

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT

BETWEEN:

R (on the application of  
FRIENDS OF THE EARTH LIMITED)

Claimant

-and-

THE SECRETARY OF STATE  
FOR INTERNATIONAL TRADE/  
UK EXPORT FINANCE (UKEF)

First Defendant

-and-

CHANCELLOR OF THE EXCHEQUER

Second Defendant

-and-

TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA

Interested Party 1

-and-

MOZ LNG1 FINANCING COMPANY LIMITED

Interested Party 2

---

CLAIMANT'S SKELETON ARGUMENT  
For hearing 7-9 December 2021

---

Essential reading: Parties' skeleton arguments  
Claimant's Amended Grounds ("ASFG") p.1-39 [CB1/1/3-42]  
Defendants' Detailed Grounds of Defence ("DGD") [CB1/2/60-99]  
Greg Muttitt ("GM") WS [CB1/11/283-315]  
Kevin Anderson ("KA") WS1 [CB1/4/127-145]; WS2 [CB1/6/154-172]

References to the hearing bundles are in the format Bundle/Tab/Page Number/ Paragraph Number. A fully referenced version of this skeleton argument will be filed once the Authorities Bundle has been agreed.

I. INTRODUCTION

1. This is a challenge to the First ("UKEF") and Second ("COE") Defendants' Decisions of 12 and 10 June 2020 respectively,<sup>1</sup> which led to the final Decision of 30 June 2020 to provide loans and guarantees of \$1.15bn for the development by Total E&P of its \$20bn

---

<sup>1</sup> Note that it appears from a July 2019 Report by the AfDB (of which the UK is a Board Member) that UKEF had already agreed to fund the Project to the tune of \$1.15bn: [MG/25 (fourth box) [SB/41.21/638]].

Liquefied Natural Gas Project in Cabo Delgado in Northern Mozambique (“the Decision”). The case concerns one of the largest single financing packages ever offered by UKEF to a foreign fossil fuel project. Total aims to extract 43 million tonnes of Liquid Natural Gas (“LNG”) per annum for 32 years from the offshore gas fields, totalling combusted emissions of approximately 4.3 GtCO<sub>2</sub> (4.3 billion tonnes) [KA WS1 §24 [CB1/4/134].

2. On 10 September 2020 the parties signed a consent order agreeing to a rolled-up hearing and expedition. Swift J. then requested the parties attend a hearing (on 17 September 2021) on the basis that he did not consider the case suitable for expedition (since the loan agreements could be unravelled should the Decision be found to be unlawful) which the Defendants agreed. On 21 September 2020, he ordered certain disclosure to be followed by amended grounds. Amended grounds were filed on 9 November 2020. On 15 March 2021 Lang J. refused permission on the papers without reasons. On 21 April 2021 Thornton J. granted permission on Ground 1 [Order of 14 May 2021 [SB/19/269-270]]. The hearing was then not fixed until 8 months later because of lack of availability of Sir James Eadie QC. 1,723 of pages of additional disclosure were provided, a significant amount after a Part 18 and specific disclosure request on 06 August 2021 [SB/45/1543] and 24 September 2021[SB/47/1818]

### **Summary of issues.**

3. This case is not concerned with whether, or the extent to which, the Defendants should have considered the Paris Agreement (“PA”) in reaching their Decision. Rather, it is concerned with whether, having concluded that both the Project and its financing were compatible with the UK and Mozambique’s obligations under the PA, and having taken the Decision on that basis, the Decision was lawful: [DGD §75 [CB1/2/84], §102.2 [CB1/2/91]]. The conclusion of PA compatibility was a key consideration in the Decision, even if not a pre-condition [Louis Thomas Statement (“LT WS, Exhibits in Format: LT/Exhibit Number”) §85, §88 [CB1/7/188]; Maxwell Griffin Statement (“MG WS, Exhibits in Format: MG/Exhibit Number”) §60-61, §64 [CB1/8/218-220]; ]; indeed consideration of Climate Change risk, including compatibility with the PA, was a requirement of the decision making: [LT/4/§14 [CB2/17/146] and §37 [CB2/17/150]; Further Disclosure (“FD/Item Number”) FD/32/§3 [SB/48.2/1824]].

