UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF GUATEMALA,	)	
Petitioner,	)	
v.	)	**Civil Case No.**
IC POWER ASIA DEVELOPMENT LTD.,	)	
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF GUATEMALA'S PETITION FOR RECOGNITION OF AN ARBITRATION AWARD

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Petitioner, Republic of Guatemala ("Guatemala"), by and through the undersigned counsel, respectfully submits this Memorandum of Law in Support of its Petition to Recognize an Arbitration Award (the "Petition"). The Petition seeks the recognition of an international arbitration award (the "Award") against IC Power Asia Development Ltd. ("ICPA") pursuant to Article III of the New York Convention and Section 207 of the Federal Arbitration Act. For the reasons stated below, the Court should grant the Petition.

INTRODUCTION

As an international player in the electricity distribution business, ICPA has routinely and extensively benefited from the human and economic capital available in New York. Whether it is an acquisition, disposition, financing, or structure of long-term growth and assets, ICPA has realized hundreds of millions of dollars in benefits, all with the aid of investors, advisors, and economic structures created and implemented through New York. When ICPA wanted to sue Guatemala before an arbitration tribunal, it retained its right to bring the claim through a transaction in New York and governed by New York law. ICPA lost its claim, must now reimburse Guatemala for the costs and fees accrued, and has offered no defense to this obligation despite numerous requests. Guatemala now requests that this Court recognize the resulting arbitration award, granting pre-and post-judgment interest as well as reimbursement of the additional attorneys' fees and costs that Guatemala has accrued.

STATEMENT OF FACTS

1. The Award pertains to an investment dispute under the bilateral investment treaty between Guatemala and Israel (the "Treaty"). *See* Agreement for the Reciprocal Promotion and Protection of Investments, Guatemala-Israel, Nov. 7, 2006 (referred hereafter as "Guatemala-Israel BIT") (**Cutz Declaration, Exhibit A**). The Treaty provides several protections for investments made by investors of these two countries, known as Contracting Parties. *See id.*, art. 2-8. Among

other benefits, investors of a Contracting Party were given the right to settle an investment dispute with the other Contracting Party through an arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). *See id.*, arts. 8(2)(e), 8(3). An award rendered pursuant to such an arbitration is "final and binding." *See id*., art. 8(5).

2. ICPA[1] is a company incorporated by Israel Corporation Ltd. ("IC") in Tel Aviv, Israel, in January 2010. *See* Award, ¶100, (**Exhibit 1**); Notice of Arbitration, ¶¶ 7, 11 (**Exhibit 3**). Five years after its incorporation, IC transferred its shares in ICPA to Kenon Holding Ltd. ("Kenon"), a company incorporated in Singapore. *See* Award, ¶101 (**Exhibit 1**). Kenon is listed on the New York Stock Exchange (the "NYSE"). *See Shares Information*, KENON HOLDINGS.[2] As of December 22, 2021, Kenon has a market capitalization of over USD 2.4 billion. *See ibid*.

3. On May 3, 2015, Actis Infrastructure 2 LP ("Actis"), acting through its financial advisor Citigroup New York, invited ICPA to acquire its shares in "the two largest electricity distribution companies in Guatemala," namely Distribuidora de Electricidad de Occidente, S.A., ("DEOCSA") and Distribuidora de Electricidad de Oriente, S.A ("DEORSA") (referred together as the "Distributors.").[3] *See* Award, ¶¶ 102-103 (**Exhibit 1**); Letter from Pedro Aguirre Saravia, Managing Director, Citigroup Global Markets Inc., to Javier García & Joaquin Coloma, Inkia

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

2 https://www.kenon-holdings.com/investor-relations/share-information.aspx (last visited January 10, 2022).

3 The Distributors provide electricity services for "approximately 1.6 million households in Guatemala (representing approximately 60% of Guatemala's distribution clients) and distribute energy to approximately 100,000 km in Guatemala, covering approximately 10 million inhabitants." *See IC Power Ltd. Agrees to Acquire Energuate, a Private Electricity Distribution Business in Guatemala*, KENON HOLDINGS LTD. (Dec. 30, 2015) (**Exhibit 8**).

Energy Ltd. (May 13, 2015) (**Exhibit 4**). ICPA, if interested, was instructed to submit its offer to the managing director and vice president of Citigroup based in New York. *See* Letter from Pedro Aguirre Saravia, Managing Director, Citigroup Global Markets Inc., to Javier García & Joaquin Coloma, Inkia Energy Ltd. (May 13, 2015), p. 2 (**Exhibit 4**).

4. On January 28, 2016, ICPA accepted Actis's offer and acquired its shares for USD 265 million. *See* Award, ¶ 221 (**Exhibit 1**). The acquisition was executed through an agreement concluded in New York and governed under New York Law. *See* Stock Purchase Agreement among IC Power Distribution Holdings Pte. Limited and DEORSA-DEOCSA Holdings Limited (Dec. 19, 2015), sec. 2.3, sec. 10.11, (**Exhibit 5**). To pay for the shares, ICPA borrowed USD 120 million from Credit Suisse AG. *See* Award, ¶ 221 (**Exhibit 1**); Kenon Holdings Ltd. and its subsidiaries, Annual Report, p. 73 (Dec. 31, 2016) (**Exhibit 6**).

