



CENTER ON INTERNATIONAL
COMMERCIAL ARBITRATION

NINTH LL.M. INTERNATIONAL COMMERCIAL AND INVESTMENT
MOOT COMPETITION

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

**NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER THE
ASEAN COMPREHENSIVE INVESTMENT AGREEMENT (ACIA)**

Warm Energy Holding, Inc.

Claimant

v.

Kingdom of Lanakai

Respondent

July 17, 2021

NOTICE OF INTENT TO ARBITRATE

1. In accordance with Articles 32 and 33 of the ASEAN Comprehensive Investment Agreement (the “ACIA”), the Claimant Warm Energy Holding, Inc. (“Warm”) respectfully provides to the Government of the Republic of Lanakai this written notice of its intention to submit a claim to arbitration. In accordance with Article 33, para. 1, of ACIA, Warm requests that the arbitration be held under the 2017 Investment Arbitration Rules of the Singapore International Arbitration Center (the “SIAC”).

I. CLAIMANT AND ITS ENTERPRISES

2. Warm is a Corporation organized under the laws of Mobi, Republic of Bultan. Its address is 2131 Decatur Place, 20912 Mobi-Capital, Bultan. Bultan is a State party to the ACIA since the treaty’s entry into force on March 29, 2016.
3. Warm is wholly owned by Joel Krombacher. Krombacher is based in the capital city of Mobi, in Bultan. He is an engineer with more than 35 years’ experience in the energy sector. He was born in Lanakai, but he has lived in Bultan with a “Permit of Residency” for the past 25 years. Through his company Warm, Krombacher invests in energy projects worldwide. Thus, he has developed the engineering and management for energy projects in China, Cambodia, the Philippines, and the Middle East with an aggregate value of US \$350 million.
4. Warm’s investments in Lanakai were done through European Warm Holding, S.A., a *société anonyme* registered in Luxembourg (“European”). Warm holds 85% of the shares of European. The remaining 15% are held by Joel Krombacher in his own name. The address of the company is 12, rue Gerhard Mercator, L-2182 Luxembourg. To pay for the legal costs of the settlement of the present dispute, European has a US \$10 million stand-by credit line with the Macao-registered investment fund MoneyAcrobat, Inc.
5. The activities of Warm, through European, and its investments in the region of Nogi, Kingdom of Lanakai (“Lanakai”) are led by Peter Gallagher, a Nogi-based engineer who has worked for more than two decades for Joel Krombacher as a renewable energy developer, developing hydro and solar energy projects in various parts of Southeast Asia.
6. European owns 100% of the shares of HydroNogi, Co. (“HYNO”), a corporation incorporated under the laws of Lanakai. HYNO’ address is 32 Church Street, Palu (Lanakai). Peter Gallagher is the CEO of HYNO.
7. Warm submits this Notice of Intent as an investor of a Party on its own behalf and as an investor of a Party on behalf of HYNO under ACIA Article 28, para. b). Claimant herewith also waives any other procedure of dispute settlement for this particular dispute, pursuant to Article 34, para. 1, section c), of the ACIA.

II. PROVISIONS OF ACIA BREACHED

8. Lanakai, through the actions of the Autonomous Government of Nogi, for which it is internationally responsible, has breached its obligations under ACIA, including but not limited to the following provisions:
 - (a) Article 14 - Expropriation and Compensation;
 - (b) Article 11 – Fair and Equitable Treatment;
 - (c) Article 6 – Most Favored-Nation Treatment; and
 - (d) Article 5 - National Treatment.