4. The questions for this Court are whether:
  - a. The Decision was based on an error of law, namely that the Project and its financing were compatible with the UK and Mozambique's obligations under the PA (Ground 1A); and/or
  - b. Was otherwise unlawful in so far as it was reached without regard to essential relevant considerations (Ground 1B).
5. The Defendants do not and have never argued that they would have taken the same Decision had they concluded that the Project and/or its financing were incompatible with the UK and/or Mozambique's obligations under the PA. That accords with UKEF's stated ESHR policy to comply with all applicable international agreements including the OECD Common Approaches, which explicitly recognises "*the responsibility of adherents to implement the commitments undertaken by the Parties to the UNFCCC*" (OECD Principles [AB/8/220], ESHR Policy December 2018 §3 [CB2/5/33] referred to at ASFG §18 [CB1/1/10] & §40 [CB1/1/17]).
6. Nor do the Defendants say that their Decision to agree to finance the Project was taken on the basis that there was merely a 'tenable' argument that the Project and its financing were compatible with the PA. The advice on which the Defendants relied in taking their Decision, was that the Project and its financing were compatible with the PA. That is also the public position adopted by UKEF.

#### *Finance flows and fossil fuels*

7. Flows of finance are a core element in meeting the temperature goals in Article 2 PA, as confirmed in Article 2(1)(c) PA (see below). Achieving the temperature goals requires both (i) peaking of global emissions as soon as possible and (ii) rapid reductions thereafter, as set out in Article 4(1) PA ("**low emissions pathway**"). Whilst all countries must begin reducing emissions, reductions should be fastest in the wealthiest countries and poorer countries should receive finance and support to enable reduction: GM WS §76 [CB1/11/310].
8. Alignment of all finance flows with the low emissions pathway (Art. 2(1)(c)) was a critical element agreed by the Parties to the PA. As the UK stated in its December 2020 submission pursuant to Article 9(5) PA: "[under Article 2(1)(c)]...*all parties committed*

to collectively align finance flows with low greenhouse gas and climate resilient development.” Further, “[w]ithout the fundamental shift in the financial system as a whole, the climate goals of the Paris Agreement cannot be met.”<sup>2</sup> (emphasis added)

9. UKEF also recognises that [m]aking financial flows consistent with a net zero and resilient economy is a crucial goal of the 2015 Paris Agreement” and has expressed the ambition to “[e]mbed the UK and UKEF as a key influencer in multilateral negotiations amongst export credit agencies, and encourage our peers to join us in making financial flows consistent with the Paris Agreement.”<sup>3</sup>
10. In July 2019 the Government stated in its Green Finance Strategy that it would be “[e]nsuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans [and] [e]nsuring that relevant programmes do not undermine the ambition in countries’ Nationally Determined Contributions (NDC) and adaptation plans.”<sup>4</sup>
11. A year later and only the day after the Decision, the CDC (the UK development bank) in order to align its financing with its obligations under the PA, adopted a climate change strategy that states that it excludes new investment in the vast majority of fossil fuel subsectors.<sup>5</sup> Even earlier, on 8 November 2019, the finance ministers of the EU issued a statement urging the European Investment Bank (“EIB”) to end financing for fossil-fuel energy projects so as to align with the PA.<sup>6</sup> The Private Infrastructure Development Group (“PIDG”), funded by the governments of the UK, the Netherlands, Switzerland, Australia, Sweden, Germany and the International Finance Corporation (“IFC”) has done the same.<sup>7</sup>

---

<sup>2</sup> [https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202012111841---UK%20Biennial%20Finance%20Communication%202020%20-%20publication%20version%20\(1\).pdf](https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202012111841---UK%20Biennial%20Finance%20Communication%202020%20-%20publication%20version%20(1).pdf) submitted pursuant to Dec. 12 CMA 1: <https://unfccc.int/Art.9.5-biennial-communications>

<sup>3</sup> See <https://www.gov.uk/government/publications/uk-export-finance-climate-change-strategy-2021-to-2024> pp. 5 and 8.

