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

BETWEEN:

GLOBAL ENERGY HOLDING, INC.

Claimant

and

KINGDOM OF SUNDA

Respondent

GOVERNMENT OF SUNDA'S RESPONSE TO THE NOTICE OF ARBITRATION

3 September 2017

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

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 Sunda provides this Response to the Notice of Arbitration filed by Global Energy Holding Inc. ("the Claimant" or "Global").

2. The Respondent is the Kingdom of Sunda. Sunda'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, SUNDA

II. FACTUAL BACKGROUND

A. Ashanti's Efforts to Modernize and Restructure Electricity Generation

3. In the late 1990s, it became clear that Ashanti's old state-owned, vertically integrated electricity utility, Ashanti Hydro, could no longer efficiently forecast, generate, transmit and distribute electricity throughout the Province. In 2005, the Government of Ashanti 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 Ashanti intervened to temporarily freeze electricity prices.

4. Following the 2006 Provincial election, the new Government of Ashanti recognized that it would soon face electricity shortfalls and thus had to increase electricity supply in the Province. In fact, between 1999 and 2006, Ashanti's generation capacity had fallen by 6%, while electricity demand had grown by 8.5%.[1] In March 2006, the Ashanti Electricity Company ("SCEC"), an independent entity responsible for the day-to-day operation of the electrical system in Ashanti, 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 Ashanti'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.

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

6. Beginning in 2007, the Government of Ashanti began to explore the use of alternative and renewable sources of electricity generation, such as solar (photovoltaic), wind, biomass,

[1] Ashanti' 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 Ashanti 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).

biogas and hydroelectric. As a first step, Ashanti enacted the provincial *Electricity Renovation Act, 2007* ("ERA").[3] The ERA was designed 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 SCPA,[4] that would be responsible for the "procurement of electricity supply and capacity,"[5] including supply and capacity from clean and renewable energy sources.[6] The SCPA's role is not to create, administer or enforce the health, safety and environmental regulations relating to electricity generation. That role belongs solely to the relevant government ministries.

7. Between 2007 and 2012, the Government of Ashanti and the SCPA (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. 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 SCPA 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 Ashanti began the development of the largest renewable electricity initiative in Ashanti. This critical initiative had several components, including the *Law for Sustainable Energy, 2012*.[7]

9. The GEGEA amended the *Electricity Act, 1996* to authorize the Ashanti Head of Department of Energy to direct the SCPA to develop a Feed-in-Tariff Program ("FIT Program").[8] 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 *Green Energy and Green Economy Act, 2012* ... and is critical to Ashanti's success in becoming a place where most of its energy needs are produced locally and in an environmentally friendly way.[9]

10. The SCPA began taking applications for the FIT Program on October 1, 2013. In order to implement the FIT Program, the SCPA 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 SCPA received a total of 350 applications for projects that would generate over 5,000 MW. Of these, the SCPA received 5 applications for biogas, 9 applications for biomass, 6 applications for landfill gas, 165 applications for solar PV, and

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[3] Provincial *Electricity Renovation Act,* adopted on February 15, 2007, c. 23.
[4] Provincial *Electricity Act,* 1996, s. 13.1(1): ("A corporation without share capital to be known as the Ashanti Power Authority...is hereby established."). While the Head of Department of Energy has the authority to appoint certain members of the SCPA'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 SCPA such as increasing generation capacity from renewable energy sources, *Ibid,* s. 13.30(2), the SCPA 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.
[5] *Ibid,* s. 13.2(5)(b)-(c).p.
[6] *Ibid,* s. 13.32.
[7] *Law for Sustainable Energy*, adopted on June 30, 2012, c. 12 (Tab 8).
[8] *Electricity Act (amended),* 2012, s. 15.15.
[9] Letter from Suna Rumanaya, Head of Department of Energy and Infrastructure to Colin Anderson, Chief Executive Officer, Ashanti Power Authority (September 24, 2012).

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 SCPA offered 187 FIT Contracts for a total of almost 3,200 MW of potential generation capacity.[10]

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

12. While renewable energy projects cause less pollution than coal-fired power plants, they must still comply with health, safety and environmental regulations with respect to their development and operation. The Government of Ashanti consistently communicated this to FIT Program applicants. So did the SCPA. In the same vein, both the Government of Ashanti and the SCPA also clarified that an award of a FIT Contract by the SCPA was not an authorization from the Ashanti Government to proceed with a project. Indeed, as noted above, while the SCPA 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 Ashanti. 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 Ashanti

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 Ashanti'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 Ashanti has moved slowly with respect to hydroelectric energy facilities. For example, in November 2006, the DNR decided to defer consideration of hydroelectric energy power development to gain a better scientific understanding of its impacts on the

[10] Ashanti Power Authority News Release: "Ashanti 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.