III. ISSUES AND FACTUAL BASIS FOR THE CLAIM

A. Nogi Adopts FIT Program to Attract Investment in Renewable Energy

9. Beginning in the mid-2000s, the Autonomous Government of Nogi in Lanakai began adopting policies to encourage investment in renewable energy sources to increase Nogi's energy production capacity and replace fossil fuel-based, non-renewable energy sources. On June 30, 2016, the Nogi Regional Legislature enacted the *Law for Sustainable Energy, 2016* and amended related legislation. The Government of Nogi promulgated additional regulations and rules, creating a Feed-in-Tariff Program (the "FIT Program") that established a 17-year fixed premium price to be paid by the Nogi Power Authority (the "NOPA"), a non-profit corporation controlled by the Government of Nogi, for energy from renewable sources, including wind, hydroelectric, solar, biogas, biomass and landfill gas. The FIT Program created standard sets of bidding rules, standard pricing, and standard FIT contracts that applied to renewable energy applicants.
10. On several occasions, Government of Nogi representatives stated that a primary purpose of the *Law for Sustainable Energy* was to create certainty for investors to invest in renewable power in Nogi and thereby create jobs -- more than 15,000 new jobs between 2016 and 2020. Nogi's Head of Department of Energy and Infrastructure Suna Rumanaya, speaking on December 15, 2016 to the National Trade Association, stated that the *Law for Sustainable Energy*:
... will make the province a great destination for green power developers, and incent proponents large and small to develop projects by offering an attractive price for renewable energy AND the *Certainty* that creates an attractive investment climate. -- *Certainty* that we will purchase the power at a fair price. -- *Certainty* that we will get the power connected to the grid. -- *Certainty* that government will issue permits in a timely way.
[Emphasis in original]
11. In its January 26, 2017 press release announcing the *Law for Sustainable Energy*, Nogi's Department of Energy and Infrastructure described the "most notable" elements of the *Law for Sustainable Energy* as including:
 1. Creating a new attractive feed-in tariff regime (a pricing system for renewable energy). This regime will guarantee rates and help promote new investment in renewable energy generation, increase investor confidence and access to financing;
 2. Establishing the "right to connect" to the electricity grid for producers of renewable energy;
 3. Establishing a streamlined approvals process, including providing service guarantees for renewable energy projects.

B. Warm Energy Holding's King River Project is Awarded a FIT Contract

12. For several years, Warm had been assessing hydroelectric energy resources in Nogi, in particular in the area near the island of Palang in eastern King River. Peter Gallagher who, as described in paragraph 5 above, leads Warm's activities and investments in Nogi, had been central to developing a successful solar energy project on a hillside facing the King River, and knew that the area also had outstanding potential as a site for a hydroelectric energy project.
13. Between 2010 and 2017, the Department of Natural Resources ("DNR"), which, among other things, exercises regulatory authority on behalf of the Government of Nogi for granting access to Public Land for hydroelectric energy development, had deferred approving applications for Public Land to develop hydroelectric energy projects to allow further scientific study of the effects of the dams and ensuing lakes on the environment and local economy and infrastructure. In January 2017, the Natural Resources Head of Department announced that the DNR was lifting the deferral and would be accepting new applications for Public Land for hydroelectric energy project development. In June 2017, the Head of Department of Natural Resources Kemala Sjahrir publicly stated that Nogi was "open for business" for hydroelectric energy development.

14. In March 2017, on the basis of the actions and representations on the part of the Government of Nogi, Warm's subsidiary HYNO submitted to the DNR Public Land applications to develop a hydroelectric energy facility (the "HYNO Project") in the island of Palang area of the King River. Beginning in 2017, HYNO spent heavily on resource evaluation, engineering and technical reviews with respect to the HYNO Project. When the FIT Program was announced in 2017, HYNO focused its efforts on ensuring it would meet the FIT Contract requirements.
15. In a letter to HYNO dated August 24, 2017, the DNR made it clear that in order for HYNO to maintain the priority position of its Public Land applications, HYNO had to submit an application to the FIT program within the initial FIT application period. In a subsequent phone call between HYNO and DNR executives on October 15, 2017, DNR stated that Public Land applicants, such as HYNO, who applied to the FIT Program and were awarded a FIT Contract "... will be given the highest priority to the Public Land sites applied for." For HYNO, this meant that these applications would take precedence over all others for this site.
16. Based on these assurances, on October 29, 2017, HYNO applied for a FIT Contract, depositing with its application a US \$1.7 million letter of guarantee, in accordance with the FIT Program rules. On May 2, 2018, HYNO was informed that its application had been accepted by the NOPA and it was offered a FIT Contract dated May 11, 2018. At 1,450 MW, the HYNO Project was the largest single FIT Contract and accounted for 19.6 per cent of the hydraulic power contracted by the NOPA during that first round of FIT Contract awards.
17. On August 10, 2018, HYNO executed the FIT Contract, with a five-year period, commencing May 11, 2018, for the HYNO Project's development and construction to be completed. As required by the FIT rules, HYNO delivered to the NOPA a letter of guarantee in the amount of US \$4 million, in place of the previous US \$1.7 million letter of credit.
18. At that time, Warm and HYNO looked forward to developing a highly beneficial and profitable energy project. Warm had conducted water flow assessments that showed that in the area of the island of Palang they were stronger and steadier than those in the areas of any other hydroelectric dam project in Lanakai, a fact that would likely result in the HYNO Project having a higher energy-generating capacity than any other FIT Project (other regions in Lanakai also granted FIT benefits for renewable energy production). Warm and HYNO expected that, during the 17-year FIT Contract period, the HYNO Project would generate approximately US \$2.6 billion in revenue. It also anticipated that the HYNO Project would require an investment of approximately US \$1.2 billion, including US \$850 million for Nogi goods and services (because of the FIT Program's 50% Nogi content requirements), and create approximately 800 jobs during project development and construction, and 85 permanent jobs.

