

**IN THE MATTER OF AN ARBITRATION
IN ACCORDANCE WITH THE ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA)
NPC RULES**

- BETWEEN -

FRAZER SOLAR GmbH

Claimant

- and -

THE KINGDOM OF LESOTHO

Respondent

STATEMENT OF CLAIM

7 OCTOBER 2019

withers LLP

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I. INTRODUCTION

1. This Statement of Claim is submitted on behalf of Frazer Solar GmbH (the "**Claimant**" or "**FSG**"), a company incorporated under the laws of the Federal Republic of Germany ("**Germany**"), pursuant to the Tribunal's Procedural Order No. 1 dated 16 September 2019. It sets out the factual and substantive legal grounds entitling the Claimant to compensation from the Kingdom of Lesotho ("**Lesotho**" or the "**Respondent**") in connection with breaches by the Respondent of an agreement to finance, supply and install energy efficient and renewable energy products in Lesotho dated 24 September 2018 (the "**Supply Agreement**").¹

II. EXECUTIVE SUMMARY

2. This dispute relates to the complete failure by the Respondent to comply with its obligations under the Supply Agreement and proceed with a solar energy project (the "**Project**") which had the potential to greatly assist Lesotho by reducing the cost of electricity through significantly expanding the use of renewable energy in that country.
3. FSG, through its founder and managing director, Mr Robert Frazer, spent over two years planning and negotiating the details of the Project at the highest levels of the Respondent's Government, including with its Prime Minister. The Supply Agreement was agreed to by the Respondent and signed, on behalf of the Respondent, by the Minister in the Prime Minister's Office. However, almost immediately following the Respondent committing to proceed with the project, it breached its obligations and failed to honour its commitments. As a consequence, FSG is entitled to compensation as a result of the Respondent's material breaches of the Supply Agreement.
4. In a little more detail, this dispute arises out of the Supply Agreement entered into between the parties pursuant to which the Respondent engaged FSG to develop a large-scale renewable energy project. Under the terms of the Supply Agreement, FSG was to provide the Respondent with a complete energy solution. This consisted of supplying and installing renewable energy products, including solar hot water heaters, LED lights, photovoltaic panels ("**Solar PV**") and solar lanterns, as well as lining up finance for the project through a German Government-owned bank. The finance offering meant that the solar project would have had no upfront financial outlay for the Respondent and the electricity costs savings achieved from the implementation of the Project would have far exceeded the repayments under the loan. As a result, the project would have been cash-flow positive for the Respondent and would have helped to make the country energy self-sufficient.

¹ Supply Agreement entered into between Frazer Solar GmbH and Office of the Prime Minister on behalf of the Government of Lesotho, 24 September 2018 ("**Supply Agreement**"), C-003.

5. Under the Supply Agreement, the parties agreed that the Respondent would pay FSG a total, fixed contract price of €100,000,000 to develop the Project. The contract price was to be paid in five instalments by drawing down on the finance which was to be provided by a bank that is owned by the German Government. The Supply Agreement also provided FSG with the right of first opportunity to develop all other renewable energy projects in Lesotho for a period of five years.
6. Having entered into the Supply Agreement, the Respondent failed to carry out its obligations in a number of material respects, including by failing to fulfil its obligation to complete the finance arrangements and to pay the contract price. While FSG remained ready to perform the Supply Agreement, the Respondent did not engage with FSG's efforts to commence the Project or reach an amicable settlement. By March 2019, the Respondent had still not complied with its obligations under the Supply Agreement and so FSG sent to the Respondent a notice of breach. By May 2019, it was reported in the Lesotho press that a solar project was being negotiated in the region of Mafeteng between the Lesotho Government and a Chinese state-backed consortium – a breach of FSG's right of first opportunity under the Supply Agreement. On 11 July 2019, FSG alerted the Respondent to its continuing obligation to honour FSG's right of first opportunity in relation to renewable energy projects in Lesotho. Again, the Respondent did not respond or engage with FSG. Having received no response to its notices, FSG terminated the Supply Agreement on 29 July 2019 and commenced these proceedings.
7. As a result of the Respondent's material breaches, FSG has been denied the value of the Supply Agreement and is entitled to compensation for its losses. In addition to the damages provision which is contained in the Supply Agreement and requires the Respondent to pay FSG a liquidated damages sum in the event of a material breach of the Supply Agreement with respect to the Project, FSG has a valuable right of first opportunity to renewable energy projects in Lesotho for a period of five years. As an alternative damages claim, independent valuation experts, FTI Consulting ("FTI"), have valued FSG's losses at the time of the notice of the breach of contract in March 2019, in addition to the loss of opportunity to participate in the solar project at Mafeteng.
8. This Statement of Claim is accompanied by the Witness Statement of Mr Robert Frazer. It is also accompanied by an expert report prepared by Mr Henry Pannell and Dr Liberty Mncube, economic and valuation experts from FTI (the "**FTI Expert Report**").
9. This Statement of Claim is structured as follows. **Section III** describes the relevant facts of the dispute, including the nature of the project which was the subject of the Supply Agreement and the Respondent's failure to perform under that contract. **Section IV** establishes the basis for the Tribunal's jurisdiction over the dispute and the law applicable to the dispute. **Section V** provides an analysis of the Respondent's obligations under the

Supply Agreement and how the Respondent materially breached those obligations.

Section VI explains the damages owed to FSG under the Supply Agreement. **Section VII** sets out FSG's request for relief.

10. Also submitted with this Statement of Claim are the Claimant's factual exhibits numbered **C-001 to C-067**, and legal authorities numbered **CLA-001 to CLA-023**.

III. FACTS RELEVANT TO THE DISPUTE

A FSG was founded by Robert Frazer who has extensive experience developing solar energy projects

11. FSG was founded by Mr Frazer who is a New Zealand national, currently residing in Australia. Prior to founding FSG, Mr Frazer gained extensive experience developing and managing solar and renewable energy projects across the world.² He was the General Manager (International) at Rheem Australia Pty Ltd ("Rheem"), which is an Australian company that manufactures hot water and renewable energy products, including solar hot water systems (also known as "geysers").³ While at Rheem, amongst other things, Mr Frazer managed projects for the supply and installation of solar hot water systems sold under the brand name "**Solahart**" in various international markets, including in Lesotho. An example of a solar hot water system from one of those projects is shown below.



Figure 1: Photo of Solahart hot water system

² Witness Statement of Robert Frazer, 4 October 2019, ¶ 7.

³ See Rheem website, "Discover Solar", undated, <https://www.rheem.com.au/discover-solar>, C-007.

12. Some of the more prominent projects which Mr Frazer managed were the installation of solar hot water units for a construction camp for approximately 20,000 workers in the United Arab Emirates (the "UAE"), the installation of solar hot water units at the Abu Dhabi campus of New York University in the UAE, the supply of approximately 20,000 solar hot water units as part of the South African government's solar hot water project in around 2011-2012, and the installation of approximately 1,000 solar hot water units in around 200 HIV clinics in Lesotho from 2013-2015. This last project in Lesotho was funded by USAID and was known as the "Millennium Challenge Project".
13. While Mr Frazer was working at Rheem, he came to understand that one of the issues which inhibited governments from implementing large-scale solar projects was that there was a lack of obtainable financing to fund the upfront cost of the projects.⁴ This realisation led Mr Frazer to create a business development strategy for Rheem which involved arranging finance to cover the upfront costs of delivering renewable energy projects and to approach governments to develop renewable energy projects using Solahart products (the "**Solahart Business Strategy**").⁵
14. To advance the Solahart Business Strategy, in December 2015 Mr Frazer travelled to South Africa to meet with officials from the South African government to discuss a potential solar project. Mr Frazer had meetings with officials from the South African ministries of Health, Education, Defence and Finance and he gave presentations on the Solahart Business Strategy.⁶ In January 2016, Mr Frazer travelled to meet with officials from the Lesotho ministries of Defence, Health, Energy, Police, Public Works, Education, Foreign Affairs and Finance to discuss the Solahart Business Strategy.⁷
15. Mr Frazer received an overwhelmingly positive response to the Solahart Business Strategy from the government officials in South Africa and Lesotho. However, in early 2016, Mr Frazer was informed that Rheem was moving its production facilities from Australia to Vietnam and closing down Solahart.⁸ As a consequence, the Solahart Business Strategy was no longer viable.
16. In March 2016, Mr Frazer left Rheem to establish his own business focussed on supplying renewable energy products and services, utilising the experience he gained at Rheem.⁹ This business traded under the name "**Frazer Solar**" and was later incorporated as FSG

⁴ Witness Statement of Robert Frazer, 4 October 2019, ¶ 8.

⁵ Witness Statement of Robert Frazer, 4 October 2019, ¶ 8; Solahart Presentation, "Solar Water Geyser: 100% Loan Financing Proposal", December 2015, **C-008**.

⁶ Solahart Presentation, "Solar Water Geyser: 100% Loan Financing Proposal", December 2015, **C-008**.

⁷ Letter from Solahart to S. Letsie, 18 January 2016, **C-009**; Market Visit Program, Austrade, 25 -27 January 2016, **C-010**.

⁸ Witness Statement of Robert Frazer, 4 October 2019, ¶ 17.

⁹ Witness Statement of Robert Frazer, 4 October 2019, ¶ 18.

in January 2018. One of Mr Frazer's first steps on setting up this business was to contact KBB Kollektorbau GmbH ("KBB")¹⁰ to supply wholesale solar products. KBB is a world-class solar product manufacturer based in Berlin, Germany and is one of the largest solar hot water system producers in Europe. As Mr Frazer's business developed - and in order to leverage KBB's expertise and to ensure a reliable supply of world-class solar products - Mr Frazer formalised the partnership with KBB and KBB became a minority shareholder on FSG's incorporation.¹¹

B The Project was to provide a complete energy solution to the Respondent

17. On leaving Rheem and establishing the FSG business, Mr Frazer developed a business model that would provide a complete solar energy solution to governments of developing countries. The FSG strategy was to combine the supply of renewable energy products and services with the provision of finance to cover the project expenses (the "**FSG Business Strategy**"). The energy costs savings over the life-cycle of the project would more than cover the financing costs, and therefore each project would be cash-flow positive and produce a net saving for the host government. As Mr Frazer explains:

*"I could see that there could be significant social and economic value to governments of host countries, like Lesotho, where typically electricity is imported and is very expensive, but sunshine is a plentiful and a relatively low cost source of energy which could be adapted to power SHWs and to generate electricity."*¹²

18. To progress the FSG Business Strategy, Mr Frazer contacted KfW IPEX-Bank GmbH ("KfW") to arrange for financing to be provided in support of the FSG Business Strategy in relation to a potential solar energy project in Lesotho. KfW is a 100% subsidiary of the KfW Banking Group which is a German government-owned bank with total assets of approximately €510 billion and annual new commitments of approximately €80 billion.¹³ KfW agreed to provide the necessary financing which was also to be insured by Euler Hermes, the German government official export credit insurance company.
19. With the financing to develop a solar project arranged, the FSG business turned its focus to developing a solar project in Lesotho. As Mr Frazer explains, Lesotho presented itself as a compelling opportunity to pursue the FSG Business Strategy for a number of reasons, including:

¹⁰ KBB Solar Collectors Brochure, undated, **C-011**. See also KBB website, <https://www.kbb-solar.com/>.

¹¹ Witness Statement of Robert Frazer, 4 October 2019, ¶ 22; Certificate of Registration for Frazer Solar GmbH, Commercial Register B, incorporated on 12 January 2018, English translation and German original, **C-001**.

¹² Witness Statement of Robert Frazer, 4 October 2019, ¶ 18.

¹³ Witness Statement of Robert Frazer, 4 October 2019, ¶ 21.

- (1) the Government of Lesotho ("GOL") had published an energy policy, the "Energy Policy 2015-2025",¹⁴ which included as its core objective the need to "*improve energy security situation by reducing reliance on... imported electricity*", and identified solar water heating systems, LED lighting and electricity generating solar panels as ways to implement that objective;
- (2) the UN was supporting renewable investment in Lesotho by private sector companies, via its "*Sustainable Energy For All*" global renewable energy initiative;¹⁵
- (3) Lesotho has very high levels of solar radiation (5,700 to 7,700 MJ/m² per annum) and sunshine hours (3,211 per annum), which are at levels of 2-3 times the average in Europe;¹⁶ and
- (4) the GOL was importing over 40% of its electricity needs from ESKOM in South Africa and EDM in Mozambique.¹⁷

One of the key reasons why developing solar projects in Lesotho is desirable is because Lesotho was (and remains) in real need of a solution to a growing energy crisis. As the FTI Expert Report explains, Lesotho is currently not able to generate electricity self-sufficiently. South Africa and Mozambique provide a substantial proportion of the Lesotho electricity supply, which is imported at prices over several higher than the price of electricity generated locally in Lesotho.¹⁸ In 2017/18, imported electricity represented 41% of the total volume, yet it accounted for 86% of electricity spending costs.¹⁹ That is, in 2017/18, LEC spent approximately M372.9 million (or €24.9 million) on imported electricity for that year alone.

