



**NINTH LL.M. INTERNATIONAL COMMERCIAL AND INVESTMENT
MOOT COMPETITION**

Washington, D.C., April 8 - 9, 2022

**IN THE MATTER OF AN ARBITRATION UNDER THE ASEAN COMPREHENSIVE INVESTMENT
AGREEMENT AND THE SIAC INVESTMENT ARBITRATION RULES**

BETWEEN:

WARM ENERGY HOLDING, INC.

Claimant

and

KINGDOM OF LANAKAI

3 September 2021

Ministry of Foreign Affairs
Office of the Legal Advisor
Independence Road, 13
208342 Panay
LANAKAI

applications for projects that would generate over 5,000 MW. Of these, the NOPA received 5 applications for biogas, 9 applications for biomass, 6 applications for landfill gas, 165 applications for solar PV, and 203 applications for onshore wind projects. Hydroelectric energy projects accounted for the fewest number of applications, with only 4 applications submitted. In response to these initial applications, the NOPA offered 187 FIT Contracts for a total of almost 3,200 MW of potential generation capacity.¹⁰

C. Nogi's Efforts to Ensure that Renewable Energy Projects are Safe and Environmentally Sound

12. While renewable energy projects cause less pollution than coal-fired power plants, they must still comply with health, safety and environmental regulations with respect to their development and operation. The Government of Nogi consistently communicated this to FIT Program applicants. So did the NOPA. In the same vein, both the Government of Nogi and the NOPA clarified that an award of a FIT Contract by the NOPA was not an authorization from the Nogi Government to proceed with a project. Indeed, as noted above, while the NOPA was responsible for procuring electricity supply, it had no authority with respect to the development or implementation of the health, safety and environmental regulations that apply to a renewable electricity generation project in Nogi. A project proponent still had to ensure that it obtained the numerous provincial, federal and municipal regulatory approvals, permits and licenses required for its particular renewable energy project.

13. The relevant regulatory processes for renewable generation projects at the Provincial level are found primarily in the Department of Environment and Renewable Energy Approvals under Part V 0.1 of the Act UHJXODWLRQ 35(\$ 5HJXODWLRQ' DV ZHOO DV WKH 'HSDUWP '15 6HW RI \$XWKRULJDWLRQ & RQ GHWHUHQVLRQ' , Q DGGL requirements administered by other Provincial Ministries may also apply. At the Federal level, permits and authorizations could also be required under, among others, the Fisheries Act, the Species at Risk Act, and the Navigable Waters Protection Act. Finally, at the municipal level, approvals such as building and construction permits and zoning amendments may also be required.

14. Different forms of renewable electricity generation involve different health, safety and environmental concerns. Accordingly, the type of information that needs to be submitted to regulatory authorities for evaluation varies. At the time of the FIT Program launch, there was greater experience around onshore wind, rooftop and ground mounted solar PV, biogas and biomass projects. Consequently, regulators knew what type of information needed to be submitted and evaluated to determine that a project did not pose significant threats to health, safety or the environment. The information requirements for such projects are set out with some specificity in both the REA Regulation and the SAC.

D. The Uncertainty Associated with Hydroelectric Energy Facilities in Nogi

15. In comparison to other renewable energy projects, at the time of the FIT Program's

¹⁰ Nogi 3RZHU \$XWKRULW\ 1HZV 5HOHDVH 36RDDH\$GRXQZDEVOH (QDUJHSD)RMHFVV' \$SULO Note that in addition to the 184 contracts cited in this press release, three additional contracts were executed approximately five months later, due to delays in allocation of grid capacity. The total of 187 contracts cited above accounts for these three additional contracts.

launch (and still today), there was no practice and no specific regulatory or scientific Program was launched, there was not a single hydroelectric energy facility operating in the province.

16. As a result of its lack of experience and the uncertainty in the existing science, the Government of Nogi has moved slowly with respect to hydroelectric energy facilities. While applications could be made under the FIT Program for hydroelectric energy projects and FIT Contracts could be entered into with the NOPA for such projects, any company doing so should have been aware that a comprehensive regulatory framework had yet to be developed. The criteria that governmental authorities would use to assess all of the relevant risks to health, safety and the environment were evolving and had yet to be fully established.
17. For example, like other renewable energy projects, hydroelectric energy facilities were subject to DOE's REA Regulation, DNR's SAC policy, and other potential permitting requirements from other Ministries. In addition to the standard reports and assessments that had to be prepared in order to obtain the various approvals and permits from these Ministries, hydroelectric energy facility developers were also required to submit additional documents, studies and information. In line with the best international practices, these included a hydroelectric sustainability report (under the REA Regulation) and a riverbed engineering study (under the SAC). However, at the time, and still today, the scientific research required to inform the regulatory review of those reports and studies has not been completed.
18. On June 24, 2019, DOE posted a policy proposal on the Environmental Registry for public comment that outlined an approach for developing the necessary regulatory requirements and guidance in respect of hydroelectric energy facilities.¹¹ Among other things, the draft policy proposed a 25 km exclusion zone for hydroelectric energy projects, and the discussion paper attached to the draft policy outlined what reports and assessments hydroelectric energy proponents would need to complete as part of an application for a REA. The paper also noted that additional guidance documents were being developed, including Cultural Heritage Guidance for Hydroelectric Energy Projects, and a Public Land Renewable Energy Policy Review.
19. On August 18, 2019, DNR posted a policy proposal on the Environmental Registry. The DNR policy, which outlined how Public Land should be made available to hydroelectric energy developers.
20. In total, over 380 comments were received on the two postings, most of which opposed the development of hydroelectric energy power in Nogi. DNR also held engagement sessions with industry, indigenous communities and other stakeholders on the proposal during 2019.
21. It was into this complex thicket of developing policy and regulatory uncertainty that the Claimant knowingly and willingly plunged.

