UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CORPORACION AIC, S.A., a
Guatemalan company,

Petitioner,

vs.

HIDROELECTRICA SANTA RITA, S.A.,a
Guatemalan company,

Respondent.
_____/

PETITION AND MOTION TO VACATE ARBITRATION AWARDS

NOW COMES the Petitioner, Corporación AIC, S.A., a Guatemalan company ("AICSA") and hereby files this Petition and Motion to Vacate Arbitration Awards, whereby it moves this Honorable Court to vacate certain rulings by an arbitration Tribunal in the Partial Award dated April 7, 2017, and in the Final Award issued by the Arbitration Panel on October 29, 2018.

INTRODUCTION

1. AICSA participated in a lengthy arbitration proceeding in Miami relating to the construction of a hydroelectric plant in Guatemala. In its Partial Award and Final Award, the Tribunal exceeded its powers in several vital respects, and AICSA prays that this Honorable Court to vacate the awards to correct these rulings.

2. While the contract that provides for arbitration specifically allowed joinder of other parties to the arbitration, the Tribunal exceeded its powers by denying joinder of a critical subcontractor. While the contract prohibited bribery and there was clear proof of bribery, the Tribunal dodged the subject by falsely declaring that it could not rule on the issue. While the contract required Guatemalan law, the Tribunal chose not to follow Guatemalan law regarding

"indemnity" damages due to AICSA and by applying interest on the amounts to be returned before the date of the award. While the contact provides that the prevailing party *shall* recovery its fees and costs, the Tribunal denied them to AICSA.

2. Also, there is a pending motion before the Tribunal to "interpret" the Final Award to require AICAS to post new advance payment bonds. The contract does not provide for new bonds. If the Tribunal were to order AICSA to post new bonds, it would be well beyond their powers, and this Court also should vacate any such award.

BACKGROUND

3. This matter arises from a project for the construction of a hydroelectric power plant in Cobán, Guatemala ("Project"). HIDROELECTRICA SANTA RITA, S.A. ("HSR") was the Owner of the Project, and AICSA was the Contractor under an Engineering, Procurement and Construction Agreement dated March 8, 2012, as amended and restated on February 20, 2013 ("EPC Contract"). Novacom, S.A. ("Novacom"), entered into an agreement with AICSA on March 7, 2012 for the Engineering, Procurement, Construction Commissioning and Start-Up of the Water-to-Wire System of the Project, which was amended on February 18, 2013 (the "Water-to-Wire Contract").

4. Advance payments were made to AICSA (under the Limited Notices to Proceed and the Notice to Proceed) for work to be executed under the EPC Contract and to Novacom for work to be executed under the Water-to-Wire Contract, including engineering and design work with respect to the turbines and generators for the Project.

5. On October 1, 2013, HSR unilaterally issued a notice of force majeure, halting work, and in March of 2014 terminated the EPC Contract. When the EPC Contract was terminated by HSR, AICSA in turn terminated the Water-to-Wire Contract with Novacom. Subsequently,

Novacom submitted the costs and expenses it incurred due to the termination of the Water-to-Wire Contract. HSR, however, disputed the accuracy of these amounts and insisted that AICSA must return all of the monies that it gave to Novacom (including the monies that HSR forwarded directly to Novacom) because HSR did not accept the supporting information provided by Novacom.

6. HSR initiated arbitration in Miami against AICSA, seeking repayment of all of the advance payments it had made pursuant to the EPC Contract. Pursuant to the joinder provision in the arbitration clause in the EPC Contract, AICSA requested the Arbitration Tribunal ("Tribunal") to join Novacom to the Arbitration to address those portions of the advance payments that had been paid to Novacom under the Water-to-Wire Contract.

7. After briefing, the Tribunal, on April 7, 2017, entered its Partial Arbitration Award ("Partial Award"), rejecting by a 2-1 vote AICSA's request to join Novacom.[1]

8. After several hearings and post hearing briefings,[2] on October 29, 2018, the Tribunal issued its Final Award ("Final Award"), denying HSR's claim for all of the advance payments, holding that AICSA was entitled to keep US$2,429,627.08 and €703,290.00 for work done pursuant to the EPC Contract, and ordering that AICSA return to HSR (i) US$7,017,231.52 plus interest and (ii) €435,168.00 plus interest. The Tribunal also ordered AICSA to reimburse HSR for US$26,940 of the costs incurred by HSR with the International Chamber of Commerce ("ICC"). Further, the Tribunal ordered AICSA to keep the Advance Payment Bonds in place in an amount equal to or higher than the amounts granted and accrued under the Final Award through full payment of those amounts. One of the members of the Tribunal filed a partial dissent with respect to the denial of AICSA's claim for breach of the bribery provision of the EPC Contract.[3]

[1] Partial Award, dated April 7, 2017, attached hereto as "Exhibit A."
[2] See Exhibits G through K attached hereto.
[3] Final Award, dated October 29, 2018, p. 6, ¶ 32.5(b), attached hereto as "Exhibit B."

9. Copies of the relevant documents are attached hereto, including the Partial Award and Dissenting Opinion (Exhibit A), the Final Arbitration Award and Dissenting Opinion (Exhibit B), the Water To Wire Contract (Exhibit C), the EPC Contract (Exhibit D), the MACOR Documents (Exhibit E), the Request For Joinder of NOVACOM (Exhibit F), HSR's Arbitration Submission (Exhibit G), AICSA's Arbitration Submission (Exhibit H), and Novacom's Arbitration Submission (Exhibit I).