5. In March 2016, Kenon transferred "all of its equity interest" in ICPA to IC Power Pte. Ltd ("IC Power")—Kenon's wholly-owned subsidiary company incorporated in Singapore—to "serve as the holding company of [ICPA] and its business." *See* IC Power Pte. Ltd., Registration Statement Under the Securities Act of 1933 (Form F-1), p. ii (Aug. 31, 2015);[4] Share Transfer Agreement between Kenon Holdings Ltd., and IC Power Pte. Ltd., sec. 2 (Mar. 17, 2016) (**Exhibit 7**). The following year, IC Power's ordinary shares were approved for listing on the New York Stock Exchange under the ticker symbol "ICP." *See IC Power Ltd., a Wholly-Owned Subsidiary of Kenon Holdings Ltd., Launches Initial Public Offering*, KENON HOLDINGS (Jan. 23, 2017).[5]

6. In July 2016, a dispute in Guatemala arose after the Superintendence of Tax Administration of Guatemala ("SAT") filed a criminal proceeding against ICPA for tax fraud and

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

5 https://www.sec.gov/Archives/edgar/data/1611005/000119312517014663/d335608dex991.htm

the Fifth Criminal, Narcotics, and Environmental Crimes Trial Court of the Department of Guatemala (the "Criminal Court") granted SAT's request for a preventative seizure of the Distributors' bank accounts. *See* Notice of Arbitration, ¶¶ 20-29 (**Exhibit 3**).

7. In December 2017, ICPA sold, through an agreement 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**) (citing Share Purchase Agreement by and among Inkia Energy Ltd., IC Power Distribution Holdings, Pte. Ltd., Nautilus Inkia Holdings LLC, Nautilus Distribution Holdings LLC, and Nautilus Isthmus Holdings LLC (Nov. 24, 2017) (**Exhibit 9**)). But ICPA retained from the sale the right to bring a claim based on the measures taken by Guatemala. *See* Award, ¶ 344 (**Exhibit 1**); Share Purchase Agreement by and among Inkia Energy Ltd., IC Power Distribution Holdings, Pte. Ltd., Nautilus Inkia Holdings LLC, Nautilus Distribution Holdings LLC, and Nautilus Isthmus Holdings LLC (Nov. 24, 2017), art. 2.6 (**Exhibit 9**).

8. On February 20, 2018, ICPA invoked its right to bring a claim and commenced an arbitration against Guatemala invoking Article 8.2(e) of the Treaty (the "Arbitration"). *See* Notice of Arbitration, ¶ 6 (**Exhibit 3**).

9. On November 14, 2019, the Arbitral Tribunal was constituted to hear ICPA's claim. The Arbitral Tribunal was composed of co-arbitrator Professor Guido Tawil (appointed by ICPA) and co-arbitrator Professor Raúl Emilio Vinuesa (appointed by Guatemala), who together nominated Professor Albert Jan van den Berg as the President of the Tribunal. *See* Award, ¶¶ 15-16, 22 (**Exhibit 1**). ICPA was represented by attorneys of the law firm White & Case LLP, which has a significant presence in New York. *See* Award, ¶ 1 (**Exhibit 1**).

10. From May 2019 until March 2020, ICPA and Guatemala filed several written

submissions on jurisdictional and substantive issues. *See* Award, ¶¶ 17-63 (**Exhibit 1**). After each party made written submissions in support of their claim, the Tribunal convened a hearing from July 13-18, 2020. *See* Award, ¶ 94 (**Exhibit 1**). A few days after the hearing, ICPA and Guatemala filed post-hearing briefs and submission on costs. *See* Award, ¶¶ 95-96 (**Exhibit 1**).

11. On October 7, 2020, the Tribunal issued the Award, rejecting ICPA's claim in its entirety and awarding 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 requests, ICPA has not paid Guatemala any portion of the Award nor has it applied to set aside or annul the Award. *See* Letter from Guatemala (**Exhibit 18**).

ARGUMENT

I. The Court has personal jurisdiction over ICPA

12. District courts "ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman,* 571 U.S. 117, 125 (2014). 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). For the reasons stated below, the Court has general and specific personal jurisdiction over ICPA.

A. This Court has general jurisdiction over ICPA because ICPA and its agent, IC Power, are "at home" in New York, the forum state

13. New York's long-arm statute permits a court to exercise general personal jurisdiction over a foreign corporation if it is "doing business" in the state. *See Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 95 (2d Cir. 2000) (citing N.Y. C.P.L.R. § 301). A foreign corporation is considered to be "doing business" in the forum state if its connections with the "State

are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler AG*, 571 U.S. at 127 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)) (internal quotation marks omitted); *In re Roman Cath. Diocese of Albany, New York, Inc.*, 745 F.3d 30, 39 (2d Cir. 2014). In determining whether the corporation's contacts with the forum state is "continuous and systematic", courts consider the corporation's "contacts with the United States over a period that is reasonable under the circumstances - up to and including the date the suit was filed." *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984) (examining the defendant's contacts with the forum state over the past seven years).