Lago Chiriquí—which is a lake that provides more than 80% of Ashanti's rural residents with drinking water, and supports Ashanti's fishing and tourism industries.[11]

17. This deferral lasted until January 17, 2012, when the then Head of Department of Natural Resources announced that DNR "was lifting the deferral and would process the applications received, while being prepared to accept new applications."[12] The lifting of the deferral meant that new applications for access to Public Land would be reviewed by DNR. However, site access was no guarantee that a project would receive the permits and authorizations required to proceed to development. It did not give a proponent the right to build projects on a site or even complete any exploratory work or testing. Rather, obtaining such site access would only have meant that a proponent could proceed to apply for the other needed regulatory approvals.

18. Thus, while applications could be made under the FIT Program for hydroelectric energy projects and FIT Contracts could be entered into with the SCPA 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.

19. 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.

20. 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.[13] 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.

21. 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,"[14] and how Public Land should be made available to hydroelectric energy developers.

22. In total, over 380 comments were received on the two postings, most of which opposed the development of hydroelectric energy power in Ashanti. DNR also held engagement sessions with industry, indigenous communities and other stakeholders on the proposal

[11] Government of Ashanti, Ashanti' Riverbed and Lakeside Strategy 2017, pp. 8, 9.
[12] Ashanti News Release: "Ashanti Lays Foundation For Hydroelectric Power Stations" (January 17, 2013).
[13] See Sunda 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).
[14] Ashanti Policy Proposal Notice: Hydroelectric energypower: Consideration of Additional Areas to be Removed from Future Development (August 18, 2015).

during 2015.

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

E. HACO's Proposed King River Hydroelectric Project

24. Claimant and HACO have long been operating in Ashanti, 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 GEGEA and the creation of the FIT Program, HACO submitted Public Land applications to develop a hydroelectric energy facility (the "HACO Project"). The proposed HACO Project was a massive endeavor. HACO proposed to construct a 300 meter long, and 80 meter high dam that would be capable of generating 1,450 MW of electricity, on the King River at a specified location near the island of Palang, south of the City of Wasi.

25. 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 Ashanti, and one for the HACO Project in the King River. HACO's FIT application was one of only four received by the SCPA for hydroelectric energy projects between October 1 and November 30, 2013. Moreover, the generating capacity of the project proposed by HACO was approximately 10 times larger than the three other proposed hydroelectric energy projects combined.

26. The SCPA offered HACO 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 HACO was open for a period of 10 business days. This standard offer contract included a requirement that HACO bring the project into operation five years after the contract date.[15] If it failed to do so, there were serious financial consequences. Moreover, if its failure to do so persisted for 18 months, the SCPA had the right to terminate the FIT Contract and to retain the deposits made by HACO as well as pursue other damages.[16] The offered FIT Contract also allowed HACO 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]."[17]

27. As described above, the regulatory process for hydroelectric energy projects was not fully developed at the time that the SCPA made this contract offer to HACO. As such, when HACO received the offer, it met with the SCPA on May 13, 2014 to discuss whether the SCPA would be willing to vary the terms of the contract to reflect the existing regulatory uncertainty.

28. The following day, SCPA Director of Contract Management Diane Goldsmith emailed HACO representative Peter Gallagher, 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. Global Energy Holding will have to determine whether or not it wants to accept the offered contract. ... The SCPA is not in a position to advise Global on how it ought to manage the regulatory risk associated with hydroelectric energy projects.[18]

[15] Ashanti Power Authority, Standard FIT Contract, v. 1.3.0, Exhibit A (Type 6: Hydroelectric Facilities) (Mar. 9, 2014).
[16] *Ibid*, s. 9.1(j), 9.2(a), 9.2(d)(ii) and 9.5.
[17] *Ibid*, p. 10.3(i).
[18] E-mail from Diane Goldsmith, Ashanti Power Authority to Peter Gallagher, HACO (May 14, 2014).

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

30. On August 2, 2014 the SCPA indicated that it would, at HACO's request, issue HACO 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. HACO executed its FIT Contract on August 10, 2014. HACO 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 which could restrict the development of hydroelectric energy facilities and directly affect HACO remained open for public comment.

31. By December 2015, the Claimant and HACO apparently realized that Ashanti would be proceeding far more cautiously with respect to the development of hydroelectric energy than they had gambled when HACO signed its FIT Contract ~~a few months earlier~~. As a result, on December 10, 2015 HACO claimed a *force majeure* event under its FIT Contract related to its inability to obtain the required regulatory approvals. The SCPA granted HACO *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 a Comprehensive Regulatory Framework Can be Established

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

33. By March 2016, the Government of Ashanti 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

> "Ashanti 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."[19]

This was exactly the type of regulatory risk that the Claimant and HACO knowingly accepted when HACO signed its FIT Contract.

34. As a result, HACO's project has been on hold since March 2016. Its FIT Contract has not been cancelled. HACO'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 Ashanti 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

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

fisheries reports in mid-2017.

