MEDIATEGURU

Moot Problem

1ST INTERNATIONAL ARBITRATION MOOT 2021

Theme -
International Investment Arbitration

Collaborators:

CIADR ENLARGING SETTLEMENT Centre for International Alternative Dispute Resolution

#CAREERS IN ARBITRATION

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About the Problem

The 2021 Problem is an arbitration under the **ASEAN Comprehensive Investment Agreement** and the **SIAC Investment Arbitration Rules**. Teams will have Claimant's Notice of Arbitration and Respondent's Response to that Notice.

At the hearing, teams will follow the facts, law, and allegations contained in these documents to further substantiate and defend their claims and positions.

While no additional factual allegations are allowed, teams are free to develop and refine the legal arguments in their skeleton arguments to be submitted in accordance with the competition rules.

The parties in this arbitration are:

Fata Energy Holding, Inc.
Claimant
v.
Kingdom of Colomba
Respondent

The documentation for the Moot Problem is the following:

SUMMARY

Claimant's Side

Fata is a Corporation organized under the laws of Mobi, Republic of Bultan. It is owned by Michael Smith who is based in the capital city of Mobi, in Bultan. Through his company Fata, Smith invests in energy projects worldwide. Thus he has developed the engineering and management for energy projects in China, Cambodia, the Philipines, and the Middle East with an aggregate value of US $350 million. Fata's investments in Colomba were done through European Fata Holding, S.A., a société anonyme registered in Luxembourg ("European"). Fata holds 85% of the shares of European. The remaining 15% are held by Michael Smith in his own name. The activities of Fata, through European, and its investments in the region of Nyugen, Kingdom of Colomba("Colomba") are led by Chris Martin, an Nyugen-based engineer. European owns 100% of the shares of HydroNyugen, Co. ("PAG"). Fata submits the Notice of Intent as an investor of a Party on its own behalf and as an investor of a Party on behalf of PAG 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. Colomba, through the actions of the Autonomous Government of Nyugen, for which it is internationally responsible, has breached its obligations under ACIA, including 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

Beginning in the mid-2000s, the Autonomous Government of Nyugen in Colomba began adopting policies to encourage investment in renewable energy sources to increase Nyugen's energy production capacity and replace fossil fuel-based, non-renewable energy sources. In its January 26, 2013 press release announcing the Law for Sustainable Energy, Nyugen's Department of Energy and Infrastructure described the "most notable" elements of the Law for Sustainable Energy. For several years, Fata had been assessing hydroelectric energy resources in Nyugen, in particular in the area near the island of Kandy in eastern Nilganges River. In June 2013, Natural Resources Head of Department Nini Labadze publicly stated that Nyugen was "open for business" for hydroelectric energy development. Beginning in 2013, PAG spent heavily on resource evaluation, engineering and technical reviews with respect to the PAG Project. When the FIT Program was announced in 2013, PAG focused its efforts on ensuring it would meet the FIT Contract requirements. In a letter to PAG dated August 24, 2013, the DNR made it clear that in order for PAG to maintain the priority position of its Public Land applications, PAG had to submit an application to the FIT program within the initial FIT application period. In a subsequent phone call between PAG and DNR executives on October 15, 2013, DNR stated that Public Land applicants, such as PAG, 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 PAG, this meant that these applications would take precedence over all others for this site. On October 29, 2013, PAG applied for a FIT Contract, depositing with its application a US $1.7 million letter of guarantee.

On August 10, 2014, PAG executed the FIT Contract, with a five year period. PAG 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. Fata and PAG expected that, during the 17-year FIT Contract period, the PAG Project would generate approximately US $2.6 billion in revenue. It also anticipated that the PAG Project would result in an investment of approximately US $1.2 billion, including US $850 million for Nyugen goods and services (because of the FIT Program's 50% Nyugen content requirements), and create approximately 1,200 jobs during project development and construction, and 85 permanent jobs. When the Government of Nyugen implemented the FIT Program in September 2014, 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. However, a year later, in June 2015, the Department of the Environment posted for public comment a new policy proposal for hydroelectric energy projects which proposed that all hydroelectric energy facilities be located at least five kilometers away from agricultural and residential land. The June 2015 policy proposal noted that DNR was undertaking a phased review of Nyugen's current process. Fata and PAG were concerned however, Fata's technical studies confirmed that the PAG Project could be successfully developed in the areas described in Fata's Public Land applications that fell outside the five kilometer exclusion zone. They approached the DNR with a proposal to re-configure the areas described in Fata's Public Land applications so the PAG Project could be developed as efficiently as possible with a five kilometer

setback and was advised by DNR that it was prepared to discuss this proposal. On the basis of these representations, PAG continued executing the FIT Contract. On September 11, 2015, PAG representatives met with DNR officials. The DNR advised PAG that the Public Land application process was on hold and that water flow testing, the review of the PAG Project under the REA Regulation, and reconfiguration could not occur until the situation changed. On September 26, 2015 and October 9, 2015, PAG wrote to the DNR seeking permission for water flow testing and for further definition of the PAG Project area. On December 1, 2015, 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 PAG Project nor implement the potential reconfiguration. PAG filed a force majeure notice, stating that PAG was unable to advance the PAG Project further toward the milestone dates in the FIT Contract without being able to carry out water flow testing. On March 12, 2016, the Government of Nyugen announced a moratorium on the further development of hydroelectric energy development. Although internal Government of Nyugen documents show that the Department of Energy would have preferred to allow the PAG Project to proceed, the Department was ultimately overruled, and the PAG Project was included in the moratorium, even despite the fact that it had a FIT Contract. On March 12, 2016 they assured Fata and PAG that the PAG Project had not been terminated but was merely *"on hold"*. They acknowledged would likely be a matter of *"years"*. The Government of Nyugen has also declined Fata's good

faith efforts to develop other renewable energy projects to make up for the frustration of its right to develop the PAG Project. PAG has complied with its obligations under the FIT Contract, maintaining the US $6 million letter of guarantee. The actions of the Government of Nyugen have frustrated PAG' ability to develop the PAG Project in accordance with its rights under the FIT Contract and has left PAG vulnerable to losing all of those rights. To Fata's and PAG's knowledge, the Government of Nyugen has taken no steps to formally implement its announcement of the moratorium through Colomba, through the actions of the Government of Nyugen, is responsible for measures inconsistent with its commitments under the ACIA: a) Colomba Has Unlawfully Expropriated Fata Energy Holding's Investments. b) Colomba has Violated Fata's Right to Fair and Equitable Treatment. c) Colomba Has Violated Fata Energy Holding's Rights Not to be Subject to Discrimination (National Treatment and Most Favored Nation Treatment).