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/820284/190716\\_BEIS\\_Green\\_Finance\\_Strategy\\_Accessible\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820284/190716_BEIS_Green_Finance_Strategy_Accessible_Final.pdf) p. 31

<sup>5</sup> <https://www.theguardian.com/environment/2020/jul/02/uk-governments-development-bank-to-end-fossil-fuel-financing> ; [https://assets.cdcgroup.com/wp-content/uploads/2020/07/01170324/CDC\\_Climate\\_Change\\_Strategy\\_spreads.pdf](https://assets.cdcgroup.com/wp-content/uploads/2020/07/01170324/CDC_Climate_Change_Strategy_spreads.pdf)

<sup>6</sup> <https://www.consilium.europa.eu/media/41303/st13871-en19.pdf>

<sup>7</sup> <https://www.pidg.org/wp-content/uploads/2020/07/Spotlight-Taking-action-on-climate-change.pdf>

12. On 12 December 2020, the Prime Minister announced that the UK would no longer provide any new direct financial or promotional support for the fossil fuel energy sector overseas, other than in limited circumstances, as soon as possible, and would align its support to enable clean energy exports.<sup>8</sup> The policy was adopted on 31 March 2021 and applied “to any new Official Development Assistance (ODA), investment, financial and trade promotion activity overseas, including support provided by UK Export Finance”.<sup>9</sup> It provided for alignment with the Paris Agreement and stated that it would “engage with [countries] to accelerate their low carbon transition, deliver a more ambitious Paris aligned Nationally Determined Contributions (NDCs) and better integrate climate considerations into core energy markets planning, including an assessment of long-term financial viability (e.g. exposure to stranded assets and/or price risks)”.<sup>10</sup> The policy specifically prohibits: “[s]upport for gas production, distribution and power generation into the global market”<sup>11</sup>; and prohibits: “[u]nabated gas production and gas distribution infrastructure to the global market. ...feedstock infrastructure needs to be directly tied to use of gas in a domestic power plant... not tied to LNG terminals for export.”<sup>12</sup> (emphasis added)
13. UKEF accepts responsibility for the emissions produced by Projects that it invests in (including the emissions from products: scope 3 emissions) and in September 2021 committed to make its portfolio of investments net zero by 2050, including Scope 3 emissions.<sup>13</sup>

*The project and the low emissions pathway: summary of claim*

14. First, the Claimant submits that the Project is not consistent with the low emissions pathway and climate resilient development and further, it makes it impossible in reality for Mozambique to meet its climate commitments under the PA. Accordingly, the Decision is contrary to the UK’s obligations in relation to finance under the PA, as well as its obligation to assist Mozambique, as a developing country Party (and a

---

<sup>8</sup> <https://www.gov.uk/government/news/pm-announces-the-uk-will-end-support-for-fossil-fuel-sector-overseas>

<sup>9</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/975753/Guidance\\_-\\_Aligning\\_UK\\_international\\_support\\_for\\_the\\_clean\\_energy\\_transition\\_-\\_March\\_2021\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975753/Guidance_-_Aligning_UK_international_support_for_the_clean_energy_transition_-_March_2021_.pdf) p.4

<sup>10</sup> Ibid. pp. 6-7.

<sup>11</sup> Ibid. p. 7

<sup>12</sup> Ibid, p.8

<sup>13</sup> UK Export Finance Climate Change Strategy 2021 to 2024, Strategic Pillar 2.

particularly vulnerable one) not only to meet its climate change commitments but to increase them.