JURISDICTION

10. The Court has jurisdiction over this motion because the arbitral award falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[4] The New York Convention was adopted as U.S. law in 9 U.S.C. § 201 *et seq.* ("Chapter 2" in the title on arbitration).

11. Case law provides that the Court's authority extends to Motions to Vacate final awards.[5] Further, 9 USCS § 208 states that 9 USCS §§ 1 et seq. ("Chapter 1") applies to actions and proceedings brought under Chapter 2 to the extent that Chapter 1 is not in conflict with Chapter 2 or the Convention as ratified by the United States. 9 USCS § 10, regarding motions to vacate, is not in conflict with Chapter 2 of the Convention. Accordingly, the Court has jurisdiction over this motion to vacate pursuant to 9 USCS. § 203, 9 USCS § 208, and 9 USCS § 10.

LEGAL BASES FOR VACATING THE AWARDS

12. Arbitrators derive their power "from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). When an arbitrator "strays from interpretation and application of [an] agreement and effectively 'dispenses his own brand of industrial justice,'" the

[4] Exhibit B, Final Award, p. 6, ¶ 32.5(b).
[5] *Cvoro v. Carnival Corp.*, 234 F. Supp. 3d 1220 (S.D. Fla. 2016).

decision may be vacated on the ground that the arbitrator exceeded his powers. *Id.* at 671-672 (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (internal quotation marks omitted).

13. In *Stolt-Nielsen*, the U.S. Supreme Court found that the arbitrators exceeded their authority when they ruled that the arbitral clause permitted the parties to engage in class litigation, even though the clause was silent on the issue. The Court found that the arbitrators' decision lacked any legal basis. "We think it is . . . clear from our precedents and the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes. It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.* at 623-24 (citations omitted).

14. Further, the Tribunal exceeds their authority when they recognize the governing legal principles yet choose not to apply them. *Mastec N. Am. V MSE Power*, 581 F. Supp. 2d 321, 324 (N.D. N.Y. 2008); *Lagstein v. Certain Underwriters*, 607 F. 3d 634 641 (9th Cir. 2010).

15. The Tribunal itself recognized the fact that all of their power stemmed from the agreement of the parties. The Tribunal stated, "[t]he jurisdiction of the Arbitral Tribunal over this dispute derives from Section 32 of the EPC Contract. . . ."[6]

SUMMARY OF ARGUMENT

16. The Tribunal exceeded its power in several ways.

17. First, the Tribunal exceeded their powers by creating a new requirement for joinder of parties and refusing to allow subcontractor Novacom to be joined to the arbitration. The EPC

[6] Exhibit B, Final Award, p. 4, ¶ 18.

Contract provides that any party may join a subcontractor if the dispute relates to the work of the subcontractor. Instead, the Tribunal exceeded their powers by creating a new requirement - that only a subcontractor against whom a party had "filed a claim" could be joined - a requirement found nowhere in the EPC Contract. Joining Novacom was critical because HSR sought recovery of monies paid to and still held by Novacom.

18. Second, the Tribunal exceeded its powers by creating a new condition precedent to enforcing the anti-corruption provisions of the EPC Contract. The EPC Contract provided that the parties must comply with the anti-corruption laws of Guatemala, the United States, and the United Kingdom. The Tribunal exceeded their powers by adding as a condition to enforcement of this *contract* provision that the United States Foreign Corrupt Practices Act create a private cause of action. The result was that HSR was not held accountable for its breach of the anti-corruption provisions *of the EPC Contract*, in contravention of the parties' agreement.

19. Third, the Tribunal exceeded its powers by choosing not to follow mandatory Guatemalan law. The Tribunal recognized that the EPC Contract calls for the application of Guatemalan law, but the Tribunal refused to follow Guatemalan law: (a) by not providing for the "indemnification" required by Guatemalan law when an owner terminates a contract, and (b) by awarding interest on advance payments as though they were loans. The advance payments received by AICSA were integral to the structure of the EPC Contract and were not loans.

20. Fourth, the Tribunal exceeded their powers because they refused to follow the mandatory provision of the EPC Contract that AICSA, as the prevailing party, shall recover its fees and costs in the arbitration and, instead, chose not to award fees based on their own rules. AICSA received more than 80% of the amounts that it was claimed and is entitled to its fees and costs as the prevailing party.

21. Finally, AICSA notes that HSR has moved the Tribunal to "interpret" their Final Award to require AICSA to post new advance payment bonds. No provision of the EPC Contract authorizes replacement advance payment bonds. If the Tribunal were to grant HSR's motion, they would clearly be exceeding their powers, and any order to post replacement bonds should be vacated.

GROUNDS TO VACATE THE AWARD

A. The Tribunal exceeded their powers by improperly altering the EPC Contract and creating a new provision requiring a party to have "filed a claim" against a subcontractor before the subcontractor could be joined in the arbitration.

22. Upon receiving the permit to undertake the construction of a hydroelectric plant on the Icbolay River, Guatemala, HSR selected AICSA as the contractor to construct the civil works for the Project. At the same time, HSR also selected Novacom to provide the water-to-wire systems for the Project. In fact, both AICSA and Novacom submitted independent bids to HSR for their respective portion of the works on the Project. The bid originally submitted by AICSA did not include a proposal for providing the water-to-wire systems since those systems were to be bid on and provided by another party.