Respondent's Side

In 2005, the Government of Nyugen attempted to establish a competitive wholesale electricity market. However, a mere nine months later, after the price of electricity spiked due to a particularly hot summer and private investment in new generation failed to materialize, the Government of Nyugen intervened to temporarily freeze electricity prices. Between 1999 and 2006, Nyugen's generation capacity had fallen by 6%, while electricity demand had grown by 8.5%. At the time, coal-fired generation accounted for approximately 55% of the Province's electricity

Thus it became necessary for adding new capacity, additional sources of generation would soon be required to make up for the loss of electricity generated by coal-fired plants. In 2007, the Government of Nyugen started considering the use of alternative and renewable sources of electricity generation, such as solar (photovoltaic), wind, biomass, biogas and hydroelectric. As a first step, Nyugen enacted the provincial Electricity Renovation Act, 2007. Between 2007 and 2012, the Government of Nyugen and the NOPA (after it was established in 2008) ran a number of electricity supply and generation procurement programs directed at obtaining the desired use of alternative and renewable energy sources. on June 30, 2012, the Government of Nyugen began the development of the largest renewable electricity initiative in Nyugen. On September 24, 2013, the Head of Department called for: a feed-in tariff ("FIT") program that is designed to procure energy from a wide range of renewable energy sources. The NOPA began taking applications for the FIT Program on October 1, 2013. the NOPA received a total of 350 applications for projects that would generate over 5,000 MW. both the Government of Nyugen and the NOPA clarified that an award of a FIT Contract by the NOPA was not an authorization from the Nyugen Government to proceed with a project. 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. its lack of experience and the uncertainty in the existing science, the Government of Nyugen has moved slowly with respect to hydroelectric energy facilities. PAG 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 Nilganges River at a specified location near the island of Kandy, south of the City of Wasi. The NOPA offered PAG a FIT Contract on May 11, 2014 for its proposed 1,450 MW hydroelectric dam. This standard offer contract included a requirement that PAG bring the project into operation five years after the contract date. the NOPA eventually granted PAG until June 2, 2014 to accept the offered FIT Contract. At PAG's request, the NOPA ultimately granted a few additional extensions, adjusting the deadline to sign the contract into August 2014. On August 2, 2014 the NOPA indicated that it would, at PAG's request, issue PAG 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. The NOPA granted PAG force majeure status, with the event set as having commenced on November 22, 2015. In this case, Claimant would have to show that it and/or PAG have suffered damages, and that the challenged measures are attributable to Nyugen, and hence not to the Kingdom of Colomba. Nyugen asks for Fata to provide guarantees for Nyugen's legal costs. PAG, were well aware of the risks before PAG signed the FIT Contract. The non-discriminatory decision of Nyugen to defer the development of hydroelectric energy projects was made because of legitimate concerns regarding the potential health, safety and environmental effects of this fledgling industry and such a decision does not violate the obligations in ACIA. Nyugen claims that it has not breached the ACIA or any provision mentioned therein.

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

Fata Energy Holding, Inc.

Claimant

v.

Kingdom of Colomba

Respondent

August 1, 2021

NOTICE OF INTENT TO ARBITRATE

1. In accordance with Articles 32 and 33 of the ASEAN Comprehensive Investment Agreement (the "ACIA"), the Claimant Fata Energy Holding, Inc. ("Fata") respectfully provides to the Government of the Republic of Colomba this written notice of its intention to submit a claim to arbitration. In accordance with Article 33, para. 1, of ACIA, Fata 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. Fata 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, 2012.

3. Fata is wholly owned by Michael Smith. Smith 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 Colomba, but he has lived in Bultan with a "Permit of Residency" for the past 25 years. Through his company Fata, Smith invests in energy projects worldwide. Thus he has developed the engineering and management for energy projects in China, Cambodia, the Philipines, and the Middle East with an aggregate value of US $350 million.

4. Fata's investments in Colomba were done through European Fata Holding, S.A., a société anonyme registered in Luxembourg ("European"). Fata holds 85% of the shares of European. The remaining 15% are held by Michael Smith 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 MoneyABC, Inc.

5. The activities of Fata, through European, and its investments in the region of Nyugen, Kingdom of Colomba("Colomba") are led by Chris Martin, an Nyugen-based engineer who has worked for more than three decades for Michael Smith 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 HydroNyugen, Co. ("PAG"), a corporation incorporated under the laws of Colombo. PAG' address is 32 Church Street, Palu (Colomba). Chris Martin is the CEO of PAG.

7. Fata 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 PAG 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. Colomba, through the actions of the Autonomous Government of Nyugen, 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. Nyugen Adopts FIT Program to Attract Investment in Renewable Energy

9. Beginning in the mid-2000s, the Autonomous Government of Nyugen in Colomba began adopting policies to encourage investment in renewable energy sources to increase Nyugen's energy production capacity and replace fossil fuel-based, non-renewable energy sources. On June 30, 2012, the Nyugen Regional Legislature enacted the Law for Sustainable Energy, 2012 and amended related legislation. The Government of Nyugen 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 Nyugen Power Authority (the "NOPA"), a non-profit corporation controlled by the Government of Nyugen, 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 Nyugen representatives stated that a primary purpose of the Law for Sustainable Energy was to create certainty for investors to invest in renewable power in Nyugen and thereby create jobs -- more than 15,000 new jobs between 2012 and 2020. Nyugen's Head of Department of Energy and Infrastructure Mariam Liparteliani, speaking on December 15, 2012 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.*

11. In its January 26, 2013 press release announcing the ***Law for Sustainable Energy***, Nyugen'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. Fata Energy Holding's Nilganges River Project is Awarded a FIT Contract

12. For several years, Fata had been assessing hydroelectric energy resources in Nyugen, in particular in the area near the island of Kandy in eastern Nilganges River. Chris Martin who, as described in paragraph 6 above, leads Fata's activities and investments in Nyugen, had been central to developing a successful solar energy project on a hillside facing the Nilganges River, and knew that the area also had outstanding potential as a site for a hydroelectric energy project.