15. Secondly, the first Defendant reached its conclusion that the Project and its financing were compatible with the UK and Mozambique's obligations under the PA on the basis of a wholly peremptory analysis, which:

- a. considered a non-PA consistent pathway (2°C rather than a 1.5°C) and concluded, without basis, that the Project would result in global emissions reductions, such as to meet the low emissions pathway.
- b. failed to consider the most basic elements essential for an assessment of compatibility with the low emissions pathway, including failing even to quantify the Greenhouse Gases ("GHGs") that will be produced from the LNG (Scope 3 emissions), failing to consider all emissions (Scopes 1-3) against the relevant low emission pathway, such as those set out by the IPCC in its 2018 Special Report (requested by the Conference of the Parties (COP) on adoption of the PA, ("**the IPCC SR15 Report**"),<sup>14</sup> and failed to have regard to the UNEP Production Gap Report [AB/5/170-176] over the Project's 32 year lifespan: [GM WS §4-85 [CB1/11/286-312].

16. Internal documents show that the first Defendant was aware of these failings and inadequacies but took the view that there was insufficient time available to remedy them by seeking appropriate outside expertise: [FD/16-18 [CB2/10/88-101]; FD/19-21 [CB2/12/105-120]; MG/17/§6 [CB2/11/103]]

## II. LEGAL FRAMEWORK

### *Statutory basis for Decision*

17. The statutory basis for the Decision is set out at paragraphs 11-14 of the ASFG [CB1/1/8-9] and paragraphs 3 and 24 [CB1/2/60 and 69] of the DGD.

---

<sup>14</sup> Decision 1 CP.21 para. 21 [AB/3/35], the same decision by which the Parties adopted the Paris Agreement [COP Decision 1/CP21](https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf): <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>

## *The UNFCCC, Decision 1/CP 2.1 and the Paris Agreement*

18. **The Paris Agreement** is the third treaty in the UN climate regime, adopted by the COP21 in 2015.<sup>15</sup> It was initiated by the COP17 (2011) in response to the “*significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2 °C or 1.5°C above pre-industrial levels.*”<sup>16</sup>
19. It builds on a complex body of rules and procedures that have developed over twenty-five years, which together make up the UN climate regime. Its founding Treaty is the UNFCCC adopted in 1992 (in force 21 March 1994), the ultimate objective of which is to stabilize greenhouse gas concentrations “*at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system*”: UNFCCC Article 2. UNFCCC Article 3(3) provides for the application of the precautionary principle, namely: “*[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects*” [AB/2/11]
20. The UNFCCC requires industrialized countries (Annex 1 countries) (including the UK) to take the lead in cutting emissions on the basis that they were largely responsible for climate change): Articles 3(1) and 4(2) [AB/2/11-12]. Further, the UNFCCC provides that developed countries are required to finance and provide technology transfer to assist Developing countries to mitigate and adapt to climate change: Article 4(3)-(5) [AB/2/12].
21. Key points regarding the PA are set out in paragraphs 53-57 ASFG [CB1/1/20]. The UK signed the Agreement on 22 April 2016. Pursuant to s. 20 of the Constitutional Reform and Governance Act 2010 (“CRAG”) it was placed before Parliament for 21 days.<sup>17</sup> Parliament raised no issues and accordingly, it was ratified and bound the UK from 18 December 2016.

---

<sup>15</sup> Decision 1 CP.21 : <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [AB/3/32]

<sup>16</sup> Decision 1 CP.17 (2011): <https://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf>

<sup>17</sup> Command Paper 9938:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/558185/EM\\_Paris\\_Ag.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/558185/EM_Paris_Ag.pdf)

22. Of key relevance to the matters before this Court are the following interlinked objectives, which represent ‘the strengthened global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty’ (Article 2 PA):

- a. **First, the temperature goal** in PA Article 2(1)(a), namely “*holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.*” [AB/3/53]. The IPCC has advised that this requires that CO2 emissions decline by about 45% from 2010 levels by 2030 (40–60% interquartile range), reaching net zero around 2050 (2045–2055 interquartile range). SPM C.1 page 12 [AB/4/75].
- b. **Secondly, the financial flows goal**, namely to “*making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*” [AB/3/53] PA Article 2(1) (c) (and see additional finance obligations in relation to developed country Parties assisting developing country Parties: PA Articles 3, 4(5), 9(1), 9(3), 9 (4) [AB/3/53-54, 57-58]).