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

35. 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 HACO have suffered damages, and that the challenged measures are attributable to Ashanti, and hence not to the Kingdom of Sunda. In this respect, the Claimant alleges that it is a Corporation organized under the laws of Bultan, which indirectly owns and controls HACO through a Luxembourg *société anonyme*. Claimant further alleges that HACO is an enterprise under Ashanti law, and that Claimant and HACO have suffered "at least" US $400,000,000 in damages as a result of certain measures of the Government of Ashanti and/or the SCPA. Since Global only indirectly owns HACO, 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, Ashanti reserves the right to object to the jurisdiction of the Tribunal.

36. In addition, in case the present dispute is not settled through negotiation and is instead submitted to arbitration, Ashanti asks for Global to provide guarantees for Ashanti's legal costs. The circumstances in which Global 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. ASHANTI HAS NOT BREACHED THE ACIA

37. The Claimant has alleged that the decision of Ashanti 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, HACO, were well-aware of the risks before HACO signed the FIT Contract. The non-discriminatory decision of Ashanti 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. Ashanti is fully protected under the ACIA by means of its Article 17, para. 1, sections. a), b), and f).

A. Ashanti Has Not Breached ACIA Articles 5 and 6

38. In its Notice of Arbitration, the Claimant alleges that certain Ashanti measures violate its rights under Articles 5 and 6 of ACIA.[20] 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, management, conduct, operation and sale or other disposition of investments in its territory."

39. 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

[20] Notice of Arbitration, para. 45.

disposition of investments."

40. In order to establish a breach of Articles 5 or 6, the Claimant must prove that Ashanti discriminated against its investments because of its nationality, and in particular, that (1) Ashanti 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.

41. Ashanti'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 Ashanti, 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 HACO's project with treatment accorded in different circumstances to completely different types of projects.

42. First, it pleads that other renewable energy investments, including those of Cheng P & S Corp., 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 Ashanti ...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.[21] 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 Cheng P & S 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 Global or HACO, which makes this whole argument irrelevant in this arbitration.

B. Ashanti has Not Breached ACIA Article 11

43. 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."

44. 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.

45. In this case, the Claimant alleges that the decision of Ashanti 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 HACO after that deferral was announced, violate the "principle of fair and equitable treatment."[22] 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 HACO.[23] However, contrary to the Claimant's apparent position, Article 11 does not require Ashanti to adhere to the autonomous "principle of fair and equitable treatment." Rather, it requires that Ashanti accord treatment in accordance with customary international law. None of the measures challenged by the Claimant fall below accepted international standards and breach Article

[21] Notice of Arbitration, para. 46.
[22] Notice of Arbitration, para. 43.
[23] Notice of Arbitration, para. 43.

11.

46. First, Ashanti'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. Ashanti adopted a cautious approach in the face of uncertainty with respect to the potential health, safety and environmental consequences of freshwater dams in the King 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.

47. Moreover, such an approach could hardly have come as a surprise to the Claimant or HACO. 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, HACO was expressly warned by the SCPA that HACO 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.

48. Second, Ashanti's treatment of HACO 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 Ashanti has failed to comply with its "promises" that no penalties would be incurred by the Claimant or HACO as a result of Ashanti's March 2016 decision and that the HACO project would not be cancelled.[24] 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 HACO to rely upon these alleged representations to make further investments. Further, as a matter of fact, Ashanti has not acted in a manner that is contrary to these alleged promises. No penalties have been applied to either the Claimant or HACO, and the HACO project has never been terminated.

49. The Claimant also alleges that Ashanti's decision not to accept any of HACO's alternative project proposals violates Article 11.[25] 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. Ashanti Has Not Breached ACIA Article 14

50. 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."

51. 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 Ashanti 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).

52. Ashanti's March 2016 decision to defer the development of hydroelectric energy projects until a comprehensive regulatory approvals process is established did not substantially

[24] Notice of Arbitration, para. 43.
[25] Notice of Arbitration, para. 44.

deprive the Claimant of any investment. First, the current deferral is not intended to be permanent. Second, the Claimant has retained its interest in HACO and HACO 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.

53. The Claimant's allegation that the Government of Ashanti expropriated HACO'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.

54. Finally, even if the Tribunal were to find that the deferral had the effect of substantially depriving the Claimant of its investment in HACO or HACO 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

55. 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 HACO damages of "at least" US $400,000,000.

56. Moreover, the Claimant cannot show that Ashanti's measures were the proximate cause of the damages that it now claims it and HACO suffered. The HACO project was in the pre-construction phase. At the relevant time, HACO 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, HACO 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 HACO obtained any of the federal or other approvals that would be necessary for the development and operation of the proposed hydroelectric energy facility.

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

58. Finally, in the circumstances of this case, the Claimant should not be permitted to recover its and HACO'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 Ashanti'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

59. For the reasons outlined above, Ashanti 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 Sunda's costs of legal assistance and representation; and

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

Respectfully submitted by the Government of Sunda.