13. Between 2006 and 2013, the Department of Natural Resources ("DNR"), which, among other things, exercises regulatory authority on behalf of the Government of Nyugen 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 2013, 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 2013, Natural Resources Head of Department Nini Labadze publicly stated that Nyugen was "open for business" for hydroelectric energy development.

14. In March 2013, on the basis of the actions and representations on the part of the Government of Nyugen, Fata's subsidiary PAG submitted to the DNR Public Land applications to develop a hydroelectric energy facility (the "PAG Project") in the island of Kandy area of the Nilganges River. Beginning in 2013, PAG spent heavily on resource evaluation, engineering and technical reviews with respect to the PAG Project. When the FIT Program was announced in 2013, PAG focused its efforts on ensuring it would meet the FIT Contract requirements.

15. In a letter to PAG dated August 24, 2013, the DNR made it clear that in order for PAG to maintain the priority position of its Public Land applications, PAG had to submit an application to the FIT program within the initial FIT application period. In a subsequent phone call between PAG and DNR executives on October 15, 2013, DNR stated that Public Land applicants, such as PAG, 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 PAG, this meant that these applications would take precedence over all others for this site.

16. On the basis of these assurances, on October 29, 2013, PAG 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, 2014, PAG was informed that its application had been accepted by the NOPA and it was offered a FIT Contract dated May 11, 2014. At 1,450 MW, the PAG 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, 2014, PAG executed the FIT Contract, with a five-year period, commencing May 11, 2014, for the PAG Project's development and construction to be completed. As required by the FIT rules, PAG 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, Fata and PAG looked forward to developing a highly beneficial and profitable energy project. Fata had conducted water flow assessments that showed that in the area of the island of Kandy they were stronger and steadier than those in the areas of any other hydroelectric dam project in Colomba, a fact that would likely result in the PAG Project having a higher energy-generating capacity than any other FIT Project (other regions in Colomba also granted FIT benefits for renewable energy production). Fata and PAG expected that, during the 17-year FIT Contract period, the PAG Project would generate approximately US $2.6 billion in revenue

It also anticipated that the PAG Project would result in an investment of approximately US $1.2 billion, including US $850 million for Nyugen goods and services (because of the FIT Program's 50% Nyugen content requirements), and create approximately 1,200 jobs during project development and construction, and 85 permanent jobs.

C. Nyugen Imposes Moratorium on Hydroelectric Energy Development, Frustrating Fata's and PAG's Ability to Obtain the Benefits of PAG's FIT Contract

19. As described above, when PAG applied for its FIT Contract for the PAG Project, the Government of Nyugen, 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 PAG "highest priority," the Government of Nyugen has done the opposite - first delaying the approval process, and then imposing a moratorium that to date has frustrated PAG from being able to take any steps to develop the PAG Project in accordance with the FIT Contract granted to it by the NOPA.

20. When the Government of Nyugen implemented the FIT Program in September 2014, 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 Nyugen'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 PAG to follow once it had obtained its FIT Contract and proceeded to develop the PAG Project.

23. However, a year later, in June 2015, the Department of the Environment posted for public comment a new policy proposal for hydroelectric energy projects, accompanied by a Discussion Paper on Hydroelectric Energy Facilities Renewable Energy Approval Requirements. The Discussion 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 2015 policy proposal noted that DNR was undertaking a phased review of Nyugen'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 Nyugen makes land available for hydroelectric energy projects. A further policy proposal related to that review was posted by DNR in August 2015.

24. Fata and PAG were concerned about what was intended with respect to these policy proposals. However, Fata's technical studies confirmed that the PAG Project could be successfully developed in the areas described in Fata's Public Land applications that fell outside the five kilometre exclusion zone.

Fata and PAG were further encouraged when they approached the DNR with a proposal to re-configure the areas described in Fata's Public Land applications so the PAG 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, 2015 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, PAG continued executing the FIT Contract, as described at paragraph 19 above. On September 11, 2015, PAG representatives met with DNR officials to discuss the studies that the DNR would permit it to undertake related to the PAG Project while DNR and the Department of the Environment considered the issues raised in the June and August 2015 policy proposals. The DNR advised PAG that the Public Land application process was on hold and that water flow testing, the review of the PAG Project under the REA Regulation, and reconfiguration could not occur until the situation changed.

26. On September 26, 2015 and October 9, 2015, PAG wrote to the DNR seeking permission for water flow testing and for further definition of the PAG Project area. The DNR did not respond to these letters until December 1, 2015, 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 PAG Project nor implement the potential re-configuration discussed in paragraph 24 above. On December 10, 2015, to preserve its ability to develop the PAG Project with an extended timeline, PAG filed a force majeure notice, stating that PAG was unable to advance the PAG Project further toward the milestone dates in the FIT Contract without being able to carry out water flow testing, further defining of the PAG Project area, and related studies.

27. Meanwhile, hydroelectric energy opponents on the island of Kandy became increasingly vocal and well-organized in anticipation of an upcoming 2016 provincial election. These opponents mounted especially strong campaigns against a proposed dam on the Nilganges River located on the island of Novu, about 60 miles north of the island of Kandy. Concerned about the lack of response they were receiving from Nyugen officials and anxious to move the PAG Project forward, PAG representatives proposed to Department of Energy officials that the PAG Project—the only hydroelectric energy project with a FIT Contract in Nyugen—may proceed as a "pilot project" that could generate scientific data to assist the Government of Nyugen in determining how to proceed with future hydroelectric energy projects.