23. **The PA** involves progressive obligations representing highest possible ambitions, applicable to all countries, which are to define their contribution by increasingly ambitious near-term Nationally Determined Contribution (“NDCs”) provided on at least a five yearly basis in the context of a long-term low-GHG development strategy: (PA Articles 3, 4(3), 4(4), 4(9), 4(11), 4(19)) (commonly known as the ratchet effect) [AB/3/53-54].

24. Article 4(1) provides that:

“In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.” [AB/3/53]

25. The PA extended the obligations in relation to finance provided in the UNFCCC.



Article 9 provides in material part:

“1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention...

3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts.

4. The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation...” [AB/3/57]

26. The Standing Committee on Finance (“SCF”) serves the PA.<sup>18</sup> In 2018, the COP requested the SCF to map, every four years, as part of its Biennial Assessment and overview of climate finance flows, the available information relevant to Article 2, paragraph 1(c), of the PA. At its Biannual Assessment of 2018 the SCF noted:

“49. Climate finance continues to account for just a small proportion of overall finance flows (see figure 3); the level of climate finance is considerably below what one would expect given the investment opportunities and needs that have been identified. However, although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole (and of capital stock) pursuant to Article 2, paragraph 1(c), of the Paris Agreement. This does not mean that all finance flows have to achieve explicitly beneficial climate outcomes, but that they must reduce the likelihood of negative climate outcomes. Although commitments are being made to ensure that finance flows from DFIs are climate consistent, more can be done to understand public finance flows and ensure that they are all consistent with countries’ climate change and sustainable development objectives.”<sup>19</sup> (emphasis added)

---

<sup>18</sup> UNFCCC Decision 1/CP.21, paragraph 63 [AB/3/40]

<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

<sup>19</sup> <https://unfccc.int/sites/default/files/resource/51904%20-%20UNFCCC%20BA%202018%20-%20Summary%20Final.pdf> (executive summary)

27. See further the 2020 summary to the same effect<sup>20</sup>. As set out at paragraph 8 above, in 2020 the UK recognised the need to make all finance flows consistent with the PA in its bi-annual communications under Article 9(5).<sup>21,22</sup>
28. The OECD has noted that measuring progress towards Article 2(1)(c) requires consideration of all finance flows, including finance for activities that undermine or do not impact climate objectives. As such, the scope of tracking finance in relation to Article 2(1)(c) goes beyond the current scope of the Biennial Assessment.<sup>23</sup>

### *The IPCC and the 1.5 Report*

29. In its Decision 1/CP.21 of 12 December 2015 adopting the PA, the COP requested the IPCC to provide a special report in 2018 *on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways*: (para. 21). In the IPCC SR15 Report [AB/4/64-169], the IPCC concluded that there was a high risk of very significantly worse outcomes were temperatures increases to exceed 1.5°C, noting that even at 1.5° harms were likely to be extreme, entailing particular risk for vulnerable communities, including in Africa [IPCC SR15 Report Fig SPM.2 [AB/4/74].<sup>24</sup> It concluded that, as at 1 January 2018, for a 66% chance of not exceeding 1.5°C, a carbon budget of 420 GtCO<sub>2</sub> remained and for a 50% chance, 580 GtCO<sub>2</sub> [IPCC SR15 Report SPM C.1.3 [AB/4/75]]. It looked at emissions pathways (budgets) by reference to timescales and found that to stay within a carbon budget of 420 GtCO<sub>2</sub> carbon neutrality had to be reached within 20 years.
30. The IPCC noted at SPM C.2 [AB/4/78] that

“Pathways limiting global warming to 1.5°C with no or limited overshoot

---

<sup>20</sup> [https://unfccc.int/sites/default/files/resource/54307\\_1%20-%20UNFCCC%20BA%202020%20-%20Summary%20-%20WEB.pdf](https://unfccc.int/sites/default/files/resource/54307_1%20-%20UNFCCC%20BA%202020%20-%20Summary%20-%20WEB.pdf) (executive summary)