14. A foreign corporation can be subject to the general jurisdiction of the forum state even if it conducts its business in New York through an agent. *See Wiwa*, 226 F.3d at 95. A "formal agency relationship is not necessary to impute the acts of the agent to a defendant when he is being sued by a third party." *Jaffe v. Boyles*, 616 F. Supp. 1371, 1375 (W.D.N.Y. 1985) (citing *Galgay v. Bulletin Company*, 504 F.2d 1062, 1065 (2d Cir. 1974)). Under New York law, an agency relationship exists for the purpose of jurisdiction when a foreign corporation "affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." *Perkins v. Sunbelt Rentals, Inc.*, No. 514CV1378BKSDEP, 2015 WL 12748009, at *10 (N.D.N.Y. Aug. 13, 2015) (quoting *Wiwa*, 226 F.3d at 95) (internal quotation marks omitted); s*ee also Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851, 854 (N.Y. 1967) (holding that Hilton Reservation Service in New York acted as an agent of Hilton Hotels, a British corporation, because Hilton Reservation "does all the business which Hilton (U.K) would do were it here by its own

officials"); *Palmieri v. Estefan*, 793 F. Supp. 1182, 1192 (S.D.N.Y. 1992) (finding an agency relationship between Sony Music, a New York corporation, and its foreign subsidiaries because the activities of Sony Music in New York "are sufficiently important to the affiliates that if they had no representative, their own officials would undertake to perform them."). Common ownership of the foreign corporation and the New York based corporation "may give rise to a valid inference as to the broad scope of the agency." *Id*., at 1193 (quoting *Frummer*, 227 N.E.2d at 854).

15. As explained below, ICPA conducted substantial business in New York both in-person and through its agent, IC Power.

1. <u>ICPA had extensive, direct contact with New York</u>

16. In 2015, ICPA acquired in New York the investments that are the basis of the Award. *See* Stock Purchase Agreement among IC Power Distribution Holdings Pte, Ltd. as Purchaser and Inkia Energy, Ltd. as Purchaser Guarantor and Deorsa-Deocsa Holdings Ltd. as Seller and Estrella Cooperatief BA (Dec. 29, 2015), sec. 2.3 (**Exhibit 5**); Letter from Pedro Aguirre Saravia, Managing Director, Citigroup Global Markets Inc., to Javier García & Joaquin Coloma, Inkia Energy Ltd. (May 13, 2015), p.2 (**Exhibit 4**).

17. ICPA has known for years that it was possible there would be jurisdiction over it in New York. As part of a planned offering of its shares on the NYSE, ICPA hired legal counsel to ensure that its investment in Guatemala complied with the Foreign Corruption Practices Act ("FCPA"). *See* Award, ¶207 (**Exhibit 1**); Statement of Reply and Response to Jurisdictional Objections (Dec. 27, 2019), ¶87 (**Exhibit 10**). ICPA submitted the documents evidencing this knowledge in the Arbitration. *See* Award, ¶ 207, fn. 191 (**Exhibit 1**) (citing Letter from Jorge Asensio Aguirre, García & Bodán, to Angela Grossheim & Daniel Urbina, ICPA (Oct. 28, 2015) (**Exhibit 11**)).

18. ICPA also frequently retained the services of financial experts in New York. ICPA retained Yvette Austin Smith, who is based in New York. *See* Award, ¶94 (**Exhibit 1**). *See also* Yvette Austin Smith, BRATTLE.[6] As part of the transaction in 2017, ICPA benefited from the services of Bank of America Merrill Lynch ("BAML") of New York, who acted as sell-side advisors and facilitated the sale of ICPA's investments to I Squared Capital. *See*, Email from Thomas Lefebvre, I Squared Capital, to Yoav Doppelt, ICPA (Sep. 2, 2017) (**Exhibit 12**); Email from Thomas Lefebvre, I Squared Capital, to Yoav Doppelt, ICPA (Oct. 9, 2017) (**Exhibit 13**).

19. ICPA availed itself of the New York financial system when two subsidiaries issued USD 300 million in promissory notes. *See* Energuate, Offering Memorandum, p. 3 (Apr. 27, 2017).[7] The notes were held by a Cayman trustee, but the proceeds to repay the notes as well as related agreements were governed by New York law. *Id*., p. 37. Bank of New York Mellon served as administrative agent. *Id*, p. 3. As part of the transaction, the owners of Energuate agreed to make payments in US Dollars in New York. *Id*., p 22. The notes were deposited with a New York depository. *Id*., p. 28. The subsidiaries retained New York counsel. *Id*., p. 238.

20. Given ICPA's extensive engagement in New York, the Court should exercise jurisdiction over ICPA.

2. <u>ICPA conducted business in New York through its agent, IC Power</u>

21. ICPA also conducted business in New York through IC Power. For jurisdictional purposes, IC Power should be considered an agent of ICPA because, besides sharing common ownership, IC Power's service in New York was significantly important to ICPA that the latter

[6] https://www.brattle.com/experts/yvette-austin-smith/ (last accessed on Jan 10, 2022).

[7] https://inkiaenergy.com/wp-content/uploads/2019/09/Project-Antigua-Offering-Memorandum.pdf

would have performed them had IC Power been unavailable.

22. In May 2015, IC Power was 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.ii (Aug. 31, 2015).[8] In addition to sharing common ownership, the companies also shared directors and senior managers. For instance, in November 2015, Mr. Yoav Doppelt was serving as a member of the board of directors of ICPA and as chairman of the board of directors of IC Power. *See* Award, ¶ 220 (**Exhibit 1**); IC Power Pte. Ltd, Amendment No. 1 to Registration Statement Under the Securities Act of 1933 (Form F-1), p. 205 (Nov. 2, 2015).[9] Mr. Javier García-Burgos was simultaneously acting as the chief executive officer of IC Power and ICPA. *See* IC Power Pte. Ltd., Registration Statement under the Securities Act of 1933 (Form F-1) (Aug. 31, 2015), p. 193;[10] Witness Statement of Javier García-Burgos, ¶2 (**Exhibit 14**). Similarly, Mr. Daniel Urbina concurrently served as the general counsel of ICPA and IC Power. *See* Witness Statement of Daniel Urbina, ¶3 (**Exhibit 15**); IC Power Pte. Ltd., Registration Statement Under the Securities Act of 1933 (Form F-1), p.194 (Aug. 31, 2015).[11]

23. IC Power's service in New York was of meaningful importance to ICPA. As noted in the Arbitration, ICPA's main "strategic objective" for acquiring the Distributors was to "balance [its] revenues" so that it could list its shares on the New York Stock Exchange. *See* Yoav Doppelt, Hr'g Tr. 6:10-17 (**Exhibit 16**). After ICPA acquired the Distributors in 2017, IC Power's ordinary shares were approved for listing on the New York Stock Exchange. *See IC Power Ltd., a Wholly-Owned Subsidiary of Kenon Holdings Ltd., Launches Initial Public Offering*, KENON HOLDINGS

[8] https://www.sec.gov/Archives/edgar/data/1649678/000119312515307805/d81507df1.htm

[9] https://www.sec.gov/Archives/edgar/data/0001649678/000119312515362467/d81507df1a.htm

[10] https://www.sec.gov/Archives/edgar/data/1649678/000119312515307805/d81507df1.htm

[11] https://www.sec.gov/Archives/edgar/data/1649678/000119312515307805/d81507df1.htm

(Jan. 23, 2017).[12] Without IC Power, ICPA would have no access to the world's largest stock market.

24. IC Power had a continuous and substantial business in New York. Bank of America Merrill Lynch of New York held the "preliminary prospectus relating to IC Power's initial public offering" and five financial advisors from New York served as underwriters on its IPO. *See* Mark Stricherz, *IC Power boosts IPO by $300 million after entering electricity market*, CQ ROLL CALL (Jan. 20, 2017) (**Exhibit 17**); *IC Power Ltd., a Wholly-Owned Subsidiary of Kenon Holdings Ltd., Launches Initial Public Offering*, KENON HOLDINGS (Jan. 23, 2017).[13] To advance its business, IC Power also took loans from financial institutions in New York, such as Bank Hapoalim New York. *See* IC Power Pte. Ltd., Registration Statement under the Securities Act of 1933 (Form F-1), F-65 (Aug. 31, 2015).[14] Those loans financed ICPA's operations, and ICPA would have had to seek out these same loans even if IC Power had been unavailable.

25. IC Power actively pursued Power Purchase Agreements ("PPAs") between its subsidiaries, such as ICPA, and its customers. Those PPAs often "provided for payment in US Dollars," meaning that IC Power relied on banks in New York to process these transactions. *See* IC Power Pte. Ltd, Registration Statement under the Securities Act of 1933 (Form F-1), p. 7 (Aug. 31, 2015).[15] The weighted average life of these PPAs as of December 2015 was 10 years, establishing a long-term connection to New York. *See* IC Power Pte. Ltd, Amendment No. 2 to Registration Statement under the Securities Act of 1933 (Form F-1), p. 10 (Sept. 16, 2016).[16] IC

[12] https://www.sec.gov/Archives/edgar/data/1611005/000119312517014663/d335608dex991.htm

[13] https://www.sec.gov/Archives/edgar/data/1611005/000119312517014663/d335608dex991.htm

[14] https://www.sec.gov/Archives/edgar/data/1649678/000119312515307805/d81507df1.htm

[15] https://www.sec.gov/Archives/edgar/data/1649678/000119312515307805/d81507df1.htm

[16]https://www.sec.gov/Archives/edgar/data/0001649678/000119312516711589/d102505df1a.htm

Power then used these PPAs to attract international lenders, including promissory notes sold pursuant to Regulation 144A, again seeking to attract US investors.

26. ICPA received considerable benefits from IC Power's continuous and substantial activities in New York, the hallmark of an agency relationship for the purposes of personal jurisdiction. Moreover, whenever ICPA needed to undertake important activities, whether it be acquisitions, capital raising, financing, dispositions, or creation of stability and long-term wealth, ICPA turned to New York. ICPA did not focus on the country of its incorporation, and it certainly did not look to the country of IC Power, its holding company. ICPA wanted all of the benefits of New York, including human and economic capital that netted ICPA hundreds of millions of dollars, and now that it lost the Arbitration, it cannot hide from its obligations to Guatemala by claiming a lack of connection.

B. This Court also has specific personal jurisdiction over ICPA because the Petition is related to ICPA's transaction in New York

27. In New York, a court may exercise specific personal jurisdiction over a foreign corporation where: i) "it has a 'statutory basis' for such jurisdiction under New York's long-arm statute, 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). Where the first condition is met, the defendant must present "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); *GEM Advisors, Inc. v. Corporacion Sidenor, S.A*., 667 F. Supp. 2d 308, 321 (S.D.N.Y. 2009) ("[a]lthough an exercise of personal jurisdiction must comport with due process, where personal jurisdiction is appropriate under section 302(a), the requirements of due process are met.").