28. On March 12, 2016, with no notice to or consultation with Fata Energy Holding, PAG or the renewable energy industry, the Government of Nyugen 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 Nyugen 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 Nini Labadze 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 Nyugen documents show that the Department of Energy would have preferred to allow the PAG Project to proceed, the Department was ultimately overruled, and the PAG Project was included in the moratorium, even despite the fact that it had a FIT Contract. In a telephone conversation with representatives of Fata and PAG on March 12, 2016, Government of Nyugen officials acknowledged that the PAG Project was "unique" because it had a FIT Contract.

They assured Fata and PAG that the PAG Project had not been terminated but was merely "*on hold*", and that the FIT Contract for the PAG Project would be amended to ensure no penalties were incurred by Fata and PAG 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 Fata and PAG that the PAG Project could continue. Head of Department Nini Labadze confirmed in statements to the media that the PAG Project *"won't be cancelled, it'll be extended until the science is done."*

30. The Government of Nyugen has never complied with that promise. Although the NOPA has granted PAG 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 PAG 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 Nyugen has also declined Fata's good faith efforts to develop other renewable energy projects to make up for the frustration of its right to develop the PAG Project. In particular, on April 15, 2016, Fata proposed that the FIT Contract for the 300 MW PAG Project be replaced with a FIT Contract or Contracts for one or more of Fata'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, 2016, the DNR advised Fata it would not consider Fata's solar energy projects as alternatives.

32. Despite the moratorium, PAG 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 Colomba, 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 Nyugen have frustrated PAG' ability to develop the PAG Project in accordance with its rights under the FIT Contract and has left PAG vulnerable to losing all of those rights. As of the date of the filing of this Notice of Intent, the Government of Nyugen has provided no indication as to when this moratorium will end, or whether it will end at all. Fata has already paid 80% of the contract with Tech Colombo, Inc. at this moment.

33. It is also unclear what the legal basis for the moratorium is under Nyugen law. To Fata's and PAG's knowledge, the Government of Nyugen 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 PAG 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 Nyugen has refused to allow it to do so.

V. VIOLATIONS OF THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

34. Colomba, through the actions of the Government of Nyugen, is responsible for measures inconsistent with its commitments under the ACIA. The measures described in this Notice of Intent breach Colombo'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 Colomba's breach of its obligations, Fata, an investor of a Party as defined in Article 4, para. d) of ACIA, has incurred damages in relation to both PAG itself and PAG' rights under the FIT Contract -- both of which are investments of Fata as defined in Article 4, para. c) of ACIA. Fata is entitled to be compensated for Colombo'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. Colomba Has Unlawfully Expropriated Fata Energy Holding's Investments

37. ACIA Article 14 prohibits Colomba 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, Colomba, through the Government of Nyugen, made a specific commitment to Fata Energy Holding and PAG 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 PAG a FIT Contract, the Government of Nyugen, through its moratorium and related measures, has effectively annulled the existing regulatory framework for the development of the PAG Project, frustrating PAG's ability to develop the PAG Project and to obtain the benefit of its FIT Contract in accordance with the representations made to it by the Government of Nyugen

39. Colomba, through the Government of Nyugen's moratorium and related actions, has deprived Fata of control of its investments

and of the benefits it and PAG would have obtained had the PAG Project been developed in accordance with the terms of the FIT Contract. As there is no evidence that the Government of Nyugen has any intention of lifting the moratorium and neither Colomba nor Nyugen has paid fair market value for effectively depriving Fata of all the value of PAG and its interests arising from the FIT Contract, its actions constitute unlawful expropriation contrary to ACIA Article 14.

B. Colomba has Violated Fata's Right to Fair and Equitable Treatment

40. ACIA Article 11 requires Colomba to accord to covered investments treatment *"fair and equitable treatment and full protection and security"*.

41. The adoption of the moratorium by Nyugen and its application to the PAG Project was arbitrary, irrational and discriminatory. It violated the legitimate expectations of Fata and PAG 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 Nyugen's post-moratorium treatment of Fata and PAG has also been arbitrary and unfair. Contrary to the representations it made in its March 12, 2016 teleconference call with representatives of Fata and PAG, the Government of Nyugen has failed to take steps to protect Fata and PAG from being penalized as a result of the moratorium.

42. Colomba also failed to enter into any discussion with Fata about alternative energy projects, as proposed on several occasions by Fata. Since Fata 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 Nyugen. However, the government of Nyugen 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 Fata and PAG.

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

44. ACIA Articles 5 and 6 prohibits 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, expansión, 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, Colomba, through the Government of Nyugen, has granted special, more favorable treatment under the FIT program to investments made by Ming Corp.., a company from Laos, than investments made by Fata. In addition, none of the developers from Colombaor 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 Fata and PAG. The Government of Nyugen 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 Nyugen as a result of community opposition. The Government of Nyugen has made no similar efforts to relocate the PAG Project, despite Fata's proposals, or to compensate Fata and PAG for their costs or the loss of their rights to develop the PAG Project.

46. These measures, among others, have violated the rights of Fata and PAG not to be subject to discrimination under ACIA Articles 5 and 6, and have caused damage to Fata and PAG.

V. RELIEF REQUESTED

47. Fata 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 Fata Energy Holding

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

BETWEEN:

FATA ENERGY HOLDING, INC.

Claimant

And

KINGDOM OF COLOMBA

Respondent

GOVERNMENT OF COLOMBA'S RESPONSE TO THE NOTICE OF ARBITRATION

3 September 2021

COLOMBA

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

I. NAME AND ADDRESS OF THE RESPONDENT

1.Pursuant to the agreement of the disputing parties to apply the ASEAN Comprehensive Investment Agreement ("ACIA"), which allows for the investor to choose any of the regional arbitration centers, and where in this case the investor has chosen the 2017 SIAC Investment Arbitration Rules, the government of the Kingdom of Colomba provides this Response to the Notice of Arbitration filed by Fata Energy Holding Inc. ("the Claimant" or "Fata").

