration, Exhibit A**.

23. Guatemala further requests pre- and post-judgment interest. There is a presumption in favor of pre-judgment interest at the rate mandated by New York law. Post-judgment interest is the rate set forth under 28 U.S.C. § 1961(a).

24. In addition, Guatemala requests its attorneys’ fees and costs since ICPA has either waived or lacks any valid defense to recognition of the Award. ICPA has not paid the Award, despite numerous requests by Guatemala, and it has offered no justification for its refusal to pay.

25. For the foregoing reasons, Guatemala respectfully requests that the Court recognize the Award by entering judgment in favor Guatemala and against ICPA in the amount of the Award, plus pre- and post-judgment interest and Guatemala's attorneys' fees and costs.

**PRAYER FOR RELIEF**

26. WHEREFORE, Petitioner, Guatemala, respectfully requests:
- a) an Order recognizing the Award pursuant to Article III of the New York Convention and 9 USCA § 207 and entering Judgment thereon;
  - b) a Judgment in favor of Guatemala in the amount of the Award USD 1,803,042.61, plus pre-judgment and post-judgment interest;
  - c) an Award of Guatemala's costs of this proceeding, including attorneys' fees as permitted by law; and
  - d) any other relief that this Court deems proper.

A proposed order is appended hereto.

Dated: January 14, 2022



Respectfully submitted,

/s/ Quinn Smith

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