C. Nogi Imposes Moratorium on Hydroelectric Energy Development, Frustrating Warm's and HYNO's Ability to Obtain the Benefits of HYNO's FIT Contract

19. As described above, when HYNO applied for its FIT Contract for the HYNO Project, the Government of Nogi, through the DNR, had represented that Public Land applicants with a FIT Contract would be given the "highest priority" to the Public Land sites for which they applied. However, far from granting HYNO "highest priority," the Government of Nogi has done the opposite - first delaying the approval process, and then imposing a moratorium that to date has frustrated HYNO from being able to take any steps to

- develop the HYNO Project in accordance with the FIT Contract granted to it by the NOPA.
20. When the Government of Nogi implemented the FIT Program in September 2018, it published two main documents that it described as setting out the “streamlined” approval process that would apply to renewable energy projects, including both solar and hydroelectric energy facilities.
 - (a) “Renewable Energy Approvals Regulation” (“REA Regulation”), made under Nogi’s *Law for the Protection of Flora and Fauna*, which established the environmental approval requirements for wind, solar, thermal and anaerobic digestion energy facilities. The REA Regulation sets out specific requirements for all types of renewable energy facilities, including hydroelectric energy projects on non-navigable waters, which it defines as Class 5 hydroelectric facilities and for which it requires the submission of an additional hydroelectric sustainability report.
 - (b) “Set of Authorization Conditions” (“SAC”) for Renewable Energy Projects adopted by the DNR, which describes the requirements and approval process elements that fall under the responsibility of the DNR. Like the REA Regulation, the SAC refers to hydroelectric energy facilities, and outlines the specific requirements that apply to hydroelectric energy facilities on Public Land, which include the hydroelectric sustainability report required by the REA regulation, a riverbed engineering study, and certain specified additional information.
 21. These documents clearly established: (a) the regulatory requirements and approvals that applied to all renewable projects; (b) the regulatory requirements that applied to only hydroelectric projects; and (c) the regulatory requirements -- such as the production of an hydroelectric sustainability report and a riverbed engineering study -- that were specific to hydroelectric energy projects on Public Land.
 22. These documents set out a reasonable and transparent regulatory framework for HYNO to follow once it had obtained its FIT Contract and proceeded to develop the HYNO Project.
 23. However, a year later, in June 2019, the Department of the Environment posted for public comment a new policy proposal for hydroelectric energy projects, accompanied by a White Paper on Hydroelectric Energy Facilities Renewable Energy Approval Requirements. The White Paper proposed that all hydroelectric energy facilities be located at least five kilometres away from agricultural and residential land. It also provided a description of the regulatory framework described in the REA Regulation and the SAC, providing more detail with respect to certain aspects of this framework and noting that future guidance documents would be developed. The June 2019 policy proposal noted that DNR was undertaking a phased review of Nogi’s current process for making Public Land available for renewable energy projects, and that the second phase of this review would include consideration of where, when and how the Government of Nogi makes land available for hydroelectric energy projects. A further policy proposal related to that review was posted by DNR in August 2019.
 24. Warm and HYNO were concerned about what was intended with respect to these policy proposals. However, Warm’s technical studies confirmed that the HYNO Project could be successfully developed in the areas described in Warm’s Public Land applications that fell outside the five-kilometre exclusion zone. Warm and HYNO were further encouraged when they approached the DNR with a proposal to re-configure the areas described in Warm’s Public Land applications so the HYNO Project could be developed as efficiently as possible with a five kilometre setback and was advised by DNR that it was prepared to

discuss this proposal. In his August 12, 2019 letter confirming this, a senior DNR official stated:

Once the re-configuration of applications has been finalized the amended applications can begin to move through the normal Public Land application process, including holding a site information meeting with DNR to discuss known or potential constraints in the project area, public and indigenous peoples notification, and confirmation of requirements for hydroelectric energy power in the renewable energy approval process.

I appreciate your need for certainty on this file, and we will move expeditiously through the remainder of the application review process in order that you may obtain Applicant of Record status in a timely manner.

25. On the basis of these representations, HYN0 continued executing the FIT Contract, as described at paragraph 19 above. On September 11, 2019, HYN0 representatives met with DNR officials to discuss the studies that the DNR would permit it to undertake related to the HYN0 Project while DNR and the Department of the Environment considered the issues raised in the June and August 2019 policy proposals. The DNR advised HYN0 that the Public Land application process was on hold and that water flow testing, the review of the HYN0 Project under the REA Regulation, and reconfiguration could not occur until the situation changed.
26. On September 26, 2019 and October 9, 2019, HYN0 wrote to the DNR seeking permission for water flow testing and for further definition of the HYN0 Project area. The DNR did not respond to these letters until December 1, 2019, when a DNR official wrote an email informing that due to the government's hydroelectric energy generation policy review was still outstanding, the DNR would not be able to advance the HYN0 Project nor implement the potential re-configuration discussed in paragraph 24 above. On December 10, 2019, to preserve its ability to develop the HYN0 Project with an extended timeline, HYN0 filed a force majeure notice, stating that HYN0 was unable to advance the HYN0 Project further toward the milestone dates in the FIT Contract without being able to carry out water flow testing, further defining of the HYN0 Project area, and related studies.
27. Meanwhile, hydroelectric energy opponents on the island of Palang became increasingly vocal and well-organized in anticipation of an upcoming 2020 provincial election. These opponents mounted especially strong campaigns against a proposed dam on the King River located on the island of Ravelo, about 60 miles north of the island of Palang. Concerned about the lack of response they were receiving from Nogi officials and anxious to move the HYN0 Project forward, HYN0 representatives proposed to Department of Energy officials that the HYN0 Project—the only hydroelectric energy project with a FIT Contract in Nogi—may proceed as a “pilot project” that could generate scientific data to assist the Government of Nogi in determining how to proceed with future hydroelectric energy projects.
28. On March 12, 2020, with no notice to or consultation with Warm Energy Holding, HYN0 or the renewable energy industry, the Government of Nogi announced a moratorium on the further development of hydroelectric energy development. They explained that further scientific research was needed before hydroelectric energy development could proceed. However, internal Government of Nogi communications documents identified organized opposition to hydroelectric power and rising electricity costs to consumers as key reasons for this decision. In addition, although Head of Department Kemala Sjahrir in her statements to the media repeated the scientific study rationale for the moratorium, she made clear that cost was also a factor, stating: “If we're reaching our clean energy objectives with projects in solar, wind, and bioenergy, why would we then want to expand into hydroelectric energy which is going to be more costly and pose unknown environmental and social impacts?” (The FIT price NOPA had agreed to pay for electricity