¹⁴ *Government of Lesotho Energy Policy 2015-2025*, undated, C-012.

¹⁵ "Sustainable Energy For All", United Nations, undated, C-013; see also <https://www.un.org/millenniumgoals/pdf/SEFA.pdf>.

¹⁶ *Global Horizontal Irradiation: Lesotho*, World Bank, 2017, C-014; *Global Horizontal Irradiation: Germany*, World Bank, 2017, C-015.

¹⁷ *Tariff Review Application 2017/18*, Submitted to LEWA Board of Directors, Lesotho Electricity Company (2017), 1 March 2017, C-016; Witness Statement of Robert Frazer, 4 October 2019, ¶ 24.

¹⁸ *Tariff Review Application 2017/18*, Submitted to LEWA Board of Directors, Lesotho Electricity Company (2017), 1 March 2017, C-016.

¹⁹ *Tariff Review Application 2017/18*, Submitted to LEWA Board of Directors, Lesotho Electricity Company (2017), 1 March 2017, C-016.

Intake Point	Energy Purchases (kWh)	kWh %	Total Spending (Maloti)	M %	M/kWh
Muela (Lesotho)	519,187,043	59%	62,302,445	14%	0.12
Eskom (South Africa)	268,636,680	30%	247,145,745	57%	0.92
EDM (Mozambique)	97,500,000	11%	125,775,000	29%	1.29
Total	885,323,723	100 %	435,223,190	100 %	0.49

Figure 2: The LEC's 2017/18 bulk supply purchase estimates (as at April 2018)²⁰

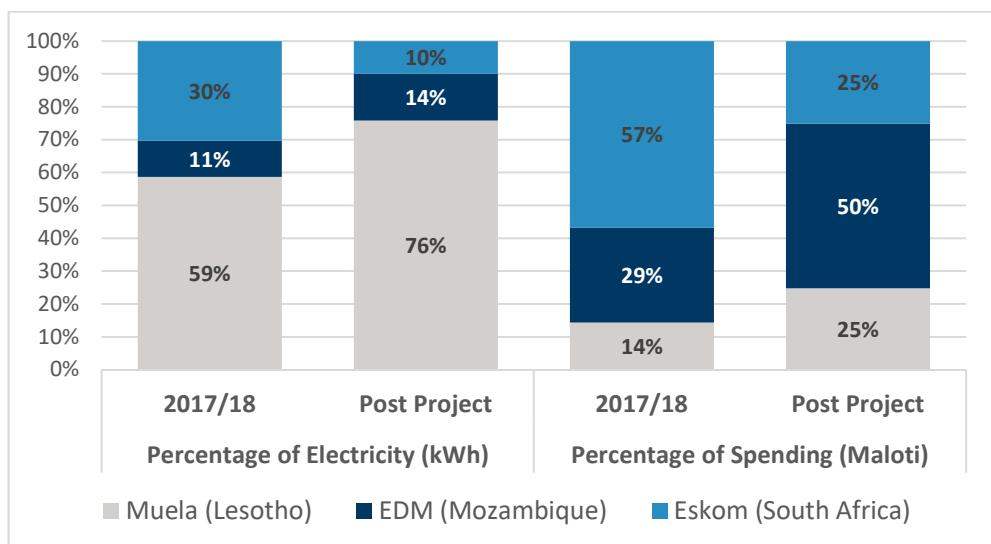


Figure 3: The LEC's electricity purchases before and after the project²¹

20. The overall consumption of electricity in Lesotho has increased by 186% (257.9 GWh to 737.3 GWh) between 2001 and 2016.²² This is mostly due to an increasing number of households connected to the electricity grid. Nevertheless, in 2017, the World Bank reported that still only 33.73% of the population of Lesotho had access to electricity.²³ It is estimated that household electrification rates could reach 54% by 2030, meaning that consumption and peak demand will likely increase dramatically over the next decade.²⁴

²⁰ FTI Report, ¶ 4.22.

²¹ FTI Report, ¶ 4.24.

²² Electricity Supply Cost of Service Study – LEWA Lesotho: Final Report, MRC Group of Companies, August 2018, C-017.

²³ Sustainable Energy for All (SE4ALL Global Tracking Framework) database, prepared by the World Bank, International Energy Agency, and the Energy Sector Management Assistance Program, undated, C-018.

²⁴ Electricity Supply Cost of Service Study – LEWA Lesotho: Final Report, MRC Group of Companies, August 2018, C-017.

21. Due to the high price of imported electricity, which has been increasing at a much faster rate than overall consumer price inflation in Lesotho, the price of electricity in Lesotho has been increasing. This has resulted in large tariff increase applications.²⁵ Simultaneously, the Lesotho Energy Company has been unable to pass through its cost increases. For example, it applied for a 17.1% average tariff increase for 2019/20 but was granted 0%. This position is unsustainable in the long-term.²⁶
22. In terms of other energy resources, Lesotho does not have any proven fossil fuel sources and the country's forest reserves are significantly diminished.²⁷ Many households rely on gas, paraffin, wood, coal, or dung as sources of energy. The use of these in a domestic context can lead to negative health implications. Accordingly, the characteristics of the Lesotho energy market are (and remain) highly conducive for large-scale solar projects, which would alleviate many of the issues described by reducing electricity consumption.
23. Against the background of this situation with respect to the electricity market in Lesotho, in July 2017, Mr Frazer renewed efforts to pursue a solar project in Lesotho. He re-established contact with his former colleague, Mr Seqhebolla Letsie, who was the Solahart distributor in Lesotho when Mr Frazer was at Rheem. Through Mr Letsie, a letter was sent on behalf of Mr Frazer to the Prime Minister's Office requesting a meeting.²⁸ Mr Frazer also provided Mr Letsie with a presentation outlining the FSG business proposal for a €50-100 million solar project based on the FSG Business Strategy.²⁹ This formed the basis for future discussions which eventually led to the project which was the subject of the Supply Agreement (the "**Project**").
24. The initial FSG business proposal contained a summary of its strategy and the key points were as follows:
 - *100% loan finance of €50-100 million from the German government at preferential interest rates*
 - *Replace existing electric water heaters with solar water heaters*
 - *Replace existing lighting with highly efficient LED lights*
 - *Install roof top PV*

²⁵ LEWA's Determination of Lesotho Energy Company's (LEC's) Tariff Application for 2017/18, Lesotho Electricity and Water Authority (LEWA), April 2017, **C-019**.

²⁶ Lesotho Electricity and Water Authority Annual Report 2017/2018, Lesotho Electricity and Water Authority (LEWA), 23 October 2018, **C-020**.

²⁷ Government of Lesotho Energy Policy, 2015-2025, undated **C-012**; Investment plan for Lesotho, Department of Energy, Ministry of Energy and Meteorology, GOL, 26 October 2018, **C-021**.

²⁸ Draft letter from R. Frazer to Prime Minister's office, undated, **C-022**. R. Frazer states that he was told by S. Letsie that he had sent the draft letter to the Prime Minister's Office.

²⁹ Email from R. Frazer to S. Letsie, 10 July 2017, **C-023**; FSG Presentation, "€50-100 Million Solar Project Proposal", undated, **C-024**.

- *Install vanadium battery storage*
 - *For Lesotho government buildings*
 - *4-5 year project, 7-10 year loan, up to 25 year warranty*
 - ...
 - *Large quantities of electricity will be saved/produced*
 - *Can mix-and-match product offering (hot water/PV/lights/battery storage) to maximise benefits for each site*
 - *Hundreds of jobs created*
 - *Overall the project is cash flow positive so in effect “costs nothing” & is “free”*
 - *No upfront payment or deposit required*
 - *The project can start immediately*³⁰
25. As the negotiations between FSG and the GOL progressed, the details of the proposal evolved, but the fundamentals of the FSG Business Strategy remained the same. These consisted of:
- (1) 100% loan finance for the Project arranged by FSG;
 - (2) supply and installation of renewable energy products by FSG; and
 - (3) significant energy savings resulting in a net positive cash flow for the GOL, with no upfront costs.
26. As a result, the Project was to provide an efficient and complete energy solution for Lesotho, with minimal outlay.
- C The Project was negotiated for over a year and was supported at the highest levels of the Lesotho Government**
27. Following the initial introductory letter and Project proposal being provided to the Prime Minister's Office, Mr Frazer travelled to Lesotho on 2 August 2017 for the start of over a year-long negotiation process with officials at the highest level of the Lesotho government, including the Prime Minister. Indeed, the Prime Minister of Lesotho, Mr Thomas Motsoahae Thabane, was very interested in the FSG business proposal and consistently supported the Project.
28. The Project negotiations commenced with a meeting, on 3 August 2017, between Mr Frazer and Minister Temeki Tsolo, who was the Minister in the Prime Minister's Office and

³⁰ FSG Presentation, "€50-100 Million Solar Project Proposal", undated, C-024.

the Minister charged with taking the Project forward.³¹ During that meeting Minister Tsolo expressed his enthusiasm for starting the Project immediately.³²

29. Following the very positive response from the Prime Minister and Minister Tsolo, follow up meetings took place in Lesotho in early October 2017 between Mr Frazer, who was accompanied by KBB's Managing Partner, Mr Stephan Fintelmann, and senior Lesotho government officials. In addition to meeting again with Minister Tsolo, Mr Frazer and Mr Fintelmann met with the Principal Secretary for the Ministry of Energy, Mr Mamaisane, the Minister of Public Works, Mr Lehlohonolo Moramotse, and the Principal Secretary for the Ministry of Public Works, Mr Hlalele. All the officials expressed strong support for the Project. Following those meetings, Minister Tsolo signed and sent a letter to KfW requesting an indicative term sheet for €100million financing in support of the Project.³³
30. On 8 October 2017, Mr Frazer emailed Minister Tsolo to plan the next steps to progress the Project. He wrote:

"I must admit I am very excited about this project. During the meeting with Public Works I heard that many schools have no electricity or hot water. I am also aware that many clinics require new hot water systems. I would feel so humbled, happy and proud to know that in addition to the direct employment created to install the products this project could help solve these issues and dramatically improve the living standards for hundreds of thousands of Basotho. I can't wait to start!"³⁴

31. In early November 2017, meetings were arranged between Mr Frazer and the Minister of Finance, Dr Moeketsi Majoro, as well as with Minister Tsolo, to discuss the benefits of the Project and progress its implementation.³⁵ Those meetings went well and a steering committee with Minister Tsolo, Minister Majoro and Minister Moramotse was established.³⁶
32. On 20 November 2017, Minister Tsolo, on behalf of the GOL, and Mr Frazer, on behalf of FSG, signed a (non-legally binding) Memorandum of Understanding (the "**MOU**") to progress the Project. The MOU stated, amongst other things:
 - (1) that its purpose was to "*formalise the objective of the parties to work together with each other and the German finance providers to prepare a finalised Project proposal*

³¹ Emails from R. Frazer to T. Tsolo and M. Ntobaki, 29 September 2017 to 3 October 2017, **C-025**.

³² Witness Statement of Robert Frazer, 4 October 2019, ¶ 27; Email from M. Ntobaki to R. Frazer, 2 August 2017, **C-026**.

³³ Witness Statement of Robert Frazer, 4 October 2019, ¶ 29; Email from M. Ntobaki to KfW attaching letter from T. Tsolo, 5 October 2017, **C-027**; Letter from T. Tsolo to KfW, 5 October 2017, **C-028**.

³⁴ Email from R. Frazer to T. Tsolo, 8 October 2017, **C-029**.

³⁵ Witness Statement of Robert Frazer, 4 October 2019, ¶ 31; Letter from R. Frazer to M. Majoro, 17 October 2017, **C-030**; Photograph of business card of M. Majoro and date stamp, 2 November 2017, **C-031**; Email from R. Frazer to T. Tsolo and M. Majoro, 9 November 2017, **C-032**; FSG Presentation, "€100 Million Solar Project: Energy Efficiency and Employment Creation", 9 November 2017, **C-033**.

³⁶ Witness Statement of Robert Frazer, 4 October 2019, ¶ 31.

for approval by [the GOL] in a timely fashion in accordance with the Project timeframes";

- (2) *that "the Project is affordable as 100% of the Project costs will be covered by loan finance provided utilising official export credit from the German government owned institutions of KfW-Ipex Bank and Euler-Hermes";*
 - (3) in Schedule 1, that the proposed financing arrangements would cover "*100% of Project costs*" with "*no upfront payment from [the GOL] is required, which means an immediate commencement is possible*"; and
 - (4) *that "[t]he loan term and repayment schedule are subject to discussion and agreement with the German finance providers. However, it is envisaged that the term will be up to 10 years with payments starting once at least 50% of the products have been installed....*"³⁷
33. To progress the Project and ensure that all relevant stakeholders were supportive, on 6 December 2017, a stakeholder workshop was held at Durham Links conference centre in Lesotho. This workshop was hosted by the GOL and 27 representatives attended. There were representatives from the key GOL ministries that would be involved in the Project, including:
- (1) the Prime Minister's Office: Minister Tsolo (Minister in the Prime Minister's Office);
 - (2) the Ministry of Energy: Mr Leneta Mabea (the Director of Energy) and Mr Thabang Phuroe (the Principal Energy Officer from the Ministry of Energy);
 - (3) the Ministry for Public Works: Minister Moramotse (the Minister for Public Works);
 - (4) the Ministry of Finance: Mr Teboho Malisebo Mokela (the Deputy Principal Secretary to the Ministry of Finance) and Mr Khotso Moleleki (the Director of Public Debt in the Ministry of Finance); and
 - (5) the Ministry of Local Government: Minister Habofanoe Lehana (Minister of Local Government).³⁸
34. In addition, representatives from "*Works, Building and Design Services*", "*Development and Planning*", the "*Lesotho Electricity Company*" and local government were in attendance at the workshop.³⁹ A presentation on the benefits, costings and savings to the

³⁷ Memorandum of Understanding between FSG and GOL, 20 November 2017, **C-034**.

³⁸ List of Participants at the Solar Energy Workshop Held at Lesotho Durham Link, 6 December 2017, **C-035**.

³⁹ List of Participants at the Solar Energy Workshop Held at Lesotho Durham Link on Wednesday December 6, 2017, 6 December 2017, **C-035**.

GOL arising out of the Project was delivered by Mr Frazer.⁴⁰ At the end of the workshop, the 27 representatives expressed their unanimous support for the Project. It was agreed that the Prime Minister's Office would take the lead role in coordinating the Project, with the objective that the Project would commence by 1 March 2018.

35. As a result of Mr Frazer's efforts to arrange financing for the Project, on 13 December 2017, KfW issued a signed letter of intent to Minister Majoro, as the Minister of Finance, expressing KfW's "*general interest in participating in the funding of this transaction*".⁴¹
36. Throughout January to March 2018, Mr Frazer met with a number of Lesotho government ministers to maintain support for the Project. This included Mr Frazer meeting with the Minister of Energy, Minister Hloaele, on 19 February 2018, in which Minister Hloaele expressed support for the Project.⁴² However, due to a change in the Cabinet and the preparation of the Lesotho annual budget, the approval process for the Project was delayed and the original target commencement date of 1 March 2018 was not achieved.
37. Nevertheless, the GOL continued to express their support for the Project and commitment to see the Project be developed. To assist with the approval process, in March 2018, Mr Frazer provided Minister Tsolo with a summary of the Project proposal, as well as a more detailed business proposal.⁴³ At this time, the proposed Project was to be implemented over a four year period, but, as explained below, this was later reduced to two years. In these proposals, the key benefits of the Project were identified:

- 1. Save up to 200 million kWh of electricity per year*
 - a. *22% reduction of total national electricity usage*
 - b. *55% reduction in imported electricity*
- 2. Install up to 40,000 solar water heaters, 1 million LED lights, solar PV and storage batteries on government buildings and infrastructure*
- 3. Provide 50,000 solar lanterns free of charge to non-electrified households to replace paraffin & candles*
- 4. Create 500-1000 jobs*
- 5. Completely aligned to Government's Energy Policy*

⁴⁰ FSG Presentation, "€100 Million Solar Project: Energy Efficiency and Employment Creation ", 6 December 2017, **C-036**.

⁴¹ Letter from KfW to M. Majoro, 13 December 2017, **C-037**.

⁴² Email from R. Frazer to F. Hloaele, 20 February 2018, **C-038**; FSG Presentation, "€100 Million Solar Project: Energy Efficiency and Employment Creation", 20 February 2018, **C-039**.

⁴³ Email from R. Frazer to T. Tsolo and M. Majoro, 10 March 2018, **C-040**; FSG Presentation, "€100 Million Energy Efficiency & Employment Creation Project Business Proposal", 8 March 2018, **C-041**; FSG Presentation, "€100 Million German Government Financed Energy Efficiency & Employment Creation Project for the Government of Lesotho: One Page Explanation", 8 March 2018, **C-042**.

6. Products to be made available to Public Servants via Loan Scheme

7. Demonstrates the government's leadership, vision and support it enjoys from the international community"⁴⁴

38. In light of the delay in the approval of the Project by the GOL, on 22 March 2018 KfW re-issued its letter of intent to Minister Majoro, as the Minister of Finance, to provide financing for the Project.⁴⁵
39. On 4 April 2018, Mr Frazer met with the Finance Minister, Minister Majoro. During that meeting Minister Majoro confirmed that he supported the Project and wanted to proceed.⁴⁶ As Mr Frazer describes in his witness statement, Minister Majoro was going to have his team write the final project recommendation for the Cabinet to approve the Project and he would send a letter to KfW confirming that the GOL wanted to proceed with the Project and requesting KfW to give the GOL a detailed financial offer.⁴⁷
40. In April 2018, Minister Tsolo, on behalf of the GOL, wrote to KfW requesting a "*detailed breakdown of the financial offer from KfW IPEX-Bank ... regarding the EUR 100 million loan*".⁴⁸ KfW responded by confirming its intention to provide finance and noted that it had identified the Development Bank of Southern Africa (the "DBSA") to act as an intermediary bank for the transaction.⁴⁹ DBSA was a frequent lender to the GOL and was going to lend €15m out of the €100 million loan, with the remaining €85 million being provided by KfW. DBSA's involvement also reduced the risk profile of the investment.⁵⁰ As a result of DBSA being included into the financial structure, the Project implementation period was reduced from four years to two years.⁵¹ As Mr Frazer explains, this was done so FSG could "*complete the first project faster so that FSG could move on to additional projects in Lesotho, minimise the risk of political change during the course of the project and more quickly provide the benefits of [the Project] to address the energy situation in Lesotho.*"⁵²
41. From April to June 2018, FSG continued to work with Minister Tsolo and Minister Majoro to obtain approval for the Project from the GOL. To this end, a Cabinet paper for the approval of the Project was submitted to Cabinet Ministers on 12 June 2018. At the Cabinet

⁴⁴ FSG Presentation, "€100 Million Energy Efficiency & Employment Creation Project Business Proposal", 8 March 2018, p. 3, **C-041**.

⁴⁵ Letter from KfW to M. Majoro, 22 March 2018, **C-043**.

⁴⁶ Witness Statement of Robert Frazer, 4 October 2019, ¶ 38.

⁴⁷ Witness Statement of Robert Frazer, 4 October 2019, ¶ 38.

⁴⁸ Letter from T. Tsolo to KfW, 10 April 2018, **C-044**.

⁴⁹ Witness Statement of Robert Frazer, 4 October 2019, ¶ 39.

⁵⁰ Witness Statement of Robert Frazer, 4 October 2019, ¶ 39.

⁵¹ Witness Statement of Robert Frazer, 4 October 2019, ¶ 40.

⁵² Witness Statement of Robert Frazer, 4 October 2019, ¶ 40.

meeting 23 out of 25 Ministers wanted the project to be voted on and approved. It appeared that the Finance Minister, Minister Majoro, despite his earlier support for the Project, was now trying to delay the Project. As Mr Frazer explains in his statement, it was shortly before this Cabinet meeting that Minister Majoro signed an agreement with a Chinese government-backed project for the construction of a road in Lesotho.⁵³

42. Despite Minister Majoro's change in position, there was still broad GOL support for the Project, as well as support from the King of Lesotho, King Letsie III. On 26 June 2018, FSG was told by Minister Tsolo that the Prime Minister had verbally approved the Project.⁵⁴ As a result, on 28 June 2018, KfW re-issued its letter of intent to Minister Majoro, as the Minister of Finance, to provide financing for the Project.⁵⁵
43. On 1 August 2018, FSG received a letter from Minister Tsolo confirming that the GOL agreed to and committed itself to proceed with the Project.⁵⁶ Minister Tsolo asked FSG "*to prepare and present all the necessary documentation on behalf of the German entities (KfW-Ipex Bank and Euler Hermes) and Development Bank of Southern Africa (DBSA).*" Minister Tsolo said that the Office of the Prime Minister would "*co-ordinate and involve relevant ministries as deemed necessary.*"⁵⁷
44. On 8 August 2018, Mr Frazer, on behalf of FSG, met with the Prime Minister, Minister Tsolo, the Government Secretary and the Senior Private Secretary to the Prime Minister, in the Prime Minister's office to discuss the Project. Mr Frazer gave a presentation of the Project, titled "*Project Proposal*" dated 1 August 2018, which was included as Annexure B of the Supply Agreement as the "*Project Proposal*".⁵⁸ The presentation provided examples of the FSG product range, which included SWH systems, LED lights, Solar PV, vanadium batteries and solar lanterns, as follows:

⁵³ Witness Statement of Robert Frazer, 4 October 2019, ¶ 86.

⁵⁴ Witness Statement of Robert Frazer, 4 October 2019, ¶ 42.

⁵⁵ Letter from KfW to M. Majoro, 28 June 2018, **C-045**.

⁵⁶ Letter from T. Tsolo to R. Frazer, 1 August 2018, **C-046**; Emails between R. Frazer and German Embassy, 2 August 2018, **C-047**; Email from R. Frazer to DBSA, 2 August 2018, **C-048**; Emails from R. Frazer to KfW, 2 August 2018 to 6 August 2018, **C-049**.

⁵⁷ Letter from T. Tsolo to R. Frazer, 1 August 2018, **C-046**.

⁵⁸ FSG Presentation, "Energy Efficiency & Employment Creation Project: Project Proposal", 1 August 2018, **C-050**; see also FSG Presentation, "Energy Efficiency & Employment Creation Project: Presentation for LEC", 16 August 2018, **C-051**.

FSG Product Range

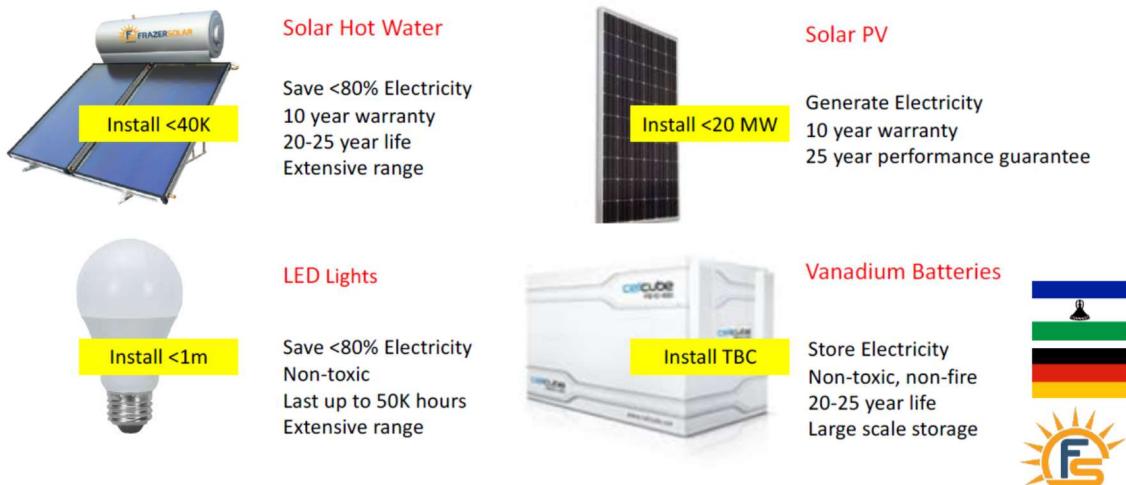


Figure 4: FSG proposed product range

45. In addition to providing an overview of the Project and energy and cost savings for the GOL which were to be achieved in "phase 1", the presentation also considered future projects in "phase 2 & 3".⁵⁹ The proposal for phases 2 and 3 was for the development of a large-scale solar PV project. Phase 2 would make Lesotho energy self-sufficient and phase 3 would turn Lesotho into a new electricity exporter.⁶⁰ All three phases were planned to be completed within five years of commencing the Project. As such, even before entering into the Supply Agreement, FSG was envisaging completing multiple renewable energy projects in Lesotho.
46. In the meeting with the Prime Minister, FSG was assured that the Project was definitely going ahead and the Prime Minister told Mr Frazer that the Government Secretary was taking responsibility for getting the Project done. This included ensuring that the Ministry

⁵⁹ FSG Presentation, "Energy Efficiency & Employment Creation Project: Project Proposal", 1 August 2018, C-050; See also Product Costings Spreadsheet, "Product-matrix Thermosiphon systems TS7 for Lesotho", undated, C-052; Solar Farm Capital Indicative Costs Spreadsheet, undated, C-053; Solar Rooftop Capital Indicative Costs Spreadsheet, undated, C-054; Emails between P. Sheldon and R. Frazer, 3 May 2018 to 6 August 2018, C-055; Interfreight Logistics Quote, 16 November 2017, C-056; Best Practice Implementation Statement of Work Quote, GE (ServiceMax Inc), 20 September 2018, C-057; *Cost of Doing Business in Lesotho 2015 – 2016*, LNDC, undated, C-058.

⁶⁰ FSG Presentation, "Energy Efficiency & Employment Creation Project: Project Proposal", 1 August 2018, slides 31-32, C-050.

of Finance, including Minister Majoro, cooperated. There were concerns, at the time, that Minister Majoro was delaying the commencement of the Project. At the meeting, the Prime Minister also asked FSG for a copy of the draft contract for the Project. This was being drafted and FSG promised to revert shortly with the draft contract for the Prime Minister and his advisers to consider.⁶¹

47. On 14 September 2018, FSG provided Minister Tsolo with a draft of the Supply Agreement for the GOL's review.⁶² The GOL requested that a minor change be made to the draft and Minister Tsolo informed FSG that the GOL was ready to sign the agreement.⁶³
48. On 24 September 2018, after more than a year of negotiations with the highest levels of the GOL, the Supply Agreement was signed at the Prime Minister's office by Minister Tsolo, on behalf of the GOL.⁶⁴ Mr Frazer counter-signed the Supply Agreement, on behalf of FSG. At the time of signing, FSG was told by Minister Tsolo that the finance agreements would be arranged and executed by the GOL, through the Ministry of Finance, not long after the signing of the Supply Agreement, and inserted at Annex A of the Supply Agreement.⁶⁵ As Mr Frazer explains in his witness statement, he understood that the GOL was responsible for finalising the financing agreements, which was also reflected in the warranty provided in clause 17.1.3 of the Supply Agreement.⁶⁶ As Mr Frazer explains:

"As the Supply Agreement was approved by the Prime Minister himself, and signed on behalf of the government by Minister Tsolo, I was excited and relieved that the Lesotho Renewable Energy Project would now go ahead. The Prime Minister and Minister Tsolo conveyed to me that the GOL was committed to implementing the Lesotho Renewable Energy Project and saw it as being very beneficial for Lesotho."⁶⁷

D The Supply Agreement recorded the Parties' agreement to proceed with the Project

49. In accordance with the Parties' negotiations, the Supply Agreement recorded the rights and obligations of FSG and the Respondent in relation to the Project. FSG was appointed by the Respondent as the "*sole and exclusive supplier to supply*" the following:
 - (1) energy efficient products, including but not limited to, "solar water heating systems, solar photovoltaic systems, LED lighting products, electricity storage batteries, and

⁶¹ Witness Statement of Robert Frazer, 4 October 2019, ¶ 46.

⁶² Email from R. Frazer to T. Tsolo, 14 September 2018, **C-059**.

⁶³ Email from T. Tsolo to R.Frazer, 16 September 2018, **C-060**.

⁶⁴ Photograph of signature page taken at Prime Minister's office, 24 September 2018, **C-061**.

⁶⁵ Witness Statement of Robert Frazer, 4 October 2019, ¶ 51.

⁶⁶ Witness Statement of Robert Frazer, 4 October 2019, ¶ 51.

⁶⁷ Witness Statement of Robert Frazer, 4 October 2019, ¶ 52.

other energy efficient products, items and equipment, together with any ancillary items and equipment" (the "**Products**")⁶⁸ and

- (2) "services associated with any of the Products, Spare Parts, and equipment, including but not limited to installation, repair, technical assistance or energy management services in regard thereto" (the "**Services**").⁶⁹

50. Pursuant to clause 7 of the Supply Agreement, the Project was large-scale and was to result in the Products being installed and the Services being rendered across, amongst others, the following specific sectors:

"7.1.1. Buildings, facilities and infrastructure;

7.1.1.1. [the Respondent] buildings, facilities and infrastructure;

7.1.1.2. LNDC [Lesotho National Development Corporation] properties;

7.1.1.3. Industrial and commercial customers;

7.1.2. Residential housing:

7.1.2.1. civil servant housing;

7.1.2.2. private sector housing;

7.1.3. Non-electrified households:

7.1.3.1. households that use paraffin and candles as the primary lighting source."

51. The Project was to have very significant benefits for the Respondent, including, as recorded in clause 3.5 of the Supply Agreement:

"very significant costs savings and generate considerable net cash flow to the [Respondent]. Other benefits to [the Respondent] include employment creation, a reduction in paraffin and candle lighting, reduced reliance on imported electricity, and lower electricity costs to commercial, industrial and residential users."

52. The Project commencement date was 1 October 2018 (the "**Commencement Date**") and it was estimated that the Project would be completed over a two-year period.⁷⁰ Pursuant to clause 5.1.4 of the Supply Agreement, FSG and the Respondent acknowledged that time was of the essence with the Project and the Respondent authorised FSG to proceed without delay in implementing the Project. The Respondent also undertook, *inter alia*, not

⁶⁸ Supply Agreement, clause 4, **C-003**. See also Supply Agreement, clause 1.1.19, **C-003**.

⁶⁹ Supply Agreement, clause 4.1, **C-003**. See also Supply Agreement, clause 1.1.27, **C-003**.

⁷⁰ Supply Agreement, clauses 1.1.3 and 3.6, **C-003**.

to "interfere with or delay the roll-out of the Project with an approvals regime"⁷¹ and to "do all things necessary to ensure that the Project runs smoothly, without interruption or undue delay."⁷²

53. The Project value was €100,000,000 (one hundred million Euros). In return for supplying the Products and Services under the Supply Agreement, the Respondent agreed to remunerate FSG by way of the direct transfer of the loan funds from the Finance Providers via the on-lending institution to FSG every 6 months in accordance with the draw-down schedule in clause 12.1 of the Supply Agreement, as follows:

"12.1.1. on the Commencement Date – 30% of the Project value, being €30 000 000 (thirty million Euros);

12.1.2. on the first day of the 6th month after the Commencement Date – 20% of the Project value, being €20 000 000 (twenty million Euros);

12.1.3. on the first day of the 12th month after the Commencement Date – 20% of the Project value, being €20 000 000 (twenty million Euros);

12.1.4. on the first day of the 18th month after the Commencement Date – 20% of the Project value, being €20 000 000 (twenty million Euros);

12.1.5. on the first day of the 24th month after the Commencement Date – 10% of the Project value, being €10 000 000 (ten million Euros)."

54. Additionally, as envisioned in the FSG presentation dated 1 August 2018, which was discussed with the Prime Minister, the Supply Agreement provided FSG with a right of first opportunity in relation to all other renewable energy, energy efficiency or electricity generation opportunities with the Respondent for a period of 5 years. Specifically, clause 18 of the Supply Agreement provided:

"18. GRANT OF FIRST OPPORTUNITY

[The Respondent] hereby grants FSG the first opportunity for all other renewable energy, energy efficiency or electricity generation opportunities with [the Respondent] for a duration of 5 years calculated from the Commencement Date."

55. The Supply Agreement included material warranties, indemnities and terms to be performed by the Respondent, including, but not limited to, the following:
- (1) Clause 5.3.6 – "A finance officer will be appointed by [the Respondent] to sign the on-lending loan contracts on behalf of [the Respondent] and such finance officer will be accommodated at FSG's Administration Centre in Lesotho."

⁷¹ Supply Agreement, clause 5.1.4, **C-003**.

⁷² Supply Agreement, clause 17.2, **C-003**.

- (2) Clause 5.2.9 – the Respondent "will provide full, complete and timely access to all of its key personnel, including the Prime Minister, Ministers, Principal Secretaries and other government officials and entities including LEC [Lesotho Electricity Corporation] and LNDC [Lesotho National Development Corporation], in order for FSG to meet its obligations in terms of this Agreement in a timely manner. All such meeting requests from FSG shall be arranged by [the Respondent] within 24 hours or such reasonable short period thereafter."
- (3) Clause 11.3 – the Respondent "shall be responsible for ensuring that sufficient funds are set aside and at all times available for purposes of the loan repayments, and furthermore, will ensure that the Project is included in the [Ministry of Finance of Lesotho's] official budget on government income and expenditure, this notwithstanding the electricity savings that will accrue to [the Respondent] over time."
- (4) Clause 16 – the Respondent "indemnifies and holds FSG, its employees and agents harmless against: ...
 - 16.1 any and all claims of any nature whatsoever...;
 - 16.2 all and any claims, losses, liabilities, or damages arising from or attributable to decisions or actions taken by FSG as a consequence of any delays by [the Respondent] in providing key inputs, information or other responses to FSG;
 - 16.3 any loss that may arise or be caused to FSG as a result of [the Respondent] not providing timely access to FSG, or its key personnel, to any facility together with all costs occasioned thereby. ..."
- (5) Clause 17.1 – the Respondent "warrants that:
 - 17.1.1. this Agreement and the Project complies with all the laws of the Government of Lesotho in respect of procurement, including but not limited to the Regulations and this contract has been approved by the Chief Accounting Officer (as referred to in the Regulations);
 - 17.1.2. FSG are expressly authorised to commence with the roll-out of the Products without any delay and to act autonomously where necessary to achieve that outcome;
 - 17.1.3. it will have signed and bound itself to the terms of the Finance Agreement prior to or contemporaneously with the execution by [the Respondent] of this Agreement;
 - ...
 - 17.1.6. [it will] desist from any acts or omissions which result in, or are likely to result in any delays to the Project timelines;
 - 17.1.7. it will provide full, complete and timely access to all its key personnel, including the Prime Minister, Ministers, Principal Secretaries and other

government officials and entities, including LEC and LMDC [Sic]. [The Respondent] further warrants and acknowledges that this is necessary due to the time constraints in respect of the Project and in order for FSG to meet its obligations in terms of this Agreement."

- (6) Clause 17.2 – "As time is of the essence for this Project, [the Respondent] shall do all things necessary to ensure that the Project runs smoothly, without interruption or undue delay. This includes responding to FSG's queries and roll-out requirements in a timely and prompt manner."
56. Clause 22 of the Supply Agreement sets out that each party was only permitted to terminate the Supply Agreement, prior to the expiration of the agreement, for an event of material breach. Pursuant to clause 22.2, if FSG terminates the Supply Agreement, then the Respondent shall, *inter alia*, "pay 50% of the then remaining unpaid draw-down amount in respect of the Project as compensation" and "pay all labour, retrenchment and/or termination costs". As explained below and in the FTI Report, this figure was approximately the same as the percentage profit margin which FSG would have received from supplying the Services and Products under the Supply Agreement and which it would have lost in the event that the GOL materially breached the Supply Agreement at any stage of the project. Therefore, it was a reasonable estimate of FSG's loss if the Supply Agreement was terminated for material breach.
57. Clause 23 provides that:

"If [the Respondent] commit[ted] any material breach of the terms of this Agreement and fails to remedy such breach within 30 (thirty) days (or such other period as may be reasonable in the circumstances) after receipt of written notice from FSG requiring it to do so, FSG shall be entitled to claim specific performance without prejudice to its right to such damages as may have been occasioned by the breach or, should the damages go to the root of the contract, to cancel this Agreement with or without a claim for damages."

E The Respondent's breaches of the Supply Agreement

58. Following the execution of the Supply Agreement by FSG and the Respondent, FSG started to make arrangements to fulfil its obligations under the Supply Agreement and stood ready to perform its obligations under the Supply Agreement.⁷³ On 27 September 2018, FSG updated KfW that the Supply Agreement was signed. On the same day FSG also sent a copy of the Supply Agreement to Lesotho's Minister for Energy, Minister Hloaele.⁷⁴

⁷³ Witness Statement of Robert Frazer, 4 October 2019, ¶ 53.

⁷⁴ Email from R. Frazer to F. Hloaele, 27 September 2018, C-062.