2.The Respondent is the Kingdom of Colomba. Colomba's address for service of documents in connection with this proceeding is: Ministry of Foreign Affairs Office of the Legal Advisor Independence Road, 13 208342 Panay, COLOMBA

II. FACTUAL BACKGROUND A. Nyugen's Efforts to Modernize and Restructure Electricity Generation

3. In the late 1990s, it became clear that Nyugen's old state-owned, vertically integrated electricity utility, Nyugen Hydro, could no longer efficiently forecast, generate, transmit and distribute electricity throughout the Province. In 2005, the Government of Nyugen attempted to establish a competitive wholesale electricity market. It hoped that a liberalized wholesale electricity market would help promote investment in electricity generation. However, a mere nine months later, after the price of electricity spiked due to a particularly hot summer and private investment in new generation

failed to materialize, the Government of Nyugen intervened to temporarily freeze electricity prices.

4. Following the 2006 Provincial election, the new Government of Nyugen recognized that it would soon face electricity shortfalls and thus had to increase electricity supply in the Province. Between 1999 and 2006, Nyugen's generation capacity had fallen by 6%, while electricity demand had grown by 8.5%.[1] In March 2006, the Nyugen Electricity Company ("SCEC"), an independent entity responsible for the day-to-day operation of the electrical system in Nyugen, estimated that "about 23,000 MW" of new or refurbished electricity generation would be needed "in approximately ten years from now."[2]

5. This need for increased supply was critical not only because of raising demand, but also because the new Government planned to improve air quality and lower Nyugen's carbon emissions by eliminating coal-fired electricity generation by the end of 2014. At the time, coal-fired generation accounted for approximately 55% of the Province's electricity. Thus, in addition to adding new capacity, additional sources of generation would soon be required to make up for the loss of electricity generated by coal-fired plants.

[1] Nyugen' Long-Term Energy Plan, "Building A Clean Energy Future For Our Children" (2010), p. 5 (Tab 1).

[2] Keynote Speech by Sunyun Ki, President and CEO, Independent Electricity Market Operator Presented at Nyugen Board of Trade Power Breakfast (March 27, 2003), p. 12; Independent Electricity Market Operator News Release: "IEMO Releases Annual 10-Year Outlook" (March 31, 2003).

B. Nyugen's Efforts to Procure Renewable Energy Generation Capacity

6. In 2007, the Government of Nyugen started considering the use of alternative and renewable sources of electricity generation, such as solar (photovoltaic), wind, biomass, biogas and hydroelectric. As a first step, Nyugen enacted the provincial Electricity Renovation Act, 2007 ("ERA")[1] to encourage the creation of new electricity supply and capacity, promote energy conservation and establish stable prices for electricity that reflected its true cost. To do so, the ERA amended the provincial Electricity Act, 1996 to create an independent corporation, the NOPA,[2] that would be responsible for the "procurement of electricity supply and capacity,"[3] including supply and capacity from clean and renewable energy sources.[4]

7. Between 2007 and 2012, the Government of Nyugen and the NOPA (after it was established in 2008) ran a number of electricity supply and generation procurement programs directed at obtaining the desired use of alternative and renewable energy sources.

[1] Provincial Electricity Renovation Act, adopted on February 15, 2007, c. 23.
[2] Provincial Electricity Act, 1996, s. 13.1(1): ("A corporation without share capital to be known as the Nyugen Power Authority...is hereby established."). While the Head of Department of Energy has the authority to appoint certain members of the NOPA's Board of Directors, Ibid, s. 13.4(2), to approve its business plan, Ibid, s. 13.22, to issue directives with respect to such goals to be achieved by the NOPA such as increasing generation capacity from renewable energy sources, Ibid, s. 13.30(2), the NOPA has independent legal personality, Ibid s. 13.2(4), is not an agent of the Government, Ibid s. 13.3, and acts independently and on its own behalf when entering into specific procurement contracts. Ibid s. 13.32.
[3] Ibid, s. 13.2(5)(b)-(c).p.
[4] Ibid, s. 13.32.

This included the Renewable Energy Supply programs in 2010, 2011, and 2012 which sought relatively small volumes of renewable electricity generated from eligible sources (including, hydro, wind, solar, and biomass). It also included the Renewable Energy Standard Offer Program introduced by the NOPA in 2008 to appeal to a broader range of facilities and energy producers.

8.However, these initiatives failed to generate the amount of new investment in renewable energy that was required. Accordingly, on June 30, 2012, the Government of Nyugen began the development of the largest renewable electricity initiative in Nyugen. This critical initiative had several components, including the Law for Sustainable Energy, 2012.[1]

9. The Law for Sustainable Energy amended the Electricity Act, 1996 to authorize the Nyugen Head of Department of Energy to direct the NOPA to develop a Feed-in-Tariff Program ("FIT Program").[2]On September 24, 2013, the Head of Department called for: a feed-in tariff ("FIT") program that is designed to procure energy from a wide range of renewable energy sources. The development of this program is a key element of meeting the objectives of the Law for Sustainable Energy, 2012 ... and is critical to Nyugen's success in becoming a place where most of its energy needs are produced locally and in an environmentally friendly way.[3]

[1] Law for Sustainable Energy, adopted on June 30, 2012, c. 12.

[2] Electricity Act (amended), 2012, s. 15.15.

[3] Letter from Mariam Liparteliani, Head of Department of Energy and Infrastructure to Colin Anderson, Chief Executive Officer, Nyugen Power Authority (September 24, 2012).

10. The NOPA began taking applications for the FIT Program on October 1, 2013. In order to implement the FIT Program, the NOPA developed the FIT Rules, Standard Definitions and the FIT Contract. Together, these documents set out the terms and conditions of participation in the FIT Program, including eligibility requirements, application requirements, contract conditions, and general rules on pricing.