¹¹ See Lanakai Policy Proposal Notice: Renewable Energy Approval Requirements for Hydroelectric Dams - An Overview of the Proposed Approach (June 25, 2019); Department of the Environment Discussion Paper, "Hydroelectric Energy Facilities Renewable Energy Approval Requirements" (June 25, 2018).

¹² Nogi Policy Proposal Notice: Hydroelectric Energy Power: Consideration of Additional Areas to be Removed from Future Development (August 18, 2019).

E. HYNO's Proposed King River Hydroelectric Project

22. & ODL PDQW DQG + < 12 KDYH ORQJ EHHQ RSHUDWLQJ LQ 1 RJL L original deferral of consideration of applications for access to Public Land for hydroelectric energy facilities. In February 2016, shortly after DNR lifted that deferral, but before the introduction of the Law on Sustainable Energy and the creation of the FIT Program, HYNO submitted Public Land applications to develop a hydroelectric HQH UJ \ IDFLOLW \ WKH ³ + < 12 3URMHFW ´ 7KH SURSRVHG + < 12 endeavor. HYNO proposed to construct a 300 meter long, and 80 meter high dam that would be capable of generating 1,450 MW of electricity, on the King River at a specified location near the island of Palang.
23. On November 21, 2017, during the launch of the FIT Program, the Claimant, through various entities, applied for a number of FIT Contracts ² ten for solar energy projects in Central and Northern Nog L DQG RQH IRU WKH + < 12 3URMHFW LQ WKH . L FIT application was one of only four received by the NOPA for hydroelectric energy projects between October 1 and November 30, 2017. Moreover, the generating capacity of the project proposed by HYNO was approximately 10 times larger than the three other proposed hydroelectric energy projects combined.
24. The NOPA offered HYNO a FIT Contract on May 11, 2018 for its proposed 1,450 MW hydroelectric dam. This was the only FIT Contract offered to a hydroelectric energy facility. Pursuant to the FIT Rules, the contract offer to HYNO was open for a period of 10 business days. This standard offer contract included a requirement that HYNO bring the project into operation five years after the contract date.¹³ If it failed to do so, there were serious financial consequences. Moreover, if its failure to do so persisted for 18 months, the NOPA had the right to terminate the FIT Contract and to retain the deposits made by HYNO as well as pursue other damages.¹⁴ The offered FIT Contract also allowed HYNO to declare force majeure LQ WKH HYHQW RI DQ ³ LQDELOLW \ V any permit, certificate, impact assessment, license or approval of any Governmental \$XWKRULW \ « UHTXLUHG WR SHUIRUP RUWFRP & RQ⁵ ZLWK W @ \ ´ R E
25. As described above, the regulatory process for hydroelectric energy projects was not fully developed at the time that the NOPA made this contract offer to HYNO. As such, when HYNO received the offer, it met with the NOPA on May 13, 2018 to discuss whether the NOPA would be willing to vary the terms of the contract to reflect the existing regulatory uncertainty.
26. The following day, NOPA Director of Contract Management Diane Goldsmith emailed HYNO representative Peter Gallagher, saying:

we can all appreciate the challenges tday, NOPA Director qeOT:0 612 792 reW*nBT/F3 9 Tf1 0 0 1 134.9 218.45 Tm0 g0 G4

few additional extensions, adjusting the deadline to sign the contract into August 2018.

28. On August 2, 2018 the NOPA indicated that it would, at HYN0's request, issue HYN0 a revised FIT Contract with a special term that extended the milestone date for commercial operation by a year from the standard offer - i.e. from four to five years from the contract date. HYN0 executed its FIT Contract on August 10, 2018. HYN0 did so despite the overall uncertainty with respect to the regulatory framework for hydroelectric energy facilities and at a time when DOE and DNR proposals for policies that could restrict the development of hydroelectric energy facilities and directly affect HYN0 remained open for public comment.
29. By December 2019, the Claimant and HYN0 apparently realized that Nogi would be proceeding far more cautiously with respect to the development of hydroelectric energy than they had gambled when HYN0 signed its FIT Contract. As a result, on December 10, 2019 HYN0 claimed a force majeure event under its FIT Contract related to its inability to obtain the required regulatory approvals. The NOPA granted HYN0 force majeure status, with the event set as having commenced on November 22, 2019.