59. Almost immediately, the Respondent failed to fulfil its obligations and committed material breaches of the Supply Agreement, thereby preventing the implementation of the Project by FSG. The commencement date for the Lesotho Renewable Energy Project under the Supply Agreement was 1 October 2018. This was also the date on which the first payment was to be made to FSG of 30% of the overall project value (i.e., €30,000,000).
60. However, the Respondent failed to procure the signing of the finance agreements as it warranted it had done "*prior to or contemporaneously with*" the execution of the Supply Agreement, contrary to clause 17.1.3.
61. The Respondent also breached clause 12.1 of the Supply Agreement which required it to pay the first instalment of €30,000,000 (thirty million Euros) on 1 October 2018. This payment was never made. Similarly, the Respondent was required to pay a further €20,000,000 (twenty million Euros) on 1 April 2019, which has also not been paid.⁷⁵
62. In addition to the breaches of clauses 17.1.3 and 12.1 and of the Supply Agreement, the Respondent is in breach, *inter alia*, of the following terms of the Supply Agreement, in that:
- (1) it has breached its obligations in clauses 5.1 and 5.2, including, clause 5.1.4 (not to interfere with or delay the roll-out of the Project with an approvals regime) and clause 5.2.9 (to provide full, complete and timely access to all of its key personnel);
 - (2) it has failed to indemnify FSG in accordance with clause 16.1 (for any and all claims of any nature whatsoever), clause 16.2 (for all and any claims, losses liabilities or damages as a consequence of any delays by the Respondent in providing key inputs, information or other responses to FSG) and clause 16.3 (for any loss that may arise or be caused to FSG as a result of the Respondent not providing timely access to any facility);
 - (3) it has breached its warranties in clauses 17.1 and 17.2, including, clause 17.1.2 (by impeding FSG from commencing with the roll-out of the Products without any delay), clause 17.1.6 (by not desisting from any acts or omissions which resulted in, or were likely to result in any delays to the Project timelines), clause 17.1.7 (by failing to provide full, complete and timely access to all its key personnel), and clause 17.2 (by failing to do all things necessary to ensure that the Project runs smoothly, without interruption or undue delay); and
 - (4) it has breached its obligation under clause 18 to provide FSG with the first opportunity for all other renewable energy, energy efficiency or electricity generation

⁷⁵ Witness Statement of Robert Frazer, 4 October 2019, ¶ 77.

opportunities with the Respondent for a duration of 5 years calculated from the Commencement Date.

63. All the breaches aforesaid are breaches of material terms, indemnities or warranties under the Agreement, and are themselves material.
64. Following the failure of the Respondent to procure the execution of the finance agreements in breach of its warranty and other legal commitments and to make the initial draw-down payments as required under the Supply Agreement, FSG repeatedly contacted the GOL ministers and officials to try to ensure that the Respondent would abide by its obligations and complete the Project, but to no avail.
65. Given the lack of progress in starting the Project, on 18 November 2018, FSG prepared a project overview document which was circulated to groups which may be interested in the Project to explain why it was not progressing.⁷⁶ A copy was also provided to the King of Lesotho around the same time.
66. On 29 November 2018, there was an article in a Lesotho newspaper which reported that Minister Majoro refused to sign the finance agreement needed to perform the Lesotho Renewable Energy Project, which had been approved for implementation by the Prime Minister of Lesotho.⁷⁷ It was reported that Minister Tsolo did not know why there was a problem and "*that the person who should sign must do so, and the Project should continue.*" Minister Tsolo told the newspaper that he had carried out the instructions of the Prime Minister so that the Lesotho Renewable Energy Project could start, but that he was "*giving up*" as he was frustrated by Minister Majoro's behaviour.⁷⁸
67. On 30 November 2018, a local radio station, Harvest FM, devoted its morning show to the Lesotho Renewable Energy Project and its failure to have commenced. Later in the day on 30 November 2018, Mr Frazer received the first of several death threats. These were passed on to him by Mr Lebohang Mohase and Mr Litsoane Liao, who had been working with FSG at the time. Mr Mohase and Mr Liao told Mr Frazer that comments had been made by supporters of Minister Majoro on Facebook pages, and that it was not safe for Mr Frazer and FSG to remain in Lesotho. As Mr Frazer explains, at that time, he did not take the threats seriously.⁷⁹
68. On 5 December 2018, Mr Mohase and Mr Liao came to see Mr Frazer again and told him that there had been more threats on his life and that he must leave Lesotho immediately.

⁷⁶ FSG Presentation, "€100 Million German Government Financed Energy Efficiency & Employment Creation Project For the Government of Lesotho", 18 November 2018, **C-063**.

⁷⁷ Moeletsi a Basotho Article, "The Minister disheartens the businessman", 2 December 2018, **C-064**.

⁷⁸ Moeletsi a Basotho Article, "The Minister disheartens the businessman", 2 December 2018, **C-064**.

⁷⁹ Witness Statement of Robert Frazer, 4 October 2019, ¶ 82.

In fear for his safety, later that day, Mr Frazer left Lesotho for South Africa. He left South Africa for Australia on 7 December 2018 and has not since returned to Lesotho.

69. As Mr Frazer explains, it was following his departure from Lesotho that he knew that the Project was not going to proceed and that FSG's efforts to proceed with the Project were futile. The GOL was not going to perform its obligations under the Supply Agreement. As Mr Frazer explains:

*"I was and remain extremely disappointed and frustrated. I had spent over two years planning, negotiating and progressing the Lesotho Renewable Energy Project on the basis of many assurances from the highest levels of the GOL only to have the GOL breach its obligations almost immediately. In addition to the lost expenses incurred by FSG, a very significant amount of time had been expended, and wasted, progressing the Lesotho Renewable Energy Project."*⁸⁰

70. As a consequence of the Respondent's material breaches of the Supply Agreement identified above, on 11 March 2019, FSG sent a letter of demand to the Respondent (the "**Letter of Demand**") in accordance with the notice provisions in clause 26.3 of the Supply Agreement.⁸¹ In the Letter of Demand, FSG set out various breaches of the Supply Agreement and provided the Respondent with 60 days to remedy those breaches – double the period provided for in clause 23 of the Supply Agreement.⁸² No response to the Letter of Demand was received from the Respondent and no efforts have been made by the Respondent to remedy its material breaches of the Supply Agreement.
71. On 26 May 2019, the Sunday Express newspaper in Lesotho published an article reporting that a Chinese State-owned consortium, backed by the EXIM Bank of China, was negotiating with the Respondent for a loan in support of the "*Ha-Ramarothole*" solar project in Mafeteng, Lesotho (the "**Mafeteng Project**").⁸³ It was reported that the project was for the development of a 70 MW solar power station, costing a total of around €120,000,000 (one-hundred and twenty million Euros). As Mr Frazer explains, it appears that the Mafeteng Project has the support of Minister Majoro.⁸⁴ In an "Op-Ed" article written by Minister Majoro, and published on 23 July 2019, Minister Majoro explains that he "*will raise 1M billion maloti with China EXIMBANK to finance the Ha Ramarothole solar power station. Negotiations for this project are near complete and construction work will start before the*

⁸⁰ Witness Statement of Robert Frazer, 4 October 2019, ¶ 84.

⁸¹ Letter from FSG to the Respondent, 11 March 2019, **C-004**. Service was carried out and acknowledged on 15 March 2019.

⁸² Letter from FSG to the Respondent, 11 March 2019, **C-004**.

⁸³ Sunday Express Article, "Lesotho, China negotiate loan for Mafeteng solar project", 26 May 2019, **C-005**; Witness Statement of Robert Frazer, 4 October 2019, ¶ 86. See also Lesotho Times Article, "Govt secures M1 billion loan", 8 June 2018, **C-065**.

⁸⁴ Witness Statement of Robert Frazer, 4 October 2019, ¶ 86.

*end of the year.*⁸⁵ Minister Majoro goes on to state that "*Lesotho's wind and solar potential should, with the help of modern technology and the private sector, become the major source of electricity to many households in Lesotho.*"⁸⁶

72. The Mafeteng Project is a renewable energy project which properly falls within clause 18 of the Supply Agreement and FSG should have been offered the first opportunity for that project. In breach of that clause, FSG has not been offered the first opportunity to proceed with the Mafeteng Project or otherwise been contacted by the Respondent in relation to it.⁸⁷ As Mr Frazer explains:

*"When I learned about the Mafeteng Project, I was very disappointed and frustrated as I knew that FSG had a right of first opportunity under the Supply Agreement to all renewable energy opportunities in Lesotho for five years. I also knew that the reported costs and margins for the Mafeteng Project were substantially higher than what FSG could have been able to offer to complete an equivalent solar PV project. I am confident that FSG would have been able to complete the Mafeteng Project if it was given that opportunity."*⁸⁸

73. Following the expiration of more than 60 days from the Letter of Demand, and having received no response to that letter from the Respondent, on 11 July 2019, FSG again notified the Respondent, in accordance with the notice provisions in clause 26.3 of the Supply Agreement, that it was in material breach of the Supply Agreement and alerted the Respondent to its continuing obligation to honour FSG's right of first opportunity in relation to renewable energy projects in Lesotho (the "**July Notice**").⁸⁹ In the July Notice, FSG requested that the Respondent furnish it with all information with respect to all opportunities covered by clause 18 of the Supply Agreement within 14 days of receipt of the July Notice. To date, FSG has received no response to the July Notice and has not been furnished with the information requested, as required by clause 18 of the Supply Agreement.
74. In summary, the Respondent has breached its obligations to FSG under the Supply Agreement and has failed to remedy those material breaches despite being given opportunities to do so. Consequently, by a letter dated 29 July 2019, FSG terminated the Supply Agreement in accordance with clause 23.1 of the Supply Agreement and seeks from the Respondent the damages claimed below.

⁸⁵ The Night's Watch Article, "Op-Ed: Lesotho's Economic Future is Bright", 23 July 2019, **C-066**.

⁸⁶ The Night's Watch Article, "Op-Ed: Lesotho's Economic Future is Bright", 23 July 2019, **C-066**.

⁸⁷ Supply Agreement, clause 18, **C-003**.

⁸⁸ Witness Statement of Robert Frazer, 4 October 2019, ¶ 87.

⁸⁹ Letter from FSG to the Respondent, 11 July 2019, **C-006**. Service was carried out and acknowledged on 11 July 2019.

IV. THE ARBITRATOR HAS JURISDICTION OVER THIS DISPUTE AND SOUTH AFRICAN LAW IS APPLICABLE

75. As explained in the FSG's "*Note on Jurisdiction*" filed with the Arbitrator on 5 September 2019, the Arbitrator has jurisdiction over this dispute.

A The arbitration agreement and appointment

76. The Supply Agreement contained the following arbitration agreement at clause 24:

"24. ARBITRATION

24.1. If a dispute arises between the Parties in connection with this Agreement or its subject matter which cannot be resolved amicably by the Parties, then the Parties shall refer the dispute to arbitration. The rules of arbitration will be the rules of the South African Association of Arbitrators in force at the time of referral of the dispute to arbitration and the arbitration will be conducted in accordance with the provisions of the Arbitration Act, No 42 of 1965.

24.2. The Parties shall agree on the appointment of an arbitrator within 5 (five) Business Days after the declaration of a dispute by one or both of the Parties and failing such agreement, the arbitrator shall be appointed by the President for the time being of the Johannesburg Bar Council within 2 (two) Business Days after having been requested by 1 (one) or both of the Parties to make such appointment. The decision of the arbitrator shall be final and binding on the Parties and can be made an order of court.

24.3. The arbitration shall be held in Johannesburg, South Africa.

24.4. Nothing in this clause shall prevent any Party from obtaining urgent, interim interdictory relief in the courts pending the outcome of or pending the consideration of an alternative dispute resolution procedure contemplated in this clause.

24.5. The arbitrator's decision shall be final and binding on the Parties and either Party may apply to court to enforce the order in Lesotho and/or South Africa."

77. The reference in clause 24.1 of the Supply Agreement, that "[t]he rules of arbitration will be the rules of the South African Association of Arbitrators in force at the time of referral of the dispute to arbitration", is an abbreviated reference to the Association of Arbitrators (Southern Africa) NPC Rules (the "**Rules**"). As the arbitration has been commenced after 1 January 2018, pursuant to clause 1 of the Rules, the 2018 Edition of the Rules apply to this arbitration.
78. In light of the arbitration being seated in Johannesburg, the Supply Agreement also contains the customary provision identifying the court which, the parties are agreed, will support the arbitral process. This is in clause 26.2 of the Supply Agreement, providing that

the High Court of South Africa Gauteng Local Division, Johannesburg has jurisdiction. The provision does not of course override the agreed submission immediately preceding it (clause 24). Nor, *a fortiori*, the expressly restricted scope for curial intervention in the overall matrix of an international arbitration conducted under the Act.

79. In accordance with the procedure set out in clause 24.2 of the Supply Agreement, FSG - following attempts to resolve the dispute amicably with the Respondent - served the Notice of Arbitration dated 30 July 2019 (the "**Notice**") on the Respondent in which it proposed the appointment of an arbitrator on 30 July 2019. Following no response from Lesotho, on 7 August 2019 (*i.e.*, six business days following service of the Notice), FSG approached the President / Chairperson of the Johannesburg Bar Council to make an appointment of an arbitrator. On 8 August 2019 the President / Chairperson of the Johannesburg Bar Council appointed the Arbitrator in these proceedings. Therefore, the Arbitrator has been validly appointed, in accordance with the agreement of the Parties and has jurisdiction over this dispute. Furthermore, Lesotho has not objected to the Arbitrator's appointment.