23. However, during final negotiations for the civil works with HSR, AICSA was required by HSR to subcontract with Novacom for the water-to-wire systems for the Project, because HSR wanted AICSA to "administer" the Novacom Contract. Accordingly, on March 7, 2012, AICSA and Novacom entered into the Water-to-Wire Contract pursuant to which Novacom would supply design, engineering, procurement, construction, commissioning and start-up of for water-to-wire systems of the Project. The terms and conditions of the Water-to-Wire Contract are substantially consistent in all material respects with the EPC Contract executed by AICSA with HSR, and, importantly, the arbitration provisions of both contracts are virtually identical, including

the joinder provision.

24. On February 18, 2013, Novacom and AICSA signed an Amendment to the Water-to-Wire Contract. On February 20, 2013, HSR issued Limited Notice to Proceed No. 2 ("LNTP No. 2"), pursuant to which HSR gave its order to commence certain limited works on the Project, including purchase orders for reinforcement steel and cement, as well as for turbine engineering. The total amount of advance payments provided by HSR to AICSA under LNTP No. 2 was US$4,500,000.00, of which US$250,000.00 was for turbine engineering and was forwarded by AICSA to Novacom under the Water-to-Wire Contract.

25. Thereafter, Novacom commenced the design and engineering of the water-to-wire works and placed the orders for the turbine and generators.

26. On July 4, 2013, HSR issued a Notice to Proceed under the EPC Contract, pursuant to which HSR formally instructed AICSA to proceed with the civil works and the subcontracts. HSR provided advance payments under the Notice to Proceed of US$4,446,585.60 to AICSA and €1,138,458.00 directly to Novacom.

27. On October 1, 2013, HSR issued a notice suspending the works due to an alleged force majeure event. On October 2, 2013, AICSA gave notice to Novacom that HSR had suspended the works due to the alleged force majeure event and requested Novacom to suspend progress of the work under the Water-to-Wire Contract.

28. On March 16, 2015, HSR issued a notice that it was terminating the EPC Contract. AICSA, in turn, notified Novacom that the Water-to-Wire Contract was also being terminated.

29. On April 30, 2015, Novacom submitted the details of the costs and expenses it incurred due to the termination of the Water-to-Wire Contract, which amounted to €703,290.00, plus US$987,926.71, plus Q1,232,466.83. HSR rejected the amounts claimed by Novacom,

alleging that the amounts lack adequate and substantive supporting documentation.

30. HSR contended that AICSA and, in turn Novacom, are only entitled to retain $250,000.00 of the advance payments because that is what is permitted under the termination provisions of LNTP No. 2. However, that argument ignores the fact that HSR issued the Notice to Proceed under the EPC Contract, which in turn led to AICSA issuing its Notice to Proceed under the Water-to-Wire Contract. As such, LNTP No. 2 was subsumed into and superseded by the Notice to Proceed, and, therefore, the termination provision of LNTP No. 2 is inapplicable.

31. However, AICSA also in turn rejected the amounts claimed by Novacom to the extent that the same were not authorized by the Water-to-Wire Contract; provided, however, that AICSA accepts that Novacom is entitled to some legitimate termination costs and expenses incurred due to the termination by HSR plus a reasonable profit on the work performed by Novacom to the date of termination.

32. Novacom also disputed that there was an alleged force majeure event. Specifically, on October 9, 2013, Novacom sent a letter to AICSA whereby it requested AICSA to clarify the events that constituted the alleged Force Majeure declared by HSR. This letter was forwarded to HSR by AICSA. HSR provided no details regarding the nature and cause of the alleged Force Majeure, the effects of the alleged Force Majeure on the agreements and on the capacity of HSR to comply with its obligations under the agreements. In fact, Novacom contended that none of its obligations were ever affected by a Force Majeure event.

33. As a consequence, Novacom's position that it may retain the monies paid by HSR to AICSA under the EPC Contract and by AICSA to Novacom under the Water-to-Wire Contract is in direct conflict with the positions of both AICSA and HSR. Indeed, both HSR and AICSA disagree with the claims of Novacom in the calculation of the amounts to be refunded, albeit for

different reasons. A significant part of the funds in dispute between HSR and AICSA are the same funds in dispute between AICSA and Novacom. The disputes between Novacom and AICSA and between AICSA and HSR are inseparable and should be decided in the same proceeding.

34. The Water-to-Wire Contract contains arbitration provisions that are nearly identical to the arbitration provisions contained in the EPC Contract between HSR and AICSA. Both contracts provide for (a) arbitration of disputes pursuant to the Rules of the ICC, (b) the arbitration proceeding to be held in the City of Miami, Florida, (c) the language to be used in the arbitration shall be the English language, (d) the governing law to be applied in the resolution of the disputes shall be Guatemalan law, and (e) a panel of three independent and impartial arbitrators.[7]

35. Moreover, to achieve consistency in results, both the EPC Contract and the Water-to-Wire Contract provide for the inclusion of any Third Party or Subcontractor in the arbitration. Specifically, both the EPC Contract and the Water-to-Wire Contract provide the following identical language in their respective Sections 32.4(a):

> 32.4 Related Disputes
>
> (a) **If the Dispute involves or relates to any Third Party or to a Subcontractor**, and such Dispute (i) raises issues of fact or law which are substantially similar to, or connected with, issues raised in any Dispute; or (ii) arises out of facts which are substantially similar to, or connected with, facts which are the subject of any dispute or difference between Owner, Contractor, Third Party, Subcontractor or the Guarantor; (iii) the inclusion of such Third Party, Subcontractor or Guarantor is necessary if complete relief is to be afforded among those who are already parties to the Arbitration and which will arise in such proceedings; or (iv) the Dispute or other matter in question between Owner and Contractor involves the work of Subcontractor, **then either Owner or Contractor may include such Third Party, Subcontractor or Guarantor as a party to the Arbitration between Owner and Contractor hereunder, whether before or after the**

[7] See Water-to-Wire Contract, attached hereto as "Exhibit C," and the EPC Contract, attached hereto as "Exhibit D."

> **commencement of the Arbitration proceedings, to the extent not specifically prohibited by Law and the ICC Rules**. (emphasis supplied)

36. Although a party to the arbitration need only meet one of the four enumerated reasons for joinder, in this case all of the conditions indicated in Section 32.4(a) exist. The dispute "involve[d] or relate[d] to" a subcontractor (Novacom), because Novacom holds funds in dispute, which were paid to them by HSR and AICSA. The dispute raised issues of fact and law that are "substantially similar to, or connected with" issues in the dispute, in that the same project was involved, the same payments were involved, there were direct payments made to Novacom by HSR, the EPC Contract and the Water-To-Wire Contract are substantially similar documents, the reasons for termination of the contract by HSR are the same, and the reimbursements sought by HSR would include advance payments made to both AICSA and Novacom. For the same reason, the dispute "arose out of facts" which were the subject of the dispute.

37. The inclusion of Novacom also is necessary for "complete relief" to be afforded to AICSA and HSR, which were already parties to the Arbitration. Under the Final Award, AICSA will be required to arbitrate or litigate with Novacom over return of the portion of the advance payments that Novacom received, and hence complete relief was not afforded. Finally, the Dispute or other matter in question between Owner and Contractor involved the work of a "Subcontractor." Having met one or more of the preconditions to joinder under both contracts, under Section 32.4(a) "either Owner or Contractor may include any Third Party or Subcontractor as a party to the Arbitration." AICSA, as Contractor, exercised its contractual rights under the EPC Contract to include Novacom, the Subcontractor, and the Tribunal exceeded their power by denying AICSA's contractual rights.

38. Logically, the general contractor would want consistent results in any dispute that

also involves both the owner and the subcontractor, and for this reason the EPC Contract allows for joinder of a subcontractor when its work merely is involved in the dispute between the owner and general contractor. It is abundantly clear that as provided in Articles 9 and 10 of the Rules of the ICC (the "ICC Rules"), the arbitration provisions of both the EPC Contract and the Water-to-Wire Contract are compatible and consistent and, as such, it would be more efficient and lead to more consistent results to treat those two agreements as if they were one and the same arbitration agreement. Novacom specifically consented to being joined as a co-Respondent in the Arbitration pursuant to the provisions of the Water-to-Wire Contract and further agreed to be bound by the eventual award and/or outcome of the Arbitration.

39. Instead of following the EPC Contract, the Tribunal exceeded their power and authority in rejecting the joinder (by a vote of two to one) and inserting their own requirement that there be a claim against Novacom. In the majority decision, the Tribunal set forth the language in the EPC Contract (quoted *supra*) but added the requirement that the parties (HSR and AICSA) assert a claim directly against the third party or subcontractor. See, Partial Award, Ex. G, at ¶ 81. There is no such requirement in the express and clear language of the EPC Contract, and the majority cites no law supporting such a requirement. See, Partial Award, Ex. G, at ¶¶ 78-81.

40. As such, the Tribunal dispensed their "own brand of industrial justice," rather than applying the agreed-upon contractual language. *Garvey*, 532 U.S. at 509 (quoting *Steelworkers*, 363 U.S. at 597) (internal quotation marks omitted). The Tribunal exceeded their power when it added the requirement that there be a claim against the subcontractor the Partial Award should be vacated to allow joinder of Novacom.

B. The EPC Contract required the parties to comply with anti-bribery statutes, including the Foreign Corrupt Practices Act. HSR committed bribery, and the Tribunal exceeded their powers by holding that they did not have authority to enforce the clear anti-bribery provisions of the EPC Contract.

41. Section 34.13 of the EPC Contract provides: "Specifically regarding any activity that involves corruption, in addition to the applicable laws of the Republic of Guatemala, [the] Parties agree to comply with and be subject to the 1977 United States Act on Foreign Corrupt Practices (U.S. Foreign Practices Act of 1977). . . ."[8] This provision establishes a standard of ethical conduct for the parties to the contract and creates a claim *for breach of the EPC Contract* against any party that violates the Foreign Corrupt Practices Act ("FCPA") and engages in bribery.