F. Public and Scientific Concerns Lead to a Decision to Defer Hydroelectric Energy Developments until the Establishment of a Comprehensive Regulatory Framework Can be Established

30. During the public consultation process on the policy proposals posted by both DOE and DNR, it became increasingly clear that concern was growing among the public about the health, safety and environmental effects of developing and operating hydroelectric energy projects in the rivers of the province of Nogi. As mentioned above, the rivers, DQG HVSHFLDOO\ WKH .LQJ 5LYHU DUH DQ LQWHJUDO SDUW P moreover, supply 90% of them with their drinking water. As also noted, hydroelectric energy projects were untested in Nogi. There remained a need for technical and environmental studies to inform the regulatory review of these projects.
31. By March 2020, the Government of Nogi had decided that because of the uncertainty with respect to the impacts of hydroelectric energy power, it could not responsibly allow any such project to proceed at that time. It concluded, in particular, that further scientific studies were necessary to inform the development of the required comprehensive regulatory framework. Accordingly, on March 12, 2020, the Government announced that

³ 1 R is not proceeding with proposed hydroelectric energy projects while further scientific research is conducted. No Renewable Energy Approvals have been issued and no projects will proceed at this time. Applications for hydroelectric energy projects in the Feed-in-Tariff program will no longer be DFFHSWHG DQG FXUUHQW DSSOLFDWLRQV ZLOO EH VXVSHQG HG

lost. The FIT Contract remains in force majeure status while the necessary scientific research is completed to inform the future regulatory framework. The Government of Nogi has already begun to complete the necessary scientific studies. For example, the DNR has initiated some supporting science and research, including the release of a riverbed engineering and fisheries reports in mid-2021.

III. THE CLAIMANT HAS NOT ESTABLISHED THAT THIS TRIBUNAL HAS JURISDICTION TO HEAR ITS CLAIM

33. In any arbitration claim, the Claimant must show that it has standing to bring the claim and that it has suffered damages. In this case, Claimant would have to show that it and/or HYNO have suffered damages, and that the challenged measures are attributable to Nogi, and hence not to the Kingdom of Lanakai. In this respect, the Claimant alleges that it is a Corporation organized under the laws of Bultan, which indirectly owns and controls HYNO through a Luxembourg société anonyme. Claimant further alleges that HYNO is an enterprise under Nogi law, and that Claimant and + < 1 2 K D Y H V X I I H U H G ³ D W O H D V W ' 8 6 L Q G D P D J H V D V measures of the Government of Nogi and/or the NOPA. Since Warm only indirectly owns HYNO, it is only an investor in the Luxembourg company. This corporate set-up does not comply with Article 28.b) of ACIA (which explicitly limits the scope of the treaty W R ³ L Q Y H V W R U V R I > D Q R W K H U @ 0 H P E H U 6 W D W H ' D Q G R W K H U reserves the right to object to the jurisdiction of the Tribunal.

34. In addition, in case the present dispute is not settled through negotiation and is instead V X E P L W W H G W R D U E L W U D W L R Q 1 R J L D V N V I R U : D U P W R S U R Y costs. The circumstances in which Warm is submitting its claim ² including the corporate structure it uses to bring the claim and the third-party funding it relies upon ² generate serious doubts as to its willingness and/or ability to pay any sums of money in case an arbitral tribunal orders it to do so.

IV. NOGI HAS NOT BREACHED THE ACIA

35. The Claimant has alleged that the decision of Nogi to proceed cautiously and defer the development of hydroelectric energy projects until a comprehensive regulatory framework is developed breaches Articles 5, 6, 11, and 14 of ACIA. These claims are

of such projects is establis K H G D Q G W K H * R Y H U Q P H Q W ¶ V W U H D W P H Q W R

48. Article 14, para. 1, states: (1) A Member State shall not expropriate or nationalize a covered investment either directly or through measures equivalent to expropriation or Q D W L R Q D O L] D W L R Q not a breach, except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective FR P S H Q V D W L R Q D Q G G L Q D F F R U G D Q F H Z L W K G X H S U R F H V

49. In order to establish a breach of Article 14 resulting from a change in regulatory policy, the Claimant must prove that it had an investment capable of being expropriated, that Nogi expropriated that investment by taking a measure that substantially deprived the Claimant of its investment, and that the expropriation did not comply with the conditions in Article 14, para. 1, (a)-(d).

50. 1 R J L ¶ V 2020 Feb. A decision to defer the development of hydroelectric energy projects until a comprehensive regulatory approvals process is established did not substantially deprive the Claimant of any investment. First, the current deferral is not intended to be