<sup>21</sup> UK submission here

[https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202012111841---UK%20Biennial%20Finance%20Communication%202020%20-%20publication%20version%20\(1\).pdf](https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202012111841---UK%20Biennial%20Finance%20Communication%202020%20-%20publication%20version%20(1).pdf) submitted pursuant to Dec. 12 CMA 1: <https://unfccc.int/Art.9.5-biennial-communications>

<sup>22</sup> EU submission here: <https://unfccc.int/sites/default/files/resource/DE-11-24-2020%20-%20EU%20Submission%20on%20Article%209.5.pdf>

<sup>23</sup> <https://www.oecd-ilibrary.org/docserver/82cc3a4c-en.pdf?expires=1636992563&id=id&accname=guest&checksum=589D2F44E48A7C64920118D84698549F>, pp. 11-12

<sup>24</sup>Summary of Report: <https://www.ipcc.ch/sr15/chapter/spm/> [AB/4/64-87]

would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems (high confidence). These systems transitions are unprecedented in terms of scale, but not necessarily in terms of speed, and imply deep emissions reductions in all sectors, a wide portfolio of mitigation options and a significant upscaling of investments in those options (medium confidence). 2.3, 2.4, 2.5, 4.2, 4.3, 4.4, 4.5)” (emphasis added).

## UNEP

31. UNEP issued its first production gap report in November 2019 and found that “*the world is on track to produce far more coal, oil and gas than is consistent with limiting warming to 1.5°C or 2°C, creating a “production gap” that makes climate goals much harder to reach*”<sup>25</sup>. UNEP noted the implications of the IPCC SR15 Report:

“p.2 The continued expansion of fossil fuel production – and the widening of the global production gap – is underpinned by a combination of ambitious national plans, government subsidies to producers, and other forms of public finance.... [AB/5/172]

p.2 Governments are planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C pathway and 120% more than would be consistent with a 1.5°C pathway... [AB/5/172]

p.4 Oil and gas are also on track to exceed carbon budgets, as countries continue to invest in fossil fuel infrastructure that “locks in” oil and gas use. The effects of this lock-in widen the production gap over time, until countries are producing 43% (36 million barrels per day) more oil and 47% (1,800 billion cubic meters) more gas by 2040 than would be consistent with a 2°C pathway... [AB/5/174]

p.4 This global production gap is even larger than the already significant global emissions gap, due to minimal policy attention on curbing fossil fuel production. Collectively, countries’ planned fossil fuel production not only exceeds 1.5°C and 2°C pathways, it also surpasses production levels consistent with the implementation of the national climate policies and ambitions in countries’ NDCs. As a consequence, the production gap is wider than the emissions gap... [AB/5/174]

p.8 last year the [IPCC] put new numbers to what has long been known: CO2 emissions from fossil fuels will need to decline rapidly, by approximately 6% per year to remain on a 1.5°C-compatible pathway, and by roughly 2% per year to remain on a 2°C-compatible one (see Chapter 2). Barring dramatic, unexpected advances in carbon capture and storage (CCS) technology, these declines mean that most of the world’s proven fossil fuel reserves must be left unburned...” [AB/5/i]

---

<sup>25</sup> Press Summary: <https://www.unep.org/resources/report/production-gap-report-2019>

32. Notably, the 2019 Production Gap Report reached its conclusions on excess production without regard to the Mozambique LNG project (and its projected production). [Table 3.1] [AB/5/ii].
33. UNEP confirmed its findings in 2020.<sup>26</sup> Its most recent report of 21 October 2021 “*track[ed] how governments worldwide are supporting fossil fuel production through their policies, investments, and other measures [and] features individual country profiles for 15 major fossil fuel-producing countries, and a special chapter on the role of transparency in helping to address the production gap.*” (p.ii) The Report finds that “[a] significant course correction, including profound changes in technology deployment, policy adoption, and financing, is needed if the world is to get on track with an equitable, low-carbon recovery that is consistent with the Paris Agreement goals.” (p.33) In that regard, it specifically referred to the Defendants’ financing of “a multibillion-dollar gas project in Mozambique, just months before the UK exclusion policy was formally approved (TotalEnergies, 2020)” (p.33)<sup>27</sup>