42. Initially, it is clear that HSR committed bribery and violated the FCPA. The FCPA and Articles 439 and 442 of the Guatemalan Penal Code, make it a crime for an individual or company to make or EVEN OFFER OR PROMISE a corrupt payment of money or ANYTHING OF VALUE to a government official to obtain or retain business. The evidence in this case has overwhelmingly shown that HSR and its principals promised, offered, and actually made such payments to the Governor of Alta Verapaz and/or the Mayor of Coban, and that these corrupt practices willfully committed by HSR contributed to the downfall of the Project. It is undisputed that, at a September 12, 2013 meeting with AICSA and others, HSR admitted that it had paid and had promised to make additional payments to the Governor of Alta Verapaz and the Mayor of Coban to garner support for the Project prior to July 2013. This is an obvious violation of the FCPA, Guatemalan law, and Section 34.13 of the EPC Contract. After severe problems arose with the Governor because corrupt payments were not made as promised, even before the declaration of Force Majeure, Stephen Pearlman, Guillermo Font, Luis Velasquez and Luis Velasquez, Jr.

[8] See Exhibit D, EPC Contract, § 34.13 (entitled "Corrupt Practices"). Both Juan Paez and Steve Pearlman testified that they were fully aware of the provisions of the FCPA and its prohibitions on corrupt payments.

discussed a proposal for paying off the Mayor and the Governor in exchange for their support of the Project.[9] The proposal was set out as follows in a September 25, 2013 email:

> *1. Semana entrante contra aceptación de los puntos de Hidro Santa Rita se les dará US 20,000.*
> *2. Una semana después de que ya esté todo normalizado, cuando se retome la gobernabilidad en el área, ya esté trabajando la empresa constructora, se les dará los otros US 20,000.00.*[10]

43. Subsequent emails by Guillermo Font to Mr. Paez, Mr. Pearlman, and Mr. Velasquez, confirmed that pursuant to a meeting with the Governor, they owed the Governor a sum of US$40,000 to be disguised as a payment for metal roofs or "láminas."[11]The email reads, in relevant part, as follows:

> *La reunión con el gobernador fue bastante positiva inclusive más allá de lo que, en lo personal, esperaba.* (omitted). *Expongo a continuación en forma resumida la reunión con el gobernador:*
>
> - *Rectificó que el monto que se le debe es de $40,000 y que la empresa a que se le compró las láminas puede dar una factura.*

44. Minutes detailing a meeting between HSR and the Governor of Cobán, dated November 19, 2013, show that the Governor increased the amount owed to US$50,000, and that such amount could be paid under a fraudulent invoice from a company that had previously provided láminas, or could be paid in cash to the Governor, which demonstrates that the whole purpose of the payment was corrupt.[12] In fact, Juan Paez of HSR admitted that these bribes had been paid, and this was a "customary practice" in infrastructure projects. Mr. Paez tried to blame HSR's "prior management" for the payment of these bribes, but failed to recognize that regardless

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[9] See MACOR Documents, Email from Luis Velasquez Jr. to Juan Paez, Stephen Pearlman, Guillermo Font and Luis Velasquez, dated 25 September 2013, attached hereto as "Exhibit E." The appearance of a quid pro quo is undeniable.
[10] Id.
[11] See Exhibit E, MACOR Documents, Email from Guillermo Font to Juan Paez, Stephen Pearlman, and Luis Velasquez, dated October 28, 2013, and then forwarded to Roberto Lopez on October 29, 2013.
[12] See Exhibit E, MACOR Documents.

of any change in management, these payments were still corrupt actions of HSR.

45. HSR tried to disguise these bribes to government officials as donations of "láminas" to the local communities, and produced a fraudulent invoice for the equivalent in quetzals to US$50,000.06 worth of laminas from Macor, an earthmoving company in the state of Zacapa.[13] This invoice and internal documentation of HSR showed that US$50,000.06 was paid to Macor on the approval of Stephen Pearlman.[14] This corrupt payment is a blatant violation of the FCPA, which also makes it a willful breach of the EPC Contract.

46. No reasonable person could believe that this was anything other than a bribe papered to look like a donation of roofing materials to the communities. Per HSR's own internal requirements, bills of lading or shipping receipts, as well as a list of persons to whom the láminas were provided, including signatures and/or fingerprints, had to be provided 15 days prior to payment.[15] HSR has not produced a single bill of lading or shipping receipt for a single lámina, and it has not provided any documentation of delivery – no receipts, no list of names, no signatures, no fingerprints, and no photos related in any way to the shipment or delivery of the supposed láminas was produced in discovery.[16] HSR's assertion that there was an exchange of money for láminas is especially disingenuous considering that 3,565 láminas would have involved several truckloads, and the fact that the purported supplier was an earthmoving company (that did not sell láminas) that was located almost 200 kilometers and several departments away from Cobán. Significantly, the price of the láminas was set so that the total invoice was exactly US$50,000, the amount agreed to be paid to the governor. HSR simply cannot overcome the overwhelming weight of the evidence

[13] See Id.
[14] See Id.
[15] Id.
[16] Furthermore, it would have been virtually impossible for the láminas to be purchased and delivered in the timeframe HSR alleges.

that shows that this was a corrupt payment, an FCPA violation, a violation of Guatemalan law, and a breach of the EPC Contract.[17]