28. New York's long-arm statute permits a state court to assume jurisdiction over a

foreign corporation if it "transacts any business within the state… in person or through an agent." N.Y. C.P.L.R. § 302(a)(1). To exercise jurisdiction under this statute, "proof of one transaction in New York is sufficient… so long as the defendant's activities here were purposeful and 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). The foreign defendant could be subject to the jurisdiction of the court even if it "only used electronic telephonic means to project themselves into New York to conduct business transactions." *Sandoval v. Abaco Club on Winding Bay*, 507 F.Supp.2d 312, 316 (S.D.N.Y. 2007); *see also Moore v. Publicis Groupe SA*, No. 11 CIV. 1279 ALC AJP, 2012 WL 6082454, at *8 (S.D.N.Y. Dec. 3, 2012) ("a single communication may be considered a "business transaction" where it was "related to some transaction that had its center of gravity inside New York, into which a defendant projected himself.") (internal quotation marks omitted).

29. Here, this Court has specific personal jurisdiction over ICPA because the underlying dispute is closely connected to a transaction in New York. The Award pertains to ICPA's investments in Guatemala through DEORSA and DEOCSA. *See* Award, ¶ 3 (**Exhibit 1**). ICPA acquired these companies in New York from "Deorsa-Deocsa Holdings Ltd. ("DDHL"), an investment company of Actis LLP." *See I.C. Power Ltd. Agrees to Acquire Energuate, a Private Electricity Distribution Business in Guatemala*, PR NEWSWIRE (Dec. 30, 2015);[17] Stock Purchase Agreement among IC Power Distribution Holdings Pte. Limited and DEORSA-DEOCSA Holdings Limited (Dec. 19, 2015), sec. 2.3 (**Exhibit 5**). The execution agreement that finalized the acquisition of these companies in January 2016 had several ties to New York. Citibank New

[17] https://www.prnewswire.com/news-releases/ic-power-ltd-agrees-to-acquire-energuate-a-private-electricity-distribution-business-in-guatemala-300197902.html

York, acting on behalf of Actis, invited ICPA to acquire these companies. *See* Letter from Pedro Aguirre Saravia, Managing Director, Citigroup Global Markets Inc., to Javier García & Joaquin Coloma, Inkia Energy Ltd. (May 13, 2015) (**Exhibit 4**). ICPA submitted a bid to acquire these companies to the managing director and vice president of Citibank located in New York. *See id.*, p. 2. And the execution agreement was governed by the laws of the state of New York. *See* Stock Purchase Agreement among IC Power Distribution Holdings Pte. Limited and DEORSA-DEOCSA Holdings Limited (Dec. 19, 2015), sec. 10.11 (**Exhibit 5**).

30. When ICPA later disposed of these investments, the transaction was also intimately connected to New York. On December 31, 2017, ICPA, through a Share Purchase Agreement, sold its shares in the Distributors to I Squared Capital. *See* Award, ¶ 342 (**Exhibit 1**); Share Purchase Agreement by and among Inkia Energy Ltd., IC Power Distribution Holdings, Pte. Ltd., Nautilus Inkia Holdings LLC, Nautilus Distribution Holdings LLC, and Nautilus Isthmus Holdings LLC (Nov. 24, 2017), art. II (**Exhibit 9**). The Share Purchase Agreement had multiple links to New York. The parties selected the laws of the State of New York as the governing law and gave this Court the "exclusive[]" jurisdiction to hear "any [a]ction arising out of or relating" to the Share Purchase Agreement. *See id.*, sec. 12.8-12.9 (**Exhibit 9**). New York law also governed other sub-agreements related to the Share Purchase Agreement. *See id.*, *e.g.*, Contingent Payment and Assignment Agreement, sec. 4.11, p. 435, Agreement Regarding SAT Criminal Proceedings and Investment Treaty Claims, ¶ 6, p. 442, Transaction Services Agreement, ¶ 12.2, p.456 (**Exhibit 9**).

31. In addition, the sale documents contained an express reference to the claim that led to this Petition. To seek damages for criminal proceedings brought against its Distributors by Guatemala, ICPA and its affiliates entered into a sub-agreement with I Squared Capital where the

former retained "the right to pursue the Investment Treaty Claims against Guatemala and any proceeds thereof." *See id*., Agreement Regarding SAT Criminal Proceedings and Investment Treaty Claims, p. 440 (**Exhibit 9**). The Petition arises from ICPA's exercise of its right under this agreement. *See* Notice of Arbitration (**Exhibit 3**), Award, ¶¶ 344, 372, 385 (**Exhibit 1**).

32. The Court's exercise of jurisdiction is consistent with due process. In light of the ever-increasing international trade and the ease of attending court proceedings virtually, "[t]he limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years." *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). If a corporation "purposefully avails itself of the privilege of conducting activities within the forum State…it has clear notice that it is subject to suit there," hence the forum state can exercise jurisdiction without violating due process. *Id*. at 297. *See also Hecklerco, LLC* 252 F. Supp. 3d at 376 (citing *GEM Advisors, Inc. v. Corporacion Sidenor, S.A*., 667 F. Supp. 2d at 321) (holding that "although an exercise of personal jurisdiction must comport with due process, where personal jurisdiction is appropriate under section 302(a), the requirements of due process are met") (internal quotation marks omitted).

33. By acquiring the underlying investment in New York, ICPA purposefully availed itself of the privilege of doing business in New York, and when a dispute from that investment arose, it entered into another transaction in New York where ICPA retained the right to bring a claim against Guatemala. *See* Share Purchase Agreement by and among Inkia Energy Ltd., IC Power Distribution Holdings, Pte. Ltd., Nautilus Inkia Holdings LLC, Nautilus Distribution Holdings LLC, and Nautilus Isthmus Holdings LLC (Nov. 24, 2017), sec. 2.6 (**Exhibit 9**). Any arbitration brought pursuant to this right would include both the chance of prevailing, thereby acquiring an award worth millions of dollars and potentially enforceable in New York, and the

reality of losing and having to pay an adverse award of costs and fees. ICPA took its chances, and it had to foresee losing and being subject to the precise lawsuit it now faces, although it should have already paid its outstanding debt to Guatemala.

II. This Court has subject matter jurisdiction over the Petition

34. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") governs the recognition and enforcement of the Award. The New York Convention applies where the arbitral award: i) "was made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," ii) arose "out of differences between persons, whether physical or legal," and iii) is "not considered as domestic awards in the State where the recognition and enforcement are sought." The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I(1), Dec. 29, 1970, 21 U.S.T. 2517. All the elements exist in the present case, as described below.

35. In the United States, the New York Convention is implemented by Chapter 2 of the Federal Arbitration Act ("FAA"). *See* U.S.C. §§ 201 *et seq*; *Republic of Ecuador v. Chevron Corp*., 638 F.3d 384, 391 (2d Cir. 2011). Section 203 of the FAA provides district courts subject matter jurisdiction for "action or proceeding falling under the [New York] Convention." *Albaniabeg Ambient Sh.p.k. v. Enel S.p.A.*, 169 F.Supp.3d 523, 526 (S.D.N.Y., 2016). An award "falls under the [New York] Convention" if the arbitration involves at least one foreign party and the arbitral award arose "out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement…" *See* 9 USCA § 202 (emphasis added).

36. While the FAA does not define the term "commercial," the term "is construed broadly." *BCB Holdings Limited v. Government of Belize*, 110 F.Supp.3d 233, 242 (D.D.C. 2015).

Relying on the Third Restatement of Foreign Relations Law, circuit courts have interpreted the term to include "relationships, whether contractual or not, that arise out of or in connection with commerce." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 104 (D.C. Cir. 2015) (quoting Restatement (Third) of Foreign Relations Law § 487 cmt. f); *Bautista v. Star Cruises*, 396 F.3d 1289, 1298 (11th Cir. 2005) ("[t]he word 'includes' is usually a term of enlargement, and not of limitation.... It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes.").

37. Here, the Award falls within the scope of the New York Convention. First, the Award was made in the United Kingdom, satisfying the first requirement of Article I(1). Second, both parties to the Award are a foreign state and a company incorporated outside the United States. This meets the second requirement of Article I(1) that the award arise out of a difference between legal persons. Third, the Award arose out of a commercial relationship because it is based on a bilateral investment treaty, which is "a contract between nations." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25 (2014). In addition, the underlying dispute of the Arbitration arises from a commercial legal relationship, *i.e.*, IC Power's provision of electric services through DEORSA and DEOCSA. *See* Award, ¶¶ 3, 103 (**Exhibit 1**); *IC Power Ltd. Agrees to Acquire Energuate, a Private Electricity Distribution Business in Guatemala*, KENON HOLDINGS LTD. (Dec. 30, 2015) (**Exhibit 8**). By virtue of the fact that the Award arises from a commercial relationship, it satisfies the requirements of the FAA. 9 U.S.C. § 202. Numerous courts have asserted subject matter jurisdiction over awards related to similar disputes. *See Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 186 (D.D.C. 2016) (holding that the award issued under the Energy Charter Treaty is commercial for the purposes of 9 U.S.C. § 202 because, *inter alia*, the award pertains to the "petitioners' right to develop oil and gas fields within" Kazakhstan); *Hum. v. Czech Republic-*

Ministry of Health, 824 F.3d 131, 136–137 (D.C. Cir. 2016) (holding that the petitioner's "provision of healthcare technology and medical services [to the Czech Republic] has an obvious connection to commerce."); *Africard Co. v. Republic of Niger*, 210 F. Supp. 3d 119, 124 (D.D.C. 2016) ("the dispute in this case, which arises out of a service contract between a company and a government to provide biometric and electronic passports… clearly "arise[s] out of or in connection with commerce.").

III. Venue is proper because there is subject matter jurisdiction, a consequence of Section 203 of the FAA

38. 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); s*ee 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 in Section II, this Court has subject matter jurisdiction pursuant, making venue proper. *See* 9 U.S.C. § 203.

IV. This Court should recognize the Award

A. Judicial review of arbitral awards is extremely limited

39. Given the "emphatic federal policy in favor of arbitral dispute resolution," (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 631 (1985)), arbitral awards are given "considerable deference." *BG Group*, 572 U.S. at 41; *see also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc*., 126 F.3d 15, 23 (2d Cir. 1997) ("review of arbitration awards is very limited . . . in order to avoid undermining the twin goals of arbitration, namely,

settling disputes efficiently and avoiding long and expensive litigation.") (internal quotation marks omitted); *Nat'l Football League Players Ass'n v. Nat'l Football League Mgmt. Council*, 523 F. App'x 756, 760 (2d Cir. 2013) ("FAA requires district courts to accord significant deference to arbitrators' decisions.").

40. The New York Convention provides limited defenses against enforcement of arbitral awards, hence, "confirmation under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited conditions for confirmation or grounds for refusal to confirm an arbitration award." *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007); *see also* Motions and affidavits, 3 Fed. Proc., L. Ed. § 4:140 ("an arbitration award under the [New York] Convention may be enforced by filing a petition or application for an order confirming the award supported by an affidavit. The hearing on such a petition or application will take the form of a summary procedure in the nature of federal motion practice.").

B. The New York Convention and the FAA require recognition of the Award

41. Pursuant to Section 207 of the FAA, the Court must confirm the Award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the" applicable Convention. 9 U.S.C. § 207. *See also Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012). And a party opposing the recognition of an award carries the "heavy" burden of establishing any of the grounds for denying recognition. *See Zeiler*, 500 F.3d at 169. Considering the well-established policy of favoring "enforcement of foreign arbitration awards," courts have construed the grounds for nonrecognition "narrowly." *See China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp*., 334 F.3d 274, 283 (3d Cir. 2003); *see also Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA*), 508 F.2d

969, 973 (2d Cir. 1974) (reading the public policy exception narrowly in line with "the general pro-enforcement bias informing the [New York] Convention."); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 288 (5th Cir. 2004) (holding that "[d]efenses to enforcement under the New York Convention are construed narrowly, to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.") (internal quotation marks omitted).

42. Here, none of the grounds for rejecting the recognition of the Award applies. ICPA willingly accepted Guatemala's offer to arbitrate under the Guatemala-Israel BIT by filing a Notice of Arbitration. *See* Guatemala-Israel BIT, art. 8.2(e) (**Cutz Declaration, Exhibit A**), Notice of Arbitration, ¶12 (**Exhibit 3**). Nor can ICPA claim that the Award fell outside the scope of the parties' agreement or that the underlying dispute is non-arbitrable. The Award deals with an investment dispute that Parties agreed to settle through an *ad-hoc* arbitration constituted under the UNCITRAL Rules of Arbitration. *See* Notice of Arbitration, ¶ 1, 37 (**Exhibit 3**); Guatemala-Israel BIT, art. 8(2)(e) (**Cutz Declaration, Exhibit A**). By filing a claim and submitting to the jurisdiction of the Tribunal, ICPA conceded that the dispute is within the scope of the Tribunal's jurisdiction and that it is arbitrable.

43. Given that ICPA had exercised its right in the appointment of the Tribunal and fully presented its case, without once questioning the composition of the Tribunal, it cannot reasonably challenge the enforcement pursuant to Article V(1)(b) or (d) of the New York Convention. ICPA took advantage of its right to appoint an arbitrator. Pursuant to Article 8.2(e) of the Treaty, ICPA appointed Professor Tawil who, together with Guatemala's co-arbitrator, selected the President of the Tribunal, Professor Albert Jan van den Berg. *See* Guatemala-Israel BIT, art. 8.2(e) (**Cutz Declaration, Exhibit A**), Award, ¶8 (**Exhibit 1**). Throughout the arbitration proceeding, ICPA

was represented by well-known, experienced attorneys from White & Case LLP, which made several written and oral submissions on behalf of ICPA. *See* Award, ¶¶ 1, 12-96 (**Exhibit 1**). At no point was any objection raised to the composition of the Tribunal.

44. The Award's result is also consistent with the public policy of the United States. Recognition will be denied under the public policy exception "only where enforcement would violate the forum state's 'most basic notions of morality and justice.'" *MGM Prods. Grp., Inc. v. Aeroflot Russian Airlines,* 573 F.Supp.2d 772, 775 (S.D.N.Y. 2003), aff'd, 91 F. App'x 716 (2d Cir. 2004) (quoting *Europcar Italia, S.p.A. v. Maiellano Tours, Inc*., 156 F.3d 310, 315 (2d Cir. 1998)). ICPA cannot establish that recognition of the Award would go against the nation's basic notions of morality and justice, especially considering the "emphatic federal policy in favor of arbitral dispute resolution." *Compagnie Sahelienne d'Entreprise v. Republic of Guinea*, No. CV 20-1536 (TJK), 2021 WL 2417105, at *4 (D.D.C. June 14, 2021).

45. Lastly, the Award is final and binding. ICPA has not sought to set aside the Award in the United Kingdom and is barred from seeking vacatur of the Award in the United States because more than three months have passed since the Award was issued, among other reasons. *See* 9 U.S.C.A. § 12 ("[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."); *Wells Fargo Advisors, LLC v. Mercer*, 735 F. App'x 23, 24 (2d Cir. 2018) (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984)) ("a party may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run, even when raised as a defense to a motion to confirm"); *Milberg, LLP v. Drawrah Ltd*., 844 F. App'x 397, 399–400 (2d Cir. 2021) (denying the petition to vacate an arbitration award because the petition was filed more than three months after the award was rendered.).

V. Guatemala is entitled to receive pre- and post-judgment interests on the Award

46. Guatemala requests that the Court award pre- and post-judgment interest. While the decision to "grant prejudgment interest in arbitration confirmations is left to the discretion of the district courts," the Second Circuit has adopted "a presumption in favor of pre-judgment interest." *Ceona PTE Ltd. v. Bmt Giant, S.A. De C.V.*, No. 16CV4437, 2016 WL 6094126, at *2 (S.D.N.Y. Oct. 19, 2016) (quoting *Waterside Ocean Navigant Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 154 (2d Cir. 1984)) (internal quotation marks omitted). Hence, "[t]he common practice among courts within the Second Circuit is to grant interest at a rate of nine percent, the rate of pre-judgment interest under New York State law." *Trustees of the New York City Dist. Council of Carpenters Pension Fund v. Jessica Rose Enterprises Corp.*, No. 15-CV-9040 (RA), 2016 WL 6952345, at *4 (S.D.N.Y. Nov. 28, 2016) (quoting *Herrenknecht Corp. v. Best Rd. Boring*, No. 06 CIV. 5106 (JFK), 2007 WL 1149122, at *3 (S.D.N.Y. Apr. 16, 2007)) (internal quotation marks omitted). Guatemala thus requests pre-judgment interest at a rate of nine percent.

47. Guatemala is also entitled to post-judgment interest. The relevant statute, 28 U.S.C. § 1961(a), notes that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court…calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." *Ceona PTE Ltd.*, 2016 WL 6094126, at *3 (S.D.N.Y. Oct. 19, 2016), (quoting 28 U.S.C.A. § 1961) (internal quotation marks omitted). Section 1961 is "mandatory" and applies to "actions to confirm arbitration awards." *Trustees for The Mason Tenders Dist. Council Welfare Fund v. Euston St. Servs., Inc.*, No. 1:15-CV-6628-GHW, 2016 WL 67730, at *2 (S.D.N.Y. Jan. 5, 2016).

48. Accordingly, Guatemala requests pre-judgment interest at a rate of nine percent per

annum accruing from October 7, 2020, the date of the Award, until the date of judgment in this action. Guatemala also seeks post-judgment interest at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.

VI. The Court should award Guatemala its attorneys' fees and costs

49. Courts ordinarily award reasonable attorneys' fees to an award creditor where the award debtor fails to comply with the award "without any justification." *See First Nat'l Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Enrol. Union, Local 228*, 118 F.3d 893, 898 (2d Cir. 2007); *Trustees of the New York City Dist. Council of Carpenters Pension Fund*, 2016 WL 6952345, at *5 (S.D.N.Y. Nov. 28, 2016) (awarding attorneys' fees to the award creditor where the award debtor failed to provide "any justification" for its failure to comply with the award); *Herrenknecht Corp*., 2007 WL 1149122, at *4 (S.D.N.Y. Apr. 16, 2007) (awarding attorneys' fees to the plaintiff because the defendant "offered no justification for refusing to comply with the decision of the arbitrator"); *Ceona PTE Ltd.*, 2016 WL 6094126, at *3 (S.D.N.Y. Oct. 19, 2016) (same). In the Second Circuit, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Rose v. Solar Realty Mgmt. Corp*., No. 16 CIV. 9766 (LGS), 2017 WL 11569030, at *1 (S.D.N.Y. Mar. 31, 2017). A reasonably hourly rate is "the rate a reasonable, paying client would be willing to pay." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 193 (2d Cir. 2007).

50. The Court should award Guatemala reasonable attorneys' fees and costs because ICPA, despite repeated requests from Guatemala, has neither complied with the Award nor offered a justification for its non-compliance. *See* Letter from the Ministry of Economy of Guatemala

(Feb. 11, 2021) (**Exhibit 18**). Because ICPA initiated the claim, did not object to arbitrability or composition of the Tribunal, and never sought annulment or set aside, it has waived any reasonable objection. By remaining silent, ICPA has caused Guatemala to expend significant, additional sums to enforce a debt that ICPA could easily pay. This is fundamentally unjust, and Guatemala, therefore, respectfully requests for the Court to allow Guatemala to submit the fees and costs it incurred in this civil proceeding after the Court enters judgment on the Petition. Guatemala is willing and able to provide the necessary billing records upon the Court's finding that Guatemala is entitled to its attorneys' fees and costs.

CONCLUSION

51. For the reasons set forth above, Guatemala respectfully requests the following forms of relief:

a) an Order recognizing the Award pursuant to Article III of the New York Convention and 9 USCA § 207 and entering Judgment thereon, including pre- and post-judgment interest;

b) a Judgment in favor of Guatemala and against ICPA in the amount awarded Guatemala in the Award, US$ 1,803,042.61, plus pre- and post-judgment interest;

c) an Award of Guatemala's costs of this civil proceeding, including reasonable attorneys' fees incurred in bringing this proceeding; and

d) any other relief that this Court, in the interests of justice, deems necessary and proper.

Dated: January 14, 2022

Respectfully submitted,

/s/ *Quinn Smith*

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