- generated from hydroelectric energy projects was 15.0 cents per kilowatt hour compared to 11.5 cents per kilowatt hour for electricity generated by solar projects.)
29. Although internal Government of Nogi documents show that the Department of Energy would have preferred to allow the HYNO Project to proceed, the Department was ultimately overruled, and the HYNO Project was included in the moratorium, even despite the fact that it had a FIT Contract. In a telephone conversation with representatives of Warm and HYNO on March 12, 2020, Government of Nogi officials acknowledged that the HYNO Project was “unique” because it had a FIT Contract. They assured Warm and HYNO that the HYNO Project had not been terminated but was merely “on hold”, and that the FIT Contract for the HYNO Project would be amended to ensure no penalties were incurred by Warm and HYNO as a result of this delay, which they acknowledged would likely be a matter of “years.” In further conversations a few days later, Department of Energy officials assured Warm and HYNO that the HYNO Project could continue. Head of Department Kemala Sjahrir confirmed in statements to the media that the HYNO Project “won’t be cancelled, it’ll be extended until the science is done.”
 30. The Government of Nogi has never complied with that promise. Although the NOPA has granted HYNO force majeure as a result of the moratorium, the FIT Contract provides the NOPA with a unilateral right to terminate the FIT Contract if the force majeure results in the HYNO Project’s commercial operation date being delayed for more than 18 months beyond the original milestone date for commercial operation or if the period of force majeure lasts for longer than 24 months during any 45 month period.
 31. The Government of Nogi has also declined Warm’s good faith efforts to develop other renewable energy projects to make up for the frustration of its right to develop the HYNO Project. In particular, on July 15, 2020, Warm proposed that the FIT Contract for the 300 MW HYNO Project be replaced with a FIT Contract or Contracts for one or more of Warm’s solar energy FIT applications, which total 745 MW. The NOPA had already accepted these applications as valid and was holding US \$6.25 million in letters of credit as security. On March 18, 2021, the DNR advised Warm it would not consider Warm’s solar energy projects as alternatives.
 32. Despite the moratorium, HYNO has complied with its obligations under the FIT Contract, maintaining the US \$6 million letter of guarantee, incurring ongoing financing, staff, engineering and other costs, and entering into contractual arrangements to meet the FIT Contract’s 50% domestic content requirements, including entering into a binding turbine supply agreement with Tech Lanakai, Inc., valued at US \$30 million, in order to obtain the benefit of a waiver of certain NOPA termination rights (offered to all FIT Contract holders). However, as described above, the actions of the Government of Nogi have frustrated HYNO’s ability to develop the HYNO Project in accordance with its rights under the FIT Contract and has left HYNO vulnerable to losing all of those rights. As of the date of the filing of this Notice of Intent, the Government of Nogi has provided no indication as to when this moratorium will end, or whether it will end at all. Warm has already paid 80% of the contract with Tech Lanakai, Inc. at this moment.
 33. It is also unclear what the legal basis for the moratorium is under Nogi law. To Warm’s and HYNO’s knowledge, the Government of Nogi has taken no steps to formally implement its announcement of the moratorium through, for example, an amendment to the REA Regulation or the SAC. As a matter of law, it would appear that HYNO has rights under the REA Regulation, the SAC and other applicable laws and regulations to carry out testing and studies, make applications and have those applications considered under these provisions, but the Government of Nogi has refused to allow it to do so.

V. VIOLATIONS OF THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

34. Lanakai, through the actions of the Government of Nogi, is responsible for measures inconsistent with its commitments under the ACIA. The measures described in this Notice of Intent breach Lanakai's obligations under Articles 14 (Expropriation and Compensation); 11 (Fair and Equitable Treatment); 6 (Most Favored-Nation Treatment); and 5 (National Treatment).
35. By reason of Lanakai's breach of its obligations, Warm, an investor of a Party as defined in Article 4, para. d) of ACIA, has incurred damages in relation to both HYNO itself and HYNO' rights under the FIT Contract -- both of which are investments of Warm as defined in Article 4, para. c) of ACIA. Warm is entitled to be compensated for Lanakai's failure to comply with its obligations arising under ACIA, including lost profits, sunk costs, and opportunity costs, in the amount of US \$400 million.
36. The particular ACIA breaches are outlined below.