B The New International Arbitration Act applies to this arbitration

80. The arbitration agreement provides that the seat of arbitration is Johannesburg, South Africa and for South Africa as the choice of law. Under South African law, the new international Arbitration Act 2017 (the "**Act**") applies to this arbitration as the Parties have their places of business in two different States which are both outside of South Africa, namely, Germany and Lesotho, respectively. As a result, this arbitration is deemed to be "*international*" under Article 1(3) of Schedule I of the Act, which incorporates the UNCITRAL Model Law on International Commercial Arbitration (with modification) into South African Law.
81. Article 6 (Chapter 2) of the Act provides that "[t]he Model Law applies in the Republic subject to the provisions of this Act" and Article 20(1) of the Act (Chapter 4), provides that:

"Chapter 2 of this Act applies to international commercial arbitration agreements whether they entered into force before or after the commencement of Chapter 2 of this Act and to every arbitration under such an agreement but this section does not apply to arbitral proceedings which commenced before Chapter 2 of this Act came into force."

82. The Act came into force on 17 December 2017 and these arbitral proceedings were commenced on 30 July 2019. Accordingly, the Act applies to this arbitration. For the avoidance of doubt, Article 4(1) of the Act further provides that "[s]ubject to subsection (2), the Arbitration Act, 1965 (Act No. 42 of 1965), is not applicable to an arbitration agreement, arbitral award or reference to arbitration covered by this Act." As a result, the reference to the "*provisions of the Arbitration Act, No 42 of 1965*" in clause 24.1 of the Supply Agreement is overridden by the provisions of the Act and, therefore, the Act applies.

C The Arbitrator to determine own jurisdiction: principle of competence-competence

83. In accordance with the Act, and reflecting the international principle of competence-competence, the Arbitrator has the power to rule on his own jurisdiction. Article 16(1) of Schedule I of the Act provides: "*[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement...*" Article 23 of the Rules contains similar provisions granting the Arbitrator the power to rule on his own jurisdiction.

84. Accordingly, the Arbitrator has jurisdiction to determine this dispute.

D South African law is the applicable substantive law

85. Article 26.1 of the Supply Agreement provides:

"26.1. Applicable Law

Regardless of the place of execution, performance or domicile of the Parties, this Agreement and all modifications and amendments thereof shall be governed by and construed under and in accordance with laws of South Africa."

86. Accordingly, the applicable substantive law to be applied to determine this dispute is the "laws of South Africa".

V. THE RESPONDENT MATERIALLY BREACHED ITS OBLIGATIONS UNDER THE SUPPLY AGREEMENT AND THE CLAIMANT IS ENTITLED TO COMPENSATION

87. As a consequence of the Respondent's material breaches of the Supply Agreement, FSG suffered loss and is entitled to compensation under the terms of the Supply Agreement and South African law.

A The Supply Agreement is a valid and legally enforceable contract under South African law

88. On 24 September 2018, the parties met at the Office of the Prime Minister in Maseru, Lesotho for the purpose of signing the Supply Agreement as a legally binding manifestation of their commitment to the Project. The Supply Agreement was duly signed by Mr Robert Frazer, on behalf of the FSG, and by Minister Tsolo, on behalf of the Respondent.⁹⁰ At the time of signing, Minister Tsolo was the Minister in the Prime Minister's Office, and he

⁹⁰ Supply Agreement, p. 37, C-003.

accordingly signed the Supply Agreement as representative of the "Office of the Prime Minister for and on behalf of the Government of Lesotho" on behalf of the Respondent.⁹¹

89. The Supply Agreement was validly entered into by FSG and the Respondent on 24 September 2018. The content of the Supply Agreement was understood to "record the terms and conditions by which the supply of Products and Services by FSG to GOL will be governed."⁹² Accordingly, the Supply Agreement is a legally binding and enforceable agreement under South African law and it records the intention of the Parties to create legal obligations by their agreement.
90. Prior to the execution of the Supply Agreement, the Parties engaged in over a year of negotiations which ultimately concluded in the signing, on behalf of the Respondent, of the Supply Agreement by the Minister in the Prime Minister's Office who was responsible for the development of the Project. The actions of the Respondent – in signing the Supply Agreement – plainly evidence the requisite intention to create legal relations and reflect their acceptance of the terms of that relationship.⁹³
91. As observed by the Supreme Court of Appeal in *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties*:

*"The signing of a written contract is the usual manner in which parties indicate their agreement to its terms and certainty as to the place and date of the conclusion of the contract can be equally as important for the parties to the contract as certainty as to its content."*⁹⁴

92. Recognising that the Parties are bound by the terms of the Supply Agreement is simply an expression of the fundamental principle of the law of contract in South Africa: *pacta sunt servanda*,⁹⁵ i.e., "*the age-old contractual doctrine that agreements solemnly made should be honoured and enforced*".⁹⁶ The rationale for this maxim is that parties must be aware

⁹¹ Supply Agreement, p. 37, **C-003**. See also the warranty attached to Minister Tsolo's signature, together with the warranty in clause 26.9 that "[e]ach party warrants to the other party that it has the power, authority and legal right to sign this Agreement and that this Agreement has been duly authorised by all necessary actions of its trustees and constitutes valid and binding obligations on it." Supply Agreement, clause 26.9 and p. 37, **C-003**.

⁹² Supply Agreement, clause 3.7, **C-003**.

⁹³ See *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties*, 2009(2) SA 504 (SCA), 21 November 2008, ¶ 11, **CLA-001**: "(a) *In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required.* (b) *Where the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of acceptance required is no more than the offeree's signature*". Affirmed in *Terry and Another v Solfafa and Others*, [2019] ZAFSHC 143, 29 August 2019, **CLA-002**.

⁹⁴ *Reid v Jeffreys Bay Property Holdings (Pty) Ltd*, 1976 (3) SA 134 (C), as translated in *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties*, 2009(2) SA 504 (SCA), 21 November 2008, ¶ 11, **CLA-001**. See also *Terry and Another v Solfafa and Others*, [2019] ZAFSHC 143, 29 August 2019, **CLA-002**.

⁹⁵ *SA Central Co-op Grain Company Limited v Shifren and Others*, 1964 (4) SA 760 (A), 24 September 1964, ¶ 767A, as quoted in *Afrox Healthcare Ltd v Strydom*, [2002] ZASCA 73, 31 May 2002, ¶ 23, **CLA-003**.

⁹⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*, 2012 (1) SA 256 (CC), 17 November 2011, ¶ 70, **CLA-004**. See also the comment of the Constitutional Court of South Africa in *Barkhuizen v Napier*, 2007 (5) SA 323 (CC), 4 April 2007, ¶ 87, **CLA-**

that should either of them fail to honour their obligations, the other may invoke the assistance of the law to hold them to the agreement.⁹⁷

B The Respondent's obligations under the Supply Agreement

93. The following clauses of the Supply Agreement are material terms, conditions or warranties with which the Respondent committed to comply :

- (1) Clause 17.1.3:

"GOL warrants that...it will have signed and bound itself to the terms of the Finance Agreement prior to or contemporaneously with the execution by GOL of this Agreement".

- (2) Clause 12.1:

"FSG will be remunerated during the Term and/or Extended Period, as the case may be, of the Project by way of direct transfer of the loan funds from the Finance Providers via the on-lending institution to FSG every 6 months on the basis provided for in the Draw-down Schedule, as follows:-

12.1.1. on the Commencement Date⁹⁸] – 30% of the Project value, being €30 000 000 (thirty million Euros);

2.1.2. on the first day of the 6th month after the Commencement Date – 20% of the Project value, being €20 000 000 (twenty million Euros);

12.1.3. on the first day of the 12th month after the Commencement Date – 20% of the Project value, being €20 000 000 (twenty million Euros);

12.1.4. on the first day of the 18th month after the Commencement Date – 20% of the Project value, being €20 000 000 (twenty million Euros);

12.1.5. on the first day of the 24th month after the Commencement Date – 10% of the Project value, being €10 000 000 (ten million Euros)."

- (3) Clause 5.1.4:

"GOL and FSG acknowledge that time is of the essence with the Project, and that FSG is accordingly authorised by GOL to proceed without delay in the implementation thereof. In this regard GOL undertakes not to interfere with or delay the roll-out of the Project with an approvals regime. FSG will have a full and unfettered discretion to decide on the Product mixes and scheduled input costs for each Site. FSG will in order to give GOL a measure of protection, be guided per installation where required by the Evaluation Criteria to ensure that each installation is financially viable."

⁹⁰⁵, that "[p]acta sunt servanda is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle."

⁹⁷ *Mohamed's Leisure Holdings v Southern Sun Hotel Interests (Pty) Ltd*, [2016] ZAGPJHC 303, 4 November 2016, ¶ 1, **CLA-006**.

⁹⁸ See Supply Agreement, clause 1.1.3, **C-003**: "**Commencement Date** means 1 October 2018".

(4) Clause 5.2.9:

"5.2.9. GOL represents to FSG that it will provide full, complete and timely access to all of its key personnel, including the Prime Minister, Ministers, Principal Secretaries and other government officials and entities including LEC and LNDC, in order for FSG to meet its obligations in terms of this Agreement in a timely manner. All such meeting requests from FSG shall be arranged by GOL within 24 hours or such reasonable short period thereafter."

(5) Clause 16:

"GOL indemnifies and holds FSG, its employees and agents harmless against:

16.1. any and all claims of any nature whatsoever, including any claims from any third parties arising from or in connection with or as a result of the use of purchase or delivery of Products by FSG to GOL;

16.2. all and any claims, losses, liabilities, or damages arising from or attributable to decisions or actions taken by FSG as a consequence of any delays by GOL in providing key inputs, information or other responses to FSG;

16.3. any loss that may arise or be caused to FSG as a result of GOL not providing timely access to FSG, or its key personnel, to any facility together with all costs occasioned thereby. Such costs shall be invoiced to GOL by way of the monthly invoice provided for in clause 9..."

(6) Clause 17:

"17.1. GOL warrants that:-

17.1.2. FSG are expressly authorised to commence with the roll-out of the Products without any delay and to act autonomously where necessary to achieve that outcome;

17.1.6. [it will] desist from any acts or omissions which result in, or are likely to result in any delays to the Project timelines

17.1.7. it will provide full, complete and timely access to all its key personnel, including the Prime Minister, Ministers, Principal Secretaries and other government officials and entities, including LEC and LMDC. GOL further warrants and acknowledges that this is necessary due to the time constraints in respect of the Project and in order for FSG to meet its obligations in terms of this Agreement."

...

17.2. As time is of the essence for this Project, GOL shall do all things necessary to ensure that the Project runs smoothly, without interruption or undue delay. This includes responding to FSG's queries and roll-out requirements in a timely and prompt manner.

(7) Clause 18:

"GOL hereby grants FSG the first opportunity for all other renewable energy, energy efficiency or electricity generation opportunities with GOL for a duration of 5 years calculated from the Commencement Date."

94. The relevant clauses of the Supply Agreement extracted above all go to the root of the contract and form a vital part of the agreement between the Parties:

- (1) Clause 17.1.3 is a material term and a warranty relating to the conclusion of the finance agreements. Where a contract is concluded on the understanding that a certain action will be carried out by one of the parties, and this action forms part of the intended object of the contract, the promising party is bound by a warranty.⁹⁹ Similarly in this case, the Respondent's warranty to conclude the finance agreements was an integral aspect of the Supply Agreement. If the finance agreements had not been concluded at the time the contract was signed, the Respondent was obligated to conclude them shortly after (*i.e.*, "*contemporaneously*") the signing of the Supply Agreement.¹⁰⁰
- (2) Clause 12.1 is a material term of the contract as it provides for the consideration of the contract. Consideration for the services provided under the Supply Agreement are essential to the existence of the contract, and could not be dispensed with. Although South African law does not require that a contract be supported by consideration, where the intention of the parties while entering into the contract is that such consideration is essential to its performance, this aspect of consideration is vital.
- (3) Clauses 5.1.4¹⁰¹, 5.2.9, 16.1, 16.2, 17.1.2, 17.1.6, 17.1.7 and 17.2 are all essential material terms and warranties as they are all undertakings that the Respondent took which were vital to the performance of the contract.
- (4) Clause 18 is a material term as it creates a right of FSG under the Supply Agreement to all other renewable energy projects in the country for a specific five year period, and constitutes an essential part of the contractual transaction with the Respondent that cannot be unilaterally withheld.

⁹⁹ *Boundary Financing Limited v Protea Property Holdings (Pty) Limited*, 2009 (3) SA 447 (SCA), 27 November 2008, ¶¶ 7-11, CLA-007.

¹⁰⁰ *Boundary Financing Limited v Protea Property Holdings (Pty) Limited*, 2009 (3) SA 447 (SCA), 27 November 2008, ¶ 17, CLA-007, discussing that where a warranty/undertaking is made with both parties aware of its non-fulfilment prior to the conclusion of the contract, the warranting party is under an obligation to subsequently cure its breach of the contract by fulfilling the condition.

¹⁰¹ Relevant sentence to this end: "GOL undertakes not to interfere with or delay the roll-out of the Project with an approvals regime".

C The Respondent's material breaches of the Supply Agreement

95. Under South African law, a material breach arises when the breach of the contractual obligation goes to the root of the agreement,¹⁰² affecting a vital or essential part or term of the contract; or when there has been a substantial failure to perform.¹⁰³
96. The Respondent breached the above material provisions of the Supply Agreement in the following manner:
 - (1) Clause 17.1.3: the Respondent failed to procure the signing of the finance agreements, contrary to the warranty the Respondent provided under this provision that this had been done so or that this was contemporaneously being done with or shortly after the conclusion of the Supply Agreement.
 - (2) Clause 12.1: the Respondent failed to arrange the payment of any of the instalments to be paid under clauses 12.1.1 and 12.1.2, two of which were due on 1 October 2018 and 1 April 2019, respectively, reflecting combined payments of €50,000,000.
 - (3) Clause 5.1.4: the Respondent breached its undertaking under this provision not to interfere with or delay the roll-out of the Project with an approvals regime, such as by using internal issues or differences within the government as an obstacle to the conclusion of the finance agreements and commencement of the Project.
 - (4) Clause 5.2.9: the Respondent breached its undertaking under this provision to provide full, complete and timely access to all of its key personnel. The communications between FSG and the Respondent show that the Respondent failed to facilitate proper dialogue between FSG and its key personnel in a timely manner, leading to severe delay and ultimately the derailment of the Project.
 - (5) Clauses 17.1.2, 17.1.6, 17.1.7 and 17.2: the Respondent breached these provisions by unnecessarily delaying the commencement of the Project by failing to facilitate the necessary approvals for the timely performance of the Supply Agreement.
 - (6) Clause 18: the Respondent breached its obligation under this provision by disregarding FSG's right of first opportunity for all other renewable energy, energy efficiency or electricity generation opportunities with the Respondent for a duration of 5 years from the date of commencements of the Supply Agreement (*i.e.*, from 1 October 2018). The commencement of the Mafeteng Project, without the

¹⁰² See *Brilliant Cellular CC v MTN Service Provider (Pty) Ltd*, [2011] ZAGPJHC 175, 23 November 2011, ¶ 30.6, **CLA-008**.

¹⁰³ S van der Merwe and others, *Contract - General Principles* (4th ed, Juta & Co 2012), pp. 306-7, **CLA-009**, as discussed in *Singh v McCarthy Retail Ltd (t/a McIntosh Motors)*, 2000 (4) SA 795 (SCA), 14 September 2000, ¶ 13, **CLA-010**.

Respondent first approaching FSG with the opportunity to participate, is evidence of the Respondent's breach of this obligation.¹⁰⁴

97. For the above reasons, the Respondent is in material breach of the Supply Agreement.

D FSG lawfully terminated the Supply Agreement

98. Clause 23.1 of the Supply Agreement provides:

"If GOL commits any material breach of the terms of this Agreement and fails to remedy such breach within 30 (thirty) days (or such other period as may be reasonable in the circumstances) after receipt of written notice from FSG requiring it to do so, FSG shall be entitled to claim specific performance without prejudice to its right to such damages as may have been occasioned by the breach or, should the damages go to the root of the contract, to cancel this Agreement with or without a claim for damages."

99. South African law considers clause 23.1 a forfeiture clause or *lex commissoria*, which "entitles the innocent party to cancel the agreement if the breaching party fails to remedy its breach by the time fixed in the contract."¹⁰⁵ Such cancellation would constitute valid termination of the contract, which does not need to be confirmed by any court order.¹⁰⁶ The entitlement to cancel by virtue of a *lex commissoria* is a matter of right: it does not (in contrast with the general right to cancel on material breach) entail an inquiry into whether the breach to which a *lex commissoria* applies is serious, or goes to the root of the contract.¹⁰⁷
100. FSG duly followed the provisions of the termination clause. Upon becoming aware of the Respondent's material breaches as detailed above, it sent the Respondent a notice of breach on 11 March 2019.¹⁰⁸ It then allowed the Respondent at least 60 days, (well over the 30 day time period stipulated under the Supply Agreement), to rectify its breaches before finally formally terminating the Supply Agreement on 29 July 2019.¹⁰⁹ Therefore,

¹⁰⁴ See Sunday Express Article, "Lesotho, China negotiate loan for Mafeteng solar project", 26 May 2019, C-005.

¹⁰⁵ *Brilliant Cellular CC v MTN Service Provider (Pty) Ltd*, [2011] ZAGPJHC 175, 23 November 2011, ¶ 29.3, CLA-008, where the Johannesburg High Court analysed a similar contractual clause which provided: "37.1 Notwithstanding any other provision to the contrary contained in this Agreement, and without prejudice to any other rights or remedies which the parties may have, either party ("the aggrieved party") may terminate this Agreement without liability to the other, immediately on giving notice to the other, if the other party ("the defaulting party") commits a material breach of any of the terms of this Agreement and fails to remedy such material breach within 7 (seven) days of that party being notified in writing of the material breach".

¹⁰⁶ See *Brilliant Cellular CC v MTN Service Provider (Pty) Ltd*, [2011] ZAGPJHC 175, 23 November 2011, ¶¶ 30.1-30.12, CLA-008. See also *Singh v McCarthy Retail Ltd (t/a McIntosh Motors*, 2000(4) SA 795 (SCA), 14 September 2000, CLA-010, which considers the existence of a *lex commissoria* an essential component of a valid contract termination.

¹⁰⁷ *Oatorian Properties v Maroun*, 1973 (3) SA 779 (A), 21 May 1973, p. 785, CLA-011. See the discussion and further authorities cited in GB Bradfield, *Christie's Law of Contract in South Africa* (7th ed, LexisNexis 2016), p. 607, CLA-012.

¹⁰⁸ Letter from FSG to the Respondent, 11 March 2019, C-004.

¹⁰⁹ Letter from FSG to the Respondent, 29 July 2019, C-067.

FSG's termination of the Supply Agreement was a legitimate exercise of its rights under the Supply Agreement and South African law.

VI. FSG IS ENTITLED TO DAMAGES FOR ITS LOSSES

101. As a result of the Respondent's breaches of the Supply Agreement, and having lawfully terminated the Supply Agreement, FSG is entitled to damages from the Respondent.
102. FSG is entitled to and claims the following by way of damages:
 - (1) In accordance with clauses 22.2.2 and 18 of the Supply Agreement:
 - (i) 50% of the remaining unpaid draw-down amount in respect of the Project, namely, €50,000,000 (fifty million Euros) (the "**Liquidated Damages Claim**"); and
 - (ii) loss of profit arising out of the Respondent's breach of clause 18 of the Supply Agreement, including in particular the loss of opportunity to develop the Mafeteng Project, and any other renewable energy, energy efficiency or electricity generation opportunities with the Respondent for 5 years from 1 October 2018 (the "**Loss of Opportunity Claim**").
 - (2) In the alternative, FSG claims damages for:
 - (i) loss of profits caused to the Claimant as a consequence of the Respondent's material breach of the Supply Agreement (the "**Loss of Profits Claim**"); and
 - (ii) the Loss of Opportunity Claim.

1. Liquidated Damages Claim

103. Pursuant to clause 22.2, in the event of termination of the Supply Agreement by FSG, then GOL is obliged to ("shall"):
 - (1) Purchase all Products and stock in and in transit to Lesotho (Clause 22.2.1);
 - (2) Pay 50% of the then remaining unpaid draw-down amount in respect of the Project as compensation (Clause 22.2.2);
 - (3) Pay all outstanding amounts due under the Finance Agreements which will become immediately due and payable; (Clause 22.2.3);
 - (4) Pay all labour, retrenchment and/or termination costs (22.2.4); and
 - (5) Elect whether to purchase FSG's equipment, vehicles and other items surplus to FSG's requirements at a price agreeable to both Parties (22.2.5).

104. As the Supply Agreement was breached by the Respondent almost immediately after it was executed, the only claim under clause 22.2 which FSG makes is for damages pursuant to clause 22.2.2.
105. FSG is entitled to claim damages pursuant to clause 22.2.2 as liquidated damages. A liquidated amount is an amount which is either agreed upon or which is capable of "*speedy and prompt ascertainment*" or, put differently, where the ascertainment of the amount in issue is "*a matter of mere calculation*".¹¹⁰
106. The amount payable to FSG pursuant to clause 22.2.2 is a matter of mere calculation. It is calculated by taking the balance of the unpaid draw-down amount in respect of the Project and multiplying it by 50%. Since the total Project cost and draw-down amount was fixed in the amount of €100,000,000 and the Respondent has not paid any drawn-downs, the amount payable by the Respondent under clause 22.2.2 is easily ascertainable and equals €50,000,000.
107. The amount stipulated as payable pursuant to clause 22.2 of the Supply Agreement in the event of breach was - as the FTI Report confirms - an estimate of the amount that FSG would lose by way of profit had the Supply Agreement been terminated for breach.¹¹¹ FSG's anticipated profit margin was approximately 50% of the Project value.¹¹² Therefore, the sum stipulated in clause 22.2.2 as being due in the event of breach represents a genuine pre-estimate of the loss (of profits) that FSG would have incurred in the event of early termination of the Supply Agreement for material breach. Consequently, it is fair and reasonable that the Respondent be ordered to pay that amount, as it agreed to in the Supply Agreement.
108. Furthermore, having spent over two years planning and a year negotiating the Project with the GOL, it was important to FSG that once the parties had agreed to proceed, the Project would continue until completion. Accordingly, the amount stipulated in clause 22.2.2 is proportionate to FSG's legitimate interest in enforcing its rights vis-à-vis the Respondent under the Supply Agreement.
109. Finally, the liquidated damages amount payable in the event of termination is proportionate as it is linked to the remaining unpaid draw-down amount in respect of the Project. Consequently, it was envisaged that as the Project progressed, the amount of liquidated damages payable by the Respondent, in the event of termination, would be reduced proportionately to reflect FSG's estimated loss.

¹¹⁰ Griesel J in *Tredoux v Kellerman* 2010 (1) SA 160 CPD, 3 February 2009, CLA-013.

¹¹¹ FTI Report, ¶ 2.26.

¹¹² Witness Statement of Robert Frazer, 4 October 2019, ¶¶ 60-61.

110. As further explained below, FTI has conducted an assessment of the loss of profits caused to FSG as a consequence of the Respondent's breaches. FTI concludes that, as the loss of profits are in line with the amount that is due by way of liquidated damages, the liquidated damages provision in the Supply Agreement is a reasonable approximation of the damages FSG has suffered as a result of the Respondent's breaches.¹¹³

2. Damages for Loss of Opportunity Claim

111. FSG also seeks damages from the Respondent for the loss of opportunity to participate in other renewable energy projects in Lesotho. FSG's right of first opportunity was for a five-year period from 1 October 2018. This claim is in addition to the liquidated damages, alternatively loss of profits, claims.
112. That the parties had knowledge of and contemplated that FSG would have the right of first opportunity to any future renewable energy projects in Lesotho for a five year period is clear from the inclusion of clause 18 in the Supply Agreement. Loss caused by the breach of clause 18 is therefore neither remote nor unforeseeable to the Respondent,¹¹⁴ and allows a separate and free-standing claim for damages.
113. As at the date of this Statement of Case, the Claimant has been able to identify one project which falls within the ambit of clause 18 of the Supply Agreement, namely, the Mafeteng Project. According to information in the public domain, this project involves a 70MW solar PV farm in Mafeteng with a value of approximately €120,000,000. Media reports indicate that this project was to be awarded to a Chinese Government-backed enterprise.¹¹⁵
114. As Mr Frazer explains in his witness statement, FSG would have been able to complete the Mafeteng Project if it was given that opportunity, to which it was legally entitled.¹¹⁶ By not providing FSG with the opportunity to participate in the Mafeteng Project, the Respondent has breached clause 18 of the Supply Agreement and deprived FSG of the opportunity to earn profits from completing the Mafeteng Project.
115. FTI have undertaken a profitability analysis of the profits that FSG would have earned had it been given the opportunity to participate in the Mafeteng Project.¹¹⁷ In assessing the

¹¹³ FTI Report, ¶ 7.11.

¹¹⁴ Test in *George Fisher (Great Britain) Ltd v Multi Construction Ltd, Dexion Ltd (third party)*, [1995] 1 BCLC 260 (CA), ¶¶ 264e-267h, referenced in *Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Limited*, 2008(6) SA 468 (W), 16 November 2007, ¶ 16, CLA-023.

¹¹⁵ Witness Statement of Robert Frazer, 4 October 2019, ¶ 85, referring to article "Lesotho, China negotiate loan for Mafeteng solar project", Sunday Express, 26 May 2019, C-005.

¹¹⁶ Witness Statement of Robert Frazer, 4 October 2019, ¶ 87.