### III. THE DECISION

34. There is no dispute between the parties that the Defendants intended to exercise their power to grant funding under s. 1(1) of the Act in line with the UK’s international obligations: PAP response §33-36 [SB/2/16]; DGD §17-19 [CB1/2/166-167].<sup>28</sup> This approach accorded with the UKEF ESHR Policy of December 2018 [CB2/5/32-35], which at §3 provides: “*we will comply with all international agreements which apply to ECAs [and] not operate beyond international agreements which apply to ECAs*” [CB2/5/33]. Thus, UKEF committed: “*to be satisfied that projects comply with applicable local and relevant international laws and align with relevant ESHR standards before support is provided.*” (emphasis added) [ibid]. See further ASFG §17-25, §29-60 [CB1/1/10-12, 13-21].

---

<sup>26</sup> Executive summary here: [https://productiongap.org/wp-content/uploads/2021/10/PGR2021\\_ExecSummary\\_web\\_rev.pdf](https://productiongap.org/wp-content/uploads/2021/10/PGR2021_ExecSummary_web_rev.pdf)

<sup>27</sup> [https://productiongap.org/wp-content/uploads/2021/11/PGR2021\\_web\\_rev.pdf](https://productiongap.org/wp-content/uploads/2021/11/PGR2021_web_rev.pdf) p. 33. See further p. 51 regarding UK funding of fossil fuels and Mozambique Project.

<sup>28</sup> It is uncontentionous that Parliament is assumed to intend that statutory powers afforded to the executive be exercised in a way that is compatible with the UK’s international law obligations, absent an express abrogation by Parliament: *Assange v Swedish Prosecution Authority* [2012] 2 WLR 1275 at 10 per Lord Phillips, 98 per Lord Browne, 112 per Lord Kerr, 122 per Lord Dyson.

35. The Defendants purported to carry out an Environmental and Social Human Rights Review (“ESHR”) [MG/11] [CB2/20/204-245] and a Climate Change Review (“CCR”) [LT/07] [CB2/21/246-288] *inter alia* pursuant to the OECD Common Approaches, which explicitly recognises “*the responsibility of the Adherents to implement the commitments undertaken by the Parties to the United Nations Framework Convention on Climate Change*”(Recital 9 [AB/8/220]). By its ESHR and CCR, according to its PAP letter response, UKEF purported to include:

“consideration of *inter alia* ...greenhouse gas...emissions and climate change (including the Paris Agreement)...[and] ...climate change related risks and impacts, including physical risk, transition risk, stranded asset risk, and lock - in...,the consistency of the Project with a pathway towards low greenhouse gas emissions, in both Mozambique and globally, includ[ing] consideration of the impacts of the Project on global greenhouse gas emissions, taking into account the Paris Agreement.” [PAP Response §33-34 [SB/2/16]; see also DGD §17-19 [CB1/2/166-167]]

36. There is also no dispute that the Decision was based on the conclusion contained in those reports that the Project aligned with Mozambique and the UK’s commitments under the PA [MG/11/p.7, p.23-5 [CB2/20/211, 227-229]; and CCR [LT/07/p.7-8, p.11, p.24-6 [CB2/21/252-253, 256, 269-27]. See further [DGD §75.9, §76 [CB1/2/85]]

- a. **As regards compliance with Mozambique’s obligations under the Paris Agreement**, the CCR stated that although the project would have “*a significant impact on the country’s emissions...it [was]...in alignment to Mozambique’s stated climate policies and by extension with their Paris Agreement commitments.*” [LT/07/p.8, p.24-6 §11 [CB2/21/253, 269-271]]. See further ASFG §69 - 70 [CB1/1/24-25] and DGD §75.4-8, 76 [CB1/2/84-85].
- b. **As regards the international climate change impact of the project**, that is, compliance with the PA pathway to low GHG emissions, the Defