

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

(PCA Case No. 2019-43)

**STATEMENT OF REPLY AND
RESPONSE TO JURISDICTIONAL OBJECTIONS**

Claimant did not ignore the general recommendation contained in that report that Claimant perform tax due diligence.¹⁹³ Mr. Albín details the manner in which the due diligence team used the PwC report:

To ensure that we had complied with all of PwC’s recommendations, I prepared a report addressing each point raised by PwC. As I noted in that report, ‘[m]any of these points had already been addressed both by me and the other advisors who worked in this transaction, and had been taken into account for the assessment and valuation of the companies in question.’ I then addressed directly the specific tax issue that PwC recommended that we look into by noting that ‘[t]hese temporary differences have been considered and taken into account for the calculation of the Income Tax contained in the Business Plan prepared and which has served as the basis for the valuation of the companies.’ PwC’s general recommendation that IC Power ‘perform tax due diligence to identify and quantify any known or unknown potential tax exposures’ did not require further comment, as the entire team was aware that García & Bodán had performed tax due diligence.¹⁹⁴

86. Therefore, after approximately seven months of due diligence and various levels of review, all the actors involved in the due diligence process examined the Deductions and the Binding Tax Opinions and concluded that the “Binding Tax Opinions resolved the matter of the Deductions and bound the SAT to that solution.”¹⁹⁵ As Mr. García, Claimant’s CEO at the time, observes “IC Power could (and would) have walked away from the deal at any time before closing, if it had come across any information that indicated that the issue of the deductibility of the ... Deductions ... had not been resolved, and the Distributors had a tax exposure of more than US\$100 million.”¹⁹⁶ Such information, however, was not found, nor could it have been. No one could have foreseen that Respondent would disregard the Binding Tax Opinions, initiate a criminal complaint concerning the very same issues resolved through them, and force Claimant and the Distributors to make payments of tens of millions of dollars and refrain from claiming the Deductions going forward. The problem in this case was not Claimant’s due diligence, but rather Respondent’s arbitrary, inconsistent, and unreasonable conduct.

87. Claimant also considered FCPA issues as part of its due diligence. It did so in connection with the potential acquisition and in light of a potential IPO in the U.S. market that was under consideration. In this context, contrary to Respondent’s assertions, the La Línea tax scandal and other non-tax corruption scandals that were uncovered around the due diligence period did catch the attention

¹⁹³ See SOD ¶ 163; Project Spring PwC Diligence Observations, 21 Oct. 2015 (C-154) at 9.

¹⁹⁴ Albín II ¶ 29. See also García II ¶ 10.

¹⁹⁵ Urbina ¶ 15. See also García I ¶ 13; Albín I ¶ 18; Albín II ¶¶ 24, 27; IC Power Due Diligence Team Financial Statement Review and Energuate Business Plan Report, 30 Nov. 2015 (C-158) at 12; Asensio Memorandum regarding Binding Tax Opinions, 16 June 2015 (C-406) at 1-2; García & Bodán Final Due Diligence Report (22 October 2015), 13 Nov. 2015 (C-429) at 21; Project Spring Strawman Acquisition Structuring presentation, 30 Oct. 2015 (C-421) at 22-23, 25.

¹⁹⁶ García II ¶ 6.

of Claimant and its counsel, García & Bodán.¹⁹⁷ García & Bodán conducted an investigation of those scandals and of the files of the Distributors and concluded that neither the Distributors nor its employees were ever mentioned in connection with them.¹⁹⁸ They also noted that there were “no actions filed in court against any officer linked to Energuate, or its associates or contractors related to any instance where an FCPA violation may have occurred.”¹⁹⁹

88. García & Bodán even considered the Deductions and the Binding Tax Opinions specifically. They noted that “the fact that the SAT issued the Binding Tax Opinions in an efficient timeframe – the Distributors filed the consultations on 6 February 2015 and the SAT notified the Opinions on 19 February 2015 – suggested that the Distributors and the SAT had reached an agreement on the answer beforehand.”²⁰⁰ García & Bodán also noted, however, that this did not mean that there were wrongful payments to SAT employees.²⁰¹

89. García & Bodán partner Mr. Asensio reasoned that a prior agreement between the Distributors and the SAT would not be uncommon in the circumstances of the case. According to him, it is likely that the SAT put pressure on the Distributors with the objective of improving tax collection, and that the Binding Tax Opinions were proposed as a compromise that would result in the Distributors paying more taxes, but with the security that the matter of the Deductions would be clarified.²⁰² Mr. Asensio apparently was right on point, as SAT reports issued after the Distributors challenged the March 2014 Adjustments, which Claimant has just uncovered, make clear that the SAT had the firm intent of collecting, regardless of the merits of its case. In such reports, SAT auditors recommend trying to pursue a criminal case, “because the administrative case is weak and thus we run the risk of losing at the court stage.”²⁰³

¹⁹⁷ See García & Bodán Final FCPA Opinion letter, 28 Oct. 2015 (C-420) at 1 (noting that “[r]ecent events in Guatemala have gravely affected the political scenario in Guatemala, to the extent that both the President and the Vice-president resigned. The cases that involve corruption at such high level are known as La Línea, whereby arrangements were structured to pay less import duties; Pisa that involves the crooked contracts with the social security system; and Laundering and Politics where an ample investigation took place to cover-up deviation of funds taken from the nations treasure”).

¹⁹⁸ García & Bodán Final FCPA Opinion letter, 28 Oct. 2015 (C-420) at 1; Email from García & Bodán to IC Power regarding FCPA, 21 Oct. 2015 (C-416) at 1.

¹⁹⁹ García & Bodán Final FCPA Opinion letter, 28 Oct. 2015 (C-420) at 1.

²⁰⁰ Urbina ¶ 16; Asensio Memorandum regarding Binding Tax Opinions, 16 June 2015 (C-406); Email from García & Bodán to IC Power regarding FCPA, 21 Oct. 2015 (C-416) at 1; Email from García & Bodán to IC Power, 22 Oct. 2015 (C-417) at 3.

²⁰¹ Urbina ¶ 17; Email from García & Bodán to IC Power regarding FCPA, 21 Oct. 2015 (C-416) at 1.

²⁰² Email from García & Bodán to IC Power, 22 Oct. 2015 (C-417) at 3 (“I believe that the SAT formulated adjustments precisely on that subject which led them to speak and find a way to collect more [from the Distributors]. A proposal to present a consultation was raised, with the understanding that the response would be based on an agreement, and in doing so Energuate would propose a voluntary reassessment of certain previous tax years. If this was the case, they probably paid more for those years while gaining clarity going forward with respect to those two tax issues.”).

²⁰³ SAT Internal Report No. INF-GEM-DR-027-2014, 18 Jun. 2014 (C-378) at 1; SAT Internal Report No. INF-GEM-DR-028-2014, 18 Jun. 2014 (C-379) at 1.