47. Finally, not only was payment of these bribes a breach of the EPC Contract, but it also was the proverbial nail in the coffin that led to the total collapse of the Project. HSR's initial bribes (admitted to by HSR in September 2013) created a deeper distrust of the Project among the local community, as well as an expectation among officials of "pay to play." As noted by Ms. Salguero (an expert on community relations in infrastructure projects) "*[h]oy persisten cuestionamientos de los comunitarios respecto a dineros entregados por HSR al alcalde municipal y gobernador departamental. En su percepción de los hechos para las personas recientemente entrevistados, HSR sobornó al alcalde al cual acusan de 'haber entregado el río y a HSR de intentar robárselo.'*"[18] Indeed, if the International Finance Corporation's ("IFC") Compliance Advisor

[17] HSR's FCPA problem does not disappear even despite its outrageous argument that this was just a purchase of "láminas." The outcome would be the same as if HSR were to hand the Governor a briefcase full of cash. There would still be a payment of something of value (láminas) to an official in exchange for use of his office to permit the Project to go forward without problems with the local communities. That is PRECISELY what the FCPA and Guatemalan law prohibit. 15 U.S.C. §78dd-2. It also does NOT matter that that payment passed through the hands of Luis Velasquez and/or Macor before reaching the officials or if the láminas were given to the communities for the political benefit of the Governor. The FCPA is violated by a payment to ANY PERSON while knowing that all or a portion of the thing of value will be offered, given, or promised, DIRECTLY OR INDIRECTLY to any foreign official. The evidence in the record proves that HSR had actual knowledge of the promises and the payment. That is more than enough for a conviction under the FCPA because the FCPA does NOT even require actual knowledge – knowledge is inferred if you are aware of a high probability of bribery. 15 U.S.C. §78dd-2(h)(3)). A business or individual (like Stephen Pearlman or Juan Paez) is guilty if it buries its head in the sand and ignores red flags while a consultant or third-party like Luis Velasquez or Macor does the dirty work. Under the FCPA, red flags are warning signs that indicate an increased likelihood of corruption, and they should trigger extra diligence. Knowledge is inferred when a party is found to have ignored red flags. First on the list of red flags is the country in which the business is taking place. Guatemala is a red flag country with a reputation for pervasive corruption up to the highest levels of government. It ranks nearly last among countries in the Americas region on Transparency International's Corruption Perception Index, 136th out of 176 countries globally. HSR KNEW corruption was a problem in Guatemala – that's why it included Section 34.13 of the EPC Contract. That Velasquez was hired for his relations with politicians and conducted private meetings with government officials are red flags. There were other red flags about the alleged provider of the láminas – specifically the fact that HSR knew nothing about Macor except that it had provided a quote after the Governor's multiple demands for bribes. Had HSR done any basic internet research, it would have learned that Macor does not sell láminas and that it is located far away from Coban. Yet, HSR did nothing to prevent the occurrence of corrupt payments when faced with these warning signs, a fact which would prompt ANY court to find a violation of the FCPA (and Guatemalan law) and potentially impose hefty criminal penalties and/or prison sentences.

[18] The *quid pro quo* and causation is undeniable from the sequence of events – (i) the Governor was offered payments, (ii) the Governor demanded that the payments be made, (iii) the payments were made, (iv) a celebration

Ombudsman ("CAO") would have had access to this evidence regarding the payment of bribes by HSR to Guatemalan government officials, the CAO undoubtedly would have found a clear violation of the IFC's Performance Standards, and it would have been an international scandal (e.g., World Bank sister company involved in corruption in Guatemalan project).

48. In the face of this clear evidence, the Tribunal exceeded their powers by holding that they did not have the authority to decide a claim under the EPC Contract based on bribery.[19] The Tribunal states that they cannot make a finding of breach of the FCPA because they do not have criminal jurisdiction.[20] They then go on to state that they can award damages for breach of the FCPA only if the FCPA provides a private cause of action to an aggrieved party.[21]

49. By this false logic, the Tribunal exceeded their powers and rendered the key anti-bribery provision of the EPC Contract unenforceable. Of course, the Tribunal does not have authority to enforce criminal statutes, but no one asked that the Tribunal put anyone in jail. Rather, the FCPA was incorporated into the EPC Contract to provide a standard of behavior and liability *under the EPC Contract*. The Tribunal can make findings of fact and conclusions of law about bribery, just as it does with respect to any other claim. The Tribunal recognized that the EPC Contract expressly required compliance with the FCPA; however, instead of enforcing this provision, the Tribunal chose to make up a different standard. Apparently, reluctant to deal with the sensitive issue of corruption, the Tribunal just declared that they could not apply a standard of criminal liability that also is a standard for liability under the EPC Contract and, instead, declared that they could enforce the anti-bribery provision only if the FCPA created a private remedy.

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took place at the Presidential Palace, (v) the Governor sent the national police to arrest community leaders, and (vi) the local communities became enraged.

[19] Exhibit B, Final Award, p. 64, ¶ 342.

[20] Exhibit B, Final Award, p. 62, ¶ 333.

[21] Id., p. 62, ¶ 334.

Because this is a claim for breach of the EPC Contract, whether the FCPA on its own provides a private remedy is irrelevant.

50. The Court should vacate the Final Award and require the Tribunal award damages for breach of the EPC Contract provision that requires compliance with the FCPA.[22]

C. The Tribunal exceeded their powers because they recognized that Guatemalan law controls but chose not to apply it.

51. Section 32.2(g) of the EPC Contract specifically provides that "[t]he Tribunal shall be required to apply the substantive law of Guatemala in ruling upon any Dispute, in accordance with the Parties' intent as expressed in Section 1.8 of this Agreement." The Tribunal recognized that they were required to follow Guatemalan law,[23] but they chose not to do so.

52. First, the Tribunal recognized that Article 2011 of the Guatemalan Civil Code provides for an additional measure of "indemnification" for AICSA beyond the amount it had earned by completing part of the EPC Contract. The additional indemnification is set by the judge (in this case the Tribunal) and includes additional damages suffered by AICSA, such as lost profits.

53. Article 2011 provides that the owner may separate from the agreement, paying the contractor for work done, materials, *and* an indemnity set by the Judge. HSR contended that it was entitled to terminate the EPC Contract and recover all of the advance payments, but the Tribunal rejected this argument and awarded AICSA the amount it had earned under the contract.[24] Therefore, HSR clearly is the party that "separated" itself from the EPC Contract and, accordingly, owes all of the items of damages stated in Article 2011, including "indemnity." By not setting an indemnity owed to AICSA, the Tribunal chose not to apply Guatemalan law.

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[22] The Tribunal's suggestion that the payment by HSR was not a bribe blatantly overlooks the evidence, particularly the Governor's statement that the payment could be to him personally in cash. Exhibit B, Final Award, pp. 64-65, ¶¶ 343-347.

[23] Id., p. 5, ¶ 32.3(g).

[24] Exhibit B, Final Award, p. 19, ¶ 81.

54. While Article 2011 does not itself define how the judge determines the amount of the indemnity, other provisions of Guatemalan law do.[25] First, Guatemalan law provides that, when the text is clear, it is applied as written. Second, when the application of the law is not clear, it is applied according to its purpose and spirit. Third, the law is applied consistently with analogous cases. Fourth, the law is applied in accordance with equity and general principles of law. If the Tribunal had chosen to follow these principles of Guatemalan law, they would have awarded "indemnification" to AICSA.

55. As to the text, Articles 10 and 11 of the Judiciary Law provide that the Tribunal should consult the Dictionary of the Royal Spanish Academy or the law. The Dictionary defines "indemnifying" as compensating for damage or harm through money payments. Further, Article 1645 of the Guatemalan Civil Code states that any person causing damage or harm is obligated to repair it. Article 1434 of the Guatemalan Civil Code provides that damages include the profit not earned because of the harm caused by the offending party. Accordingly, referring to these provisions to define "indemnity," it is clear that the Tribunal was required to award additional damages to AICSA for the economic harm it suffered due to HSR's termination of the EPC Contract, including loss of profits.

56. Having chosen not to apply Guatemalan law to interpret Article 2011, the Tribunal improperly looked to paragraph 30.3(a) of the EPC Contract and exceeded their powers by holding that it prohibits recovery of "indemnity" as an additional item of damage.

57. Noting only that Article 2011 does not define "indemnity" and choosing to ignore other provisions of Guatemalan law, the Tribunal referred to paragraph 30.3(a) of the EPC Contract and falsely determined that, because paragraph 30.3(a) does not mention lost profits,

[25] Article 10 of the Judiciary Law, included in Decree 2-89 of the Congress of the Republic of Guatemala.

AICSA's recovery is limited to the accrued balance plus 10%.[26]

58. There is no basis for the Tribunal's conclusion that Article 2011 and paragraph 30.3(a) work in tandem, and the Tribunal cites no authority to support their conclusion. Paragraph 30.3(a) provides only for recovery of the work already done by AICSA, and nothing in the paragraph or the EPC Contract says that paragraph 30.3(a) is AICSA's exclusive remedy for the economic harm done by HSR.

59. According to Navigant Consulting, the total profit amount that AICSA would have made on the project is approximately US$3,324,227.29 based on the originally bid gross profit for the project of 15% and AICSA's historical rate of return which is in excess of that and demonstrates its track record of successful performance. Because AICSA did actually earn profit of US$164,711.05 on the work performed prior to termination (and claimed in the section of the AICSA claim for contract work performed), the remaining, additional profit that AICSA would have earned had the project not been terminated by HSR is US$3,159,516.24 This is the additional harm caused to AICSA by HSR's termination of the EPC Contract. If the Tribunal had proceeded in accordance with their powers, they would have applied Guatemalan law to award these damages to AICSA.

60. Second, the Tribunal chose not to comply with Guatemalan law when they awarded interest on the advance payments from September 16, 2015. The Tribunal calculated the date using the rules applicable to loans.[27] The advance payments were partial payments for the EPC Contract work, and the Tribunal exceeded their powers when they treated the advance payments as loans.

[26] Exhibit B, Final Award, p. 51-52, ¶¶ 272-274.
[27] Article 1950 of the Guatemalan Civil Code provides that returned amounts are due six months from the time the loan was made.

61. Article 2000 of the Guatemalan Civil Code provides that in a work agreement the contractor is engaged to deliver the work requested by another person for a price that must be paid. It is clear that the advance payments were payments for the work to be done by AICSA. The advance payments were not loans for AICSA to use as it wanted.

62. The arbitration arose because HSR terminated the work and demanded that AICSA return all of the advance payments without paying for the work AICSA had done. Accordingly, the Tribunal was required to determine what work had been done, how much of the advance payments was earned by AICSA, and how much should be returned to HSR.

63. The obligation to pay interest only arises when the debtor is in default.[28] In this case, AICSA was not in default before the Final Award determined what part of the advance payments should be returned to HSR.[29] The earliest possible date AICSA would be in default for not returning the advance payments is October 29, 2018, when the amount owed was liquidated.

64. Accordingly, the Tribunal exceeded their powers by choosing to not follow Guatemalan law and awarding interest from September 16, 2015. The Final Award should be vacated to provide that interest runs only from October 29, 2018.

D. The Tribunal exceeded their powers when they failed to award costs and fees to AICSA as the prevailing party.

65. Section 32.3(f) of the EPC Contract specifically directs that the "[t]he arbitral award in favor of the **prevailing Party shall** include an award for . . . reasonable attorneys' fees and costs incurred in connection with such Dispute."[30] After recognizing the priority of this provision of the EPC Contract, the Tribunal falsely decided that there was no prevailing party.[31] In the supposed

[28] Pursuant to Article 1435 of the Guatemalan Civil Code, interest is owed only from the time the debtor is in default.
[29] It should be noted that there is no provision in the EPC Contract requiring a return of any of the advance payments, even if the EPC Contract is terminated.
[30] See Exhibit D, EPC Contract, Section 32.3(f) (emphasis added).
[31] See Exhibit B, Final Award, p. 74, ¶ 409.

absence of a prevailing party, the Tribunal resorted to the general ICC rule on allocation of costs and decided not to award costs to either party.[32] The Tribunal's decision exceeds their powers because the Final Award shows that AICSA was the prevailing party.

66. The Tribunal acknowledged that AICSA was allowed to keep 80% of the dollar amount it sought and 87% of the euro amount it sought.[33] Because the arbitration began with HSR's demand that AICSA return all of the advance funds (less only US$250,000), this holding shows that AICSA prevailed on the issue that initiated and dominated the proceeding. Prevailing on this issue means that AICSA was the prevailing party and should be awarded attorneys' fees.

67. Also, the Tribunal attempted to justify their decision by noting that HSR prevailed on the issue of whether AICSA is entitled to lost profits.[34] This was not the initiating or dominating issue. Further, this Court should hold that the Tribunal exceeded their powers by denying AICSA's claim for lost profits,[35] in which case AICSA would be the prevailing party on this issue and clearly the prevailing party overall.

68. Accordingly, the Court should vacate the Final Award to provide that AICSA is entitled to its fees and costs.

E. If the Tribunal grants HSR's pending motion to "interpret" the Final Award to require new advance payment bonds, Tribunal will have exceeded their powers.

69. As the Final Award stands currently, the Tribunal has not exceeded their power regarding the Advanced Payment Bonds; however, if the Tribunal grants HSR's pending motion to "interpret" the Final Award to require new bonds, they will have exceeded their powers. Because of the three month deadline to file the Motion to Vacate, AICSA is raising the argument now so

[32] See Id., p. 75, ¶ 420.
[33] See Id., p. 74, ¶ 411.
[34] See Id., p. 74, ¶ 412.
[35] See Section 3 above.

that, *if* the Tribunal grants HSR's motion, the issue will be before the Court.

70. Section 30.4 of the EPC Contract gives the Tribunal the authority to require AICSA to *maintain* the Advance Payment Bonds, which AICSA has done. HSR speculates that, if the Final Award is not vacated, the bond issuer will not honor that part of the award that relates to the advance payments. On this basis, HSR has moved the Tribunal to "interpret" its award to require *new* advance payment bonds.

71. AICSA provided the bonds that were required by the EPC Contract. Any question regarding the effectiveness of the bonds is between HSR and the bond issuer, and should be resolved between them. The EPC Contract contemplated no additional bonds and the Tribunal has no authority to order additional bonds. Currently, the Tribunal has acted within their authority by ordering AICSA to maintain the already-placed Advance Payment Bonds.[36] However, if the Tribunal were to grant HSR's Motion to Interpret and orders AICSA to acquire new bonds, such an order would far exceed the Tribunal's power because that is not authorized by the parties' agreement.

72. Additionally, if the Tribunal grants the motion for new bonds, they would also far exceed the Tribunal's authority to "interpret" an Award under Article 35(2) of the 2012 ICC Rules, which govern the Arbitration. Article 35(2) does not permit the Tribunal to review the substance of their reasoning or deal with additional claims or arguments; it simply allows the Tribunal to correct computational errors. The Tribunal already ruled on the issue of the Advance Payment Bonds, and they are without the authority now to change that substantive ruling. Accordingly, if the Tribunal changes their ruling regarding the Advance Payment Bonds, it would be another grounds for vacation of the award.

[36] See Exhibit B, Final Award, p.48, ¶¶ 258-59.

CONCLUSION

73. For all of the foregoing reasons, AICSA moves this Honorable Court for an Order granting this Motion to Vacate Arbitration Awards and remanding to the Arbitration Tribunal to:

1. Allow the joinder of Novacom to the arbitration;

2. Award damages to AICSA for breach of the EPC Contract requirement not to violate the FCPA and not to commit bribery;

3. Follow Guatemalan law, award "indemnity" including lost profits, and grant interest only from October 29, 2018;

4. Award fees and costs to AICSA; and

5. Reverse any "interpretation" of the Final Award that requires AICSA to obtain new advance payment bonds.

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