11. The announcement of the FIT Program generated significant interest from renewable energy investors around the world, notwithstanding the risks associated with this nascent industry. The 60-day launch period for large FIT projects ran from October 1 until November 30, 2013. During this period, the NOPA received a total of 350 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.[1]

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

[1]Nyugen Power Authority News Release: "Nyugen Announces 184 Large-Scale Renewable Energy Projects", (April 8, 2015). 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.

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 Nyugen consistently communicated this to FIT Program applicants. So did the NOPA. In the same vein, both the Government of Nyugen and the NOPA clarified that an award of a FIT Contract by the NOPA was not an authorization from the Nyugen 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 Nyugen. 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's (“DOE”) Environmental Protection Act (“EPA”), the Renewable Energy Approvals under Part V 0.1 of the Act regulation (“REA Regulation”), as well as the Department of Natural Resources' ("DNR") Set of Authorization Conditions (“SAC”). In addition, other potential permitting 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 Nyugen

15. In comparison to other renewable energy projects, at the time of the FIT Program's launch (and still today), there was no practice and no specific regulatory or scientific expertise with hydroelectric energy facilities in Nyugen's rivers. In fact, at the time the FIT 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 Nyugen 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, 2015, 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[1] Among other things, the draft policy proposed a 5 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, 2015, DNR posted a complementary policy to DOE's posting on the Environmental Registry. The DNR policy, entitled "Hydroelectric Energy Power: Consideration of Additional Areas to be Removed from Future Development,"[2] and 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 Nyugen. DNR also held engagement sessions with industry, indigenous communities and other stakeholders on the proposal during 2015.

[1] See Colomba Policy Proposal Notice: Renewable Energy Approval Requirements for Hydroelectric Dams - An Overview of the Proposed Approach (June 25, 2015); Department of the Environment Discussion Paper, "Hydroelectric Energy Facilities Renewable Energy Approval Requirements" (June 25, 2014).
[2] Nyugen Policy Proposal Notice: Hydroelectric energypower: Consideration of Additional Areas to be Removed from Future Development (August 18, 2015).

21. It was into this complex thicket of developing policy and regulatory uncertainty that the Claimant knowingly and willingly plunged.

E. PAG's Proposed Nilganges River Hydroelectric Project

22. Claimant and PAG have long been operating in Nyugen, including during the DNR's original deferral of consideration of applications for access to Public Land for hydroelectric energy facilities. In February 2012, shortly after DNR lifted that deferral, but before the introduction of the Law on Sustainable Energy and the creation of the FIT Program, PAG submitted Public Land applications to develop a hydroelectric energy facility (the "PAG Project"). The proposed PAG Project was a massive endeavor. PAG 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 Nilganges River at a specified location near the island of Kandy, south of the City of Wasi.

23. On November 21, 2013, during the launch of the FIT Program, the Claimant, through various entities, applied for a number of FIT Contracts—ten for solar energy projects in Central and Northern Nyugen, and one for the PAG Project in the Nilganges River. PAG's FIT application was one of only four received by the NOPA for hydroelectric energy projects between October 1 and November 30, 2013. Moreover, the generating capacity of the project proposed by PAG was approximately 10 times larger than the three other proposed hydroelectric energy projects combined.

24. The NOPA offered PAG a FIT Contract on May 11, 2014 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 PAG was open for a period of 10 business days. This standard offer contract included a requirement that PAG bring the project into operation five years after the contract date.[1] 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 PAG as well as pursue other damages.[2] The offered FIT Contract also allowed PAG to declare force majeure in the event of an "inability to obtain ... any permit, certificate, impact assessment, license or approval of any Governmental Authority ... required to perform or comply with any obligation under [the Contract]."[3]

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 PAG. As such, when PAG received the offer, it met with the NOPA on May 13, 2014 to discuss whether the NOPA would be willing to vary the terms of the contract to reflect the existing regulatory uncertainty.

[1]Nyugen Power Authority, Standard FIT Contract, v. 1.3.0, Exhibit A (Type 6: Hydroelectric Facilities) (Mar. 9, 2014).
[2] Ibid, s. 9.1(j), 9.2(a), 9.2(d)(ii) and 9.5.
[3] Ibid, p. 10.3(i).

26. The following day, NOPA Director of Contract Management Diane Goldsmith emailed PAG representative Chris Martin, saying: we can all appreciate the challenges that you face in developing a hydroelectric energy facility. That being said, we are not prepared to change any of the terms of the FIT Contract that has been offered to you. The FIT Program is a standard offer program. Fata Energy Holding will have to determine whether or not it wants to accept the offered contract. ... The NOPA is not in a position to advise Fata on how it ought to manage the regulatory risk associated with hydroelectric energy projects.[1]

27. Despite its initial reluctance, the NOPA eventually granted PAG until June 2, 2014 to accept the offered FIT Contract. At PAG's request, the NOPA ultimately granted a few additional extensions, adjusting the deadline to sign the contract into August 2014.

28. On August 2, 2014 the NOPA indicated that it would, at PAG's request, issue PAG 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. PAG executed its FIT Contract on August 10, 2014. PAG 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 PAG remained open for public comment

[1] E-mail from Diana Valastro, Nyugen Power Authority to Chris Martin, PAG (May 14, 2014).

29. By December 2015, the Claimant and PAG apparently realized that Nyugen would be proceeding far more cautiously with respect to the development of hydroelectric energy than they had gambled when PAG signed its FIT Contract. As a result, on December 10, 2015 PAG claimed a force majeure event under its FIT Contract related to its inability to obtain the required regulatory approvals. The NOPA granted PAG force majeure status, with the event set as having commenced on November 22, 2015.

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 Nyugen. As mentioned above, the rivers, and especially the Nilganges River, are an integral part of the lives of Nyugen's population and, moreover, supply 90% of them with their drinking water. As also noted, hydroelectric energy projects were untested in Nyugen. There remained a need for technical and environmental studies to inform the regulatory review of these projects.