¹¹⁷ FTI Report, ¶¶ 8.8, 8.9 and 8.11.

likely damages suffered by FSG, FTI have conducted a profitability analysis using the DCF method. FTI considered, amongst other things, the following:¹¹⁸

- (1) The availability and structure of financing for the project, which was assumed would be similar to that of the Project;
- (2) That the selling price per Watt would have been the same as that assumed for the Project's rooftop Solar PV (€1.70 per Watt); and
- (3) That the costs would be in line with a quote received from a specialist solar consultancy for a Solar PV farm in Lesotho, being €0.91 per Watt, and include FSG overheads of €0.03 per Watt.

Sales price, Cost per unit, Margin per unit,	Margin per unit, %	Quantity	Profits,		
€/W	€	(W)	€m		
1.70	0.94	0.76	44.5%	70,000,000	53.0

Figure 5: Mafeteng Project profits

116. FTI converted the expected cash flows into a DCF analysis by reference to the likely term of the project of 12 months, a regular inflow of cash spread evenly over the period and a discount rate of 3.5% to account for similar financing arrangements and risks as for the Project.¹¹⁹
117. FTI concludes that the damage FSG has suffered as a consequence of being deprived the opportunity to participate in the Mafeteng project is in the amount of €52,090,533.¹²⁰
118. As at the date of preparing this Statement of Claim, FSG is not aware of other projects awarded by the Respondent in Lesotho to third parties that should have properly been offered to FSG. FSG reserves its right to amend its claim in the event that such further breaches come to light.
119. In connection with the Loss of Opportunity Claim, FSG also relies on clause 16.2 of the Supply Agreement, through which the Respondent indemnified FSG for "*all and any claims, losses, liabilities, or damages arising from or attributable to decisions or actions taken by FSG as a consequence of any delays by GOL in providing key inputs, information or other responses to FSG*".

¹¹⁸ FTI Report, section 8.

¹¹⁹ FTI Report ¶¶ 8.11 – 8.13.

¹²⁰ FTI Report, ¶ 8.7.

120. Accordingly, FSG's primary position is that it is entitled to be awarded damages of €102,090,533, namely €50,000,000 for the Liquidated Damages Claim and €52,090,533 for the Loss of Opportunity Claim.

3. Alternative Loss of Profits Claim

121. In the alternative to the Liquidated Damages Claim, FSG seeks compensation for the profits it has been deprived of earning as a consequence of the Respondent's material breaches of the Supply Agreement, together with the Loss of Opportunity Claim.

3.1 Entitlement to claim damages for breach of contract

122. Damages for loss in breach of contract claims are available as of right. An innocent party's entitlement to claim damages for breach of a contract was concisely formulated in *Steenkamp v Du Toit*:

*"[A] person who has rendered himself liable for damages is responsible for the natural and probable consequences of his act, those consequences being ascertained with reference to the defendant's knowledge at the time. A man, therefore, who has failed to carry out his contractual obligation, is liable for such damages as he must reasonably have known would naturally and probably result from the breach, such damages, in other words, as given his knowledge of the circumstances might naturally be expected to flow from the breach."*¹²¹

3.2 Basis for assessing losses for breach of contract – 'positive interesse'

123. A fundamental rule of the law on damages under South African law is that the aggrieved party to a contract may seek damages for breach of contract (which has been terminated in consequence of the breach) and claim everything it would have gained had the contract been properly performed.¹²² This has been described as '*positive interesse*' in the leading decision of Nienaber J in *Probert v Baker*,¹²³ and affirmed in the recent decision of *Drummond Cable Concepts v Advancenet (Pty)*, where the Johannesburg High Court held:

"It is basic rule of the law of contract that a party that sues for damages arising from a breach of contract is entitled to all the damages she has suffered in consequence of the breach. She should be placed in a position she would have been in had the contract not been breached. This...means the innocent party is asking to be compensated for her "bargain": 'A litigant

¹²¹ *Steenkamp v Du Toit*, 1910 TPD 171, p. 175, cited in *Food & Allied Workers Union v Ngcobo NO and Another*, [2013] ZASCA 45, 28 March 2013, ¶ 55, **CLA-014**.

¹²² See *Victoria Falls & Transvaal Power Co. Ltd. v Consolidated Langlaagte Mines Ltd.*, 1915 AD 1, p. 22, as discussed in *Cirano Investments 307 (Pty) Ltd v Execujet Aviation (Pty) Ltd*, [2014] ZAGPJHC 207, 22 March 2014, ¶ 12, **CLA-015**; and *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd*, 1977 (3) SA 670 (A), 22 May 1977, ¶ 687B-F, **CLA-016**, as reiterated in *Drummond Cable Concepts v Advancenet (Pty) Ltd*, [2018] ZAGPJHC 636, 14 December 2018, ¶ 9, **CLA-017**.

¹²³ *Probert v Baker*, 1983 (3) SA 229 (D), as discussed in *Drummond Cable Concepts v Advancenet (Pty) Ltd*, [2018] ZAGPJHC 636, 14 December 2018, ¶ 11, **CLA-017**. See further S van der Merwe and others, *Contract - General Principles* (4th ed, Juta & Co 2012), pp. 362-364; and WA Joubert and others, *Law of South Africa* (2nd ed, Lexis Nexis Butterworths 2005), pp. 20-21 and 49-50, **CLA-018**.

*who sues on contract sues to have his bargain or its equivalent in money or in money and kind."*¹²⁴

124. As a general rule, the damage must be calculated at the date when the innocent party elects to treat the contract as at an end.¹²⁵ In the present case, FSG formally terminated the Supply Agreement on 11 March 2019 and therefore that is the date from which damages must be assessed.

3.3 Causation and foreseeability

125. Under South African law, the defaulting party's liability is limited in terms of the broad principles of causation and remoteness, to:
- (1) those damages (often said to arise from liability for 'general damage', or termed 'general damages') that flow naturally and generally from the kind of the breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach;¹²⁶ and
 - (2) those damages ('special damages') that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending to the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach.¹²⁷
126. Accordingly, under South African law, damages that flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom, stand to be awarded.¹²⁸
127. The damages claimed by FSG were caused by, and flow naturally from, the breach. Had the Respondent not breached the Supply Agreement, FSG would have performed the Supply Agreement and supplied the products and services agreed and FSG would have been remunerated for those products and services by drawing amounts in respect of the Project in accordance with the agreed draw-down schedule in the Supply Agreement.
128. Further, the damages claimed would have been in the contemplation of the Parties as a probable result of the breach. For the reasons set out further below, it must have been

¹²⁴ *Trotman v Edwick*, 1951 (1) SA 443 (A) 449B, used in *Drummond Cable Concepts v Advancenet (Pty) Ltd*, [2018] ZAGPJHC 636, 14 December 2018, ¶ 8, **CLA-017**.

¹²⁵ *Celliers v Papenfus and Rooth* 1904 TS 73, 4 March 1904, **CLA-019**.

¹²⁶ *Shatz Investments (Pty) Ltd v Kalovrynas*, 1976(2) SA 545 (A), 2 March 1976, 550C, **CLA-020**.

¹²⁷ *Lavery & Co Ltd v Jungheinrich* 1931 AD 156, 31 March 1931, pp.169, 175, **CLA-021**. See further S van der Merwe and others, *Contract - General Principles* (4th ed, Juta & Co 2012), pp. 368-9, **CLA-009**.

¹²⁸ *Basson v Hanna*, [2016] ZASCA 198, 6 December 2016, **CLA-022**.

clear to the Respondent that FSG would have lost at least €50,000,000 because that was payable under the formula set out in clause 22.2.2 of the Supply Agreement.

129. The Claimant's losses therefore arose as a direct, proximate and natural consequence of the Respondent's breaches aforesaid and flow naturally and generally therefrom. They were also clearly in the contemplation of the parties at the time of contracting, and were accordingly foreseeable or reasonably foreseeable.

3.4 Calculation of Loss of Profits Claim

130. In order to assess the profits that FSG has lost as a consequence of the Project not proceeding as envisaged and agreed, FSG has instructed FTI to carry out a loss of profit analysis.¹²⁹
131. To assess the compensation due to FSG in relation to the profits it has lost as a consequence of the Respondent's material breaches, FTI calculates FSG's losses as at 11 March 2019, being the date on which FSG formally gave notice of the Respondent's breach of the Supply Agreement (the "**Assessment Date**").¹³⁰ This approach requires a projection of: (i) future revenues that would have been generated from the Project; and (ii) the costs associated with the carrying out of the Project and generating those future revenues, as they would have been *but for* the Respondent's breaches of the Supply Agreement.
132. FTI's assessment of FSG's lost profits using a Discounted Cash Flow ("DCF") analysis has, *inter alia*, involved the following steps:
 - (1) FTI calculated the profits that FSG would have earned from the Project by deducting the costs that FSG would have incurred in carrying out the Project as agreed from the fixed revenue of €100,000,000 that FSG should have received had the Supply Agreement been carried out as agreed.¹³¹ The total expected costs that FTI calculated that FSG would have spent on implementing the Project was €48,366,892.¹³²

¹²⁹ See FTI Report.

¹³⁰ See FTI Report, ¶ 5.4.

¹³¹ FTI Report, section 6.

¹³² FTI Report, ¶ 6.54 and Appendix 4-2.

Product	Quantity	Revenues , €m	Costs, €m	Profit margin, %	Profits, €m
SWHs	30,896	77.2	37.3	51.8%	40.0
Solar lanterns	330,000	13.3	6.1	54.1%	7.2
Solar PV (MW)	5	8.5	4.5	47.0%	4.0
LED lights	100,000	1.0	0.5	47.9%	0.5
Total		100.0	48.4	51.6%	51.6

Figure 6: Summary of expected profits¹³³

- (2) FTI based their assessment of costs by reference to the likely sales prices, quantities and costs per unit as evidenced from FSG's contemporaneous expectations, agreed quantities in the Supply Agreement and third-party evidence (for example, quotes from third party suppliers). Where contemporaneous evidence was not available, FTI relied on Mr Frazer's reasonable assumptions based on his own experience and expertise in the field.¹³⁴
- (3) Having determined the profits that FSG would have likely earned from carrying out the Project, FTI then calculated the lump sum present value of the Project by discounting the forecasted cash flows of the Project back to 11 March 2019 at an appropriate discount rate to account for market risk and the time value of money.¹³⁵ The factors that FTI took into account when discounting the future profits included the following:
 - a) The timing and the amount of revenues that FSG would have received as specified in the Supply Agreement; and
 - b) The duration of the Project and the point at which costs would have been incurred.¹³⁶
- (4) Taking into consideration the above, the discount rate applied by FTI to the Project cash flows was 3.5%.¹³⁷

¹³³ FTI Report, ¶ 2.12.

¹³⁴ FTI Report, ¶ 2.13 and Section 6.

¹³⁵ FTI Report, ¶¶ 7.7 – 7.8.

¹³⁶ FTI Report, ¶¶ 2.15 and 7.8.

¹³⁷ FTI Report, ¶ 7.9.

133. Using the above methodology, FTI concludes that the value of the lost profits that FSG incurred as a result of termination of the Supply Agreement and the Project not proceeding was €50,764,586.¹³⁸
134. FTI explain in the report that they consider their calculation to be reasonable because, amongst other reasons set out in paragraph 7.12 of their report, the costs were calculated on a conservative basis, the price and unit volume of the SHWs could have been significantly higher than assumed and the cost profile and discount rate were based on conservative assumptions.
135. In connection with the Loss of Profit Claim, FSG also relies on clause 16.2 of the Supply Agreement, through which the Respondent indemnified FSG for "*all and any claims, losses, liabilities, or damages arising from or attributable to decisions or actions taken by FSG as a consequence of any delays by GOL in providing key inputs, information or other responses to FSG*".
136. Accordingly, FSG's alternative position is that it is entitled to be awarded damages of €102,855,119, namely €50,764,586 for the Loss of Profits Claim and €52,090,533 for the Loss of Opportunity Claim.

VII. RELIEF SOUGHT BY THE CLAIMANT

137. FSG respectfully seeks, without prejudice to its reserved right to supplement and/or amend its claims and/or the quantum of its claims and/or the request for relief provided herein, an Award in its favour:
 - (1) Making declarations as to the Respondent's breaches of the Supply Agreement;
 - (2) Ordering the Respondent to pay:
 - (a) damages in the form of:
 - (i) liquidated damages in the amount of €50,000,000; and
 - (ii) damages for lost opportunity in the amount of €52,090,533;
- ALTERNATIVELY,
- (iii) damages for loss of profit in the amount of €50,764,586; and
 - (iv) damages for lost opportunity in the amount of €52,090,533;
- (b) pre-award and post-award interest to be quantified at the date of the Award, with the date from which interest accrues; and

¹³⁸ FTI Report, ¶ 7.10.

- (c) all of the costs of this arbitration, including, but without limitation, the fees and expenses of the arbitrator in addition to all legal and other costs incurred by FSG, on a full indemnity basis; and
- (3) Ordering such further and/or other relief as the Arbitrator deems just and appropriate.

Respectfully submitted,



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7 October 2019