A. Lanakai Has Unlawfully Expropriated Warm Energy Holding's Investments

37. ACIA Article 14 prohibits Lanakai from directly or indirectly nationalizing or expropriating an investment of a Bultanese investor in its territory or taking measures tantamount to nationalization or expropriation of such an investment except (a) for a public purpose, (b) in a non-discriminatory manner, (c) on payment of prompt, adequate, and effective compensation, and (d) in accordance with due process of law.
38. By virtue of the laws, policies, actions and representations made above, Lanakai, through the Government of Nogi, made a specific commitment to Warm Energy Holding and HYNO that if they applied for and obtained a FIT Contract for a hydroelectric energy facility, they would be able to apply for required regulatory approvals under a streamlined approvals process. Contrary to that commitment and despite granting HYNO a FIT Contract, the Government of Nogi, through its moratorium and related measures, has effectively annulled the existing regulatory framework for the development of the HYNO Project, frustrating HYNO's ability to develop the HYNO Project and to obtain the benefit of its FIT Contract in accordance with the representations made to it by the Government of Nogi.
39. Lanakai, through the Government of Nogi's moratorium and related actions, has deprived Warm of control of its investments and of the benefits it and HYNO would have obtained had the HYNO Project been developed in accordance with the terms of the FIT Contract. As there is no evidence that the Government of Nogi has any intention of lifting the moratorium and neither Lanakai nor Nogi has paid fair market value for effectively depriving Warm of all the value of HYNO and its interests arising from the FIT Contract, its actions constitute unlawful expropriation contrary to ACIA Article 14.

B. Lanakai has Violated Warm's Right to Fair and Equitable Treatment

40. ACIA Article 11 requires Lanakai to accord to covered investments treatment "fair and equitable treatment and full protection and security".
41. The adoption of the moratorium by Nogi and its application to the HYNO Project was arbitrary, irrational and discriminatory. It violated the legitimate expectations of Warm and HYNO that if they applied and obtained a FIT Contract for a hydroelectric energy facility, they would be able to apply for required regulatory approvals under a streamlined regulatory approvals process. The Government of Nogi's post-moratorium treatment of

Warm and HYN0 has also been arbitrary and unfair. Contrary to the representations it made in its March 12, 2020 teleconference call with representatives of Warm and HYN0, the Government of Nogi has failed to take steps to protect Warm and HYN0 from being penalized as a result of the moratorium.

42. Lanakai also failed to enter into any discussion with Warm about alternative energy projects, as proposed on several occasions by Warm. Since Warm is an energy provider with a wide range of products, the company would have accepted to switch the hydroelectric project for one or several solar projects in the province of Nogi. However, the government of Nogi and NOPA consistently rejected such proposals.
43. These measures, among others, constitute violations of the principle of fair and equitable treatment under Article 11, and have caused damage to Warm and HYN0.

C. Lanakai Has Violated Warm Energy Holding's Rights Not to be Subject to Discrimination (National Treatment and Most Favored Nation Treatment)

44. ACIA Articles 5 and 6 prohibit discrimination against investors of the other State Parties, vis-a-vis both nationals and investors of other States. Under Article 5, each Party shall accord "to investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory." Article 6 provides the same protection in comparison to investors from other Member States (most-favored nation treatment).
45. In this case, Lanakai, through the Government of Nogi, has granted special, more favorable treatment under the FIT program to investments made by Cheng P & S Corp., a company from Laos, than investments made by Warm. In addition, none of the developers from Lanakai or other jurisdictions who have been provided a FIT Contract to date have been subject to a moratorium and are unable to proceed with their projects, in contrast to Warm and HYN0. The Government of Nogi has also recently arranged to relocate two gas-fired electricity generation facilities and to pay compensation to the U.S. and Australian investors that own them after the two projects were canceled by the Government of Nogi as a result of civil society opposition. The Government of Nogi has made no similar efforts to relocate the HYN0 Project, despite Warm's proposals, or to compensate Warm and HYN0 for their costs or the loss of their rights to develop the HYN0 Project.
46. These measures, among others, have violated the rights of Warm and HYN0 not to be subject to discrimination under ACIA Articles 5 and 6, and have caused damage to Warm and HYN0.

V. RELIEF REQUESTED

44. Warm Energy Holding claims:
 - (a) damages in the amount of at least US \$400,000,000, including for lost profits and other damages incurred as a result of the moratorium and related measures;
 - (b) all legal fees and costs associated with this arbitration;
 - (c) pre- and post-award interest;
 - (d) the confidentiality of all evidence submitted in support of this claim; and
 - (e) such other relief as the Tribunal considers appropriate.

Respectfully submitted on behalf of Warm Energy Holding