31. By March 2016, the Government of Nyugen 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, 2016, the Government announced that "*Nyugen 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 accepted and current applications will be suspended.*"[1] This was exactly the type of regulatory risk that the Claimant and PAG knowingly accepted when PAG signed its FIT Contract.

32. As a result, PAG's project has been on hold since March 2016. Its FIT Contract has not been cancelled. PAG's rights under the Contract have not been 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 Nyugen 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-2017.

[1] Nyugen Department of the Environment News Release: "Nyugen Rules Out Hydroelectric Energy Projects" (February 11, 2016); Nyugen Policy Decision Notice: Hydroelectric energypower: Consideration of Additional Areas to be Removed from Future Development (February 11, 2016); Nyugen Policy Decision Notice: Hydroelectric energy: Consideration of Additional Areas to be Removed from Future Development.

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 PAG have suffered damages, and that the challenged measures are attributable to Nyugen, and hence not to the Kingdom of Colomba. In this respect, the Claimant alleges that it is a Corporation organized under the laws of Bultan, which indirectly owns and controls PAG through a Luxembourg société anonyme. Claimant further alleges that PAG is an enterprise under Nyugen law, and that Claimant and PAG have suffered "at least" US $400,000,000 in damages as a result of certain measures of the Government of Nyugen and/or the NOPA. Since Fata only indirectly owns PAG, 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 to "investors of [another] Member State") and other ACIA provisions. Accordingly, Nyugen 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 submitted to arbitration, Nyugen asks for Fata to provide guarantees for Nyugen's legal costs. The circumstances in which Fata is submitting its claim—including the corporate structure it uses to bring the claim and the third-party funding it relies upon—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. NYUGEN HAS NOT BREACHED THE ACIA

35. The Claimant has alleged that the decision of Nyugen 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 entirely without merit. The Claimant chose to invest in a highly speculative venture for which the necessary regulatory framework was in a state of flux. The Claimant and its alleged investment, PAG, were well-aware of the risks before PAG signed the FIT Contract. The non-discriminatory decision of Nyugen to defer the development of hydroelectric energy projects was made because of legitimate concerns regarding the potential health, safety and environmental effects of this fledgling industry. Such a decision does not violate the obligations in ACIA. Nyugen is fully protected under the ACIA by means of its Article 17, para. 1, sections. a), b), and f).

A. Nyugen Has Not Breached ACIA Articles 5 and 6

36. In its Notice of Arbitration, the Claimant alleges that certain Nyugen measures violate its rights under Articles 5 and 6 of ACIA.[1] Article 5, para. 1, states: *"Each Member State 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,*

[1] Notice of Arbitration, para. 45.

management, conduct, operation and sale or other disposition of investments in its territory."

37. Article 6, para. 1, states: *"Each Member State shall accord to investors of another Member State treatment no less favorable than that it accords, in like circumstances, to investors of any other Members State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."*

38 . In order to establish a breach of Articles 5 or 6, the Claimant must prove that Nyugen discriminated against its investments because of its nationality, and in particular, that
(1) Nyugen accorded treatment to its investments, and to the investments of domestic investors (under Article 5) or the investments of other Parties or non-Parties (under Article 6);
(2) such treatment was accorded "in like circumstances"; and
(3) the treatment accorded to the Claimant's investment was "less favorable" than that accorded to the investments of those other investors. The Claimant's allegations fail to meet these requirements.

39. Nyugen's decision to defer the development of the regulatory framework for the assessment of hydroelectric energy projects applied equally to every hydroelectric energy project proposed in Nyugen, whether it had made an application to the FIT Program or not. The Claimant's Notice of Intent ignores this fact and seeks to prove discrimination by comparing the treatment accorded to PAG's

project with treatment accorded in different circumstances to completely different types of projects.

40. First, it pleads that other renewable energy investments, including those of Ming Corp., which also invested in hydroelectric projects, received more favorable treatment because those projects were not delayed by a decision to defer their development until the applicable regulatory review processes could be fully developed. However, none of these proposed comparators involved hydroelectric energy projects. Second, the Claimant pleads that its investment was discriminated against because *"the Government of Nyugen ...arranged to relocate two gas-fuelled electricity generation facilities and to pay compensation to the investors that own them..."* but did not do so for it.[1] Put simply, the treatment of natural gas plants is neither relevant nor comparable to the regulation of hydroelectric energy projects, let alone unapproved and unconstructed ones. Neither the investments of Ming Corp. nor the gas plant owners were accorded treatment in like circumstances to the treatment accorded to the Claimant's investments. Third, there is no evidence that there existed any intent to discriminate against Fata or PAG, which makes this whole argument irrelevant in this arbitration.

B. Nyugen has Not Breached ACIA Article 11

[1] Notice of Arbitration, para. 46.

41. Article 11 of ACIA provides: *"Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security."*

42. A claimant alleging a breach of Article 11 bears the burden of first demonstrating the existence of a rule of international law to that effect. A claimant must then demonstrate that the impugned measure has breached this rule of international law.

43. In this case, the Claimant alleges that the decision of Nyugen to delay the development of the hydroelectric dam until a comprehensive regulatory framework for the assessment of such projects is established, and the Government's treatment of PAG after that deferral was announced, violate the *"principle of fair and equitable treatment."*[1] In particular, it alleges that the identified measures were *"arbitrary, irrational and discriminatory"*, *"unfair"* and that they *"violate the legitimate expectations"* of the Claimant and PAG.[2] However, contrary to the Claimant's apparent position, Article 11 does not require Nyugen to adhere to the autonomous *"principle of fair and equitable treatment."* Rather, it requires that Nyugen accord treatment in accordance with customary international law. None of the measures challenged by the Claimant fall below accepted international standards and breach Article 11.

[1] Notice of Arbitration, para. 43.
[2] Notice of Arbitration, para. 43.

44. First, Nyugen's decision to defer development of hydroelectric energy projects until a comprehensive regulatory framework for their review is established is consistent with the minimum standard of treatment required by Article 11. Nyugen adopted a cautious approach in the face of uncertainty with respect to the potential health, safety and environmental consequences of freshwater dams in the Nilganges River. Article 11 does not give a mandate to second-guess such legitimate exercises of regulatory authority. To the contrary, international law affords governments a high measure of deference with respect to such decision-making.

45. Moreover, such an approach could hardly have come as a surprise to the Claimant or PAG. In deciding to invest in a hydroelectric energy project, the Claimant knowingly entered a complex and unsettled regulatory environment. Indeed, prior to signing its FIT Contract, PAG was expressly warned by the NOPA that PAG bore the regulatory risks associated with an investment of this sort. Article 11 is not an insurance policy meant to protect against losses caused by investors making risky business decisions.

46. Second, Nyugen's treatment of PAG after the March 2016 decision to defer the development of hydroelectric energy projects is also consistent with the minimum standard of treatment that may be required under Article 11. The Claimant alleges that Nyugen has failed to comply with its "promises" that no penalties would be incurred by the Claimant or PAG as a result of Nyugen's March 2016 decision and that the PAG project would not be cancelled.[1]

[1] Notice of Arbitration, para. 43.

However, even if the alleged promises were made, the observance of such promises is not required by the customary international law minimum standard of treatment. Moreover, viewing the circumstances objectively, it would not have been reasonable for the Claimant or PAG to rely upon these alleged representations to make further investments. Further, as a matter of fact, Nyugen has not acted in a manner that is contrary to these alleged promises. No penalties have been applied to either the Claimant or PAG, and the PAG project has never been terminated.

47. The Claimant also alleges that Nyugen's decision not to accept any of PAG's alternative project proposals violates Article 11.[1] This claim is also meritless. There is no duty in customary international law for a government to take affirmative steps to mitigate an investor's alleged losses arising from reasonable and non-discriminatory changes to regulatory policy.

C. Nyugen Has Not Breached ACIA Article 14

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 nationalization ("expropriation"), [nota omissis] 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."

[1] Notice of Arbitration, para. 44.

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 Nyugen 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. Nyugen's March 2016 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 permanent. Second, the Claimant has retained its interest in PAG and PAG has retained its FIT Contract. The Claimant is in no worse a position than when it began its investment in 2013, because the regulatory uncertainty was the same.

51. The Claimant's allegation that the Government of Nyugen expropriated PAG's interest in the FIT Contract also cannot succeed because that interest is not an investment capable of being expropriated. The FIT Contract was expressly contingent on regulatory approvals which were—and remain—highly uncertain. As such, it was not capable of conveying "a reasonably-to-be-expected economic benefit" capable of being expropriated.

52. Finally, even if the Tribunal were to find that the deferral had the effect of substantially depriving the Claimant of its investment in PAG or PAG of its FIT Contract, the deferral cannot be *"tantamount*

to expropriation" because it was a bona fide, non-discriminatory governmental decision implemented in the public interest. Article 14 does not prohibit such legitimate governmental decision-making.

V. THE CLAIMANT'S DAMAGE CLAIMS ARE UNSUSTAINABLE

53. A claimant must establish a sufficient causal link between the alleged breaches of ACIA and the damages that it claims. The Claimant here has not even attempted to meet its burden or establish the facts necessary to prove the damages it claims. The Claimant provides no foundation for the assertion that the alleged breaches of ACIA caused it or PAG damages of "at least" US $400,000,000.

54. Moreover, the Claimant cannot show that Nyugen's measures were the proximate cause of the damages that it now claims it and PAG suffered. The PAG project was in the pre- construction phase. At the relevant time, PAG had not obtained the regulatory approvals required to begin the necessary testing and assessment of its proposed site related to obtaining a REA, let alone the construction of its proposed project. In fact, PAG has not, to date, commenced the process set out under the REA Regulation to be eligible to apply for the required REA. There is also no evidence that PAG obtained any of the federal or other approvals that would be necessary for the development and operation of the proposed hydroelectric energy facility.

55. There are no guarantees that, even if allowed to proceed with its applications for the relevant authorizations and approvals, PAG would receive the approvals and permits it needs. There are also no guarantees that the project could be constructed in the timelines required under the FIT Contract, and thus, no guarantees that PAG would not find itself in breach of its FIT Contract which could then be terminated by the NOPA. Furthermore, in light of the novelty and magnitude of the proposed project, there are no guarantees that it could be constructed economically such that PAG and the Claimant would be able to generate any profits, even under the rates provided for in the FIT Program.

56. Finally, in the circumstances of this case, the Claimant should not be permitted to recover its and PAG's actual expenditures or "sunk costs". Some of those expenditures seem to have been made after the alleged breach, and thus cannot be recovered in this proceeding. With respect to those expenditures made before the Government of Nyugen's March 2016 decision, the Claimant chose to make those investments with full knowledge of the risky nature of its business proposal. It should not now be permitted to use ACIA to retroactively insulate itself against the risks that it willingly accepted in making its investments.

VI. RESPONSE TO RELIEF SOUGHT

57. For the reasons outlined above, Nyugen respectfully requests that:

(a) The Tribunal grants provisional measures, pursuant to SIAC Investment Arbitration Rules Article 27, in combination with Article 24, in the amount of Respondent's expected procedural expenses for legal representation, the arbitral tribunal and the administrative costs. These costs should be paid into an escrow account under the supervision of the Arbitral Tribunal. In addition, Respondent asks the Tribunal to grant further provisional measures requiring Claimant to disclose details of the third-party funder in the outcome of the proceeding, and whether the third party funder has committed to undertake adverse costs liability;

(b) The Tribunal dismiss all of Claimant's claims in their entirety; and

(c) Pursuant to SIAC Investment Arbitration Rules 33, 34 and 35, the Tribunal require the Claimant to bear all costs of the arbitration, including Colomba's costs of legal assistance and representation; and

(d) The Tribunal grant any other relief it deems appropriate.

Respectfully submitted by the Government of Colomba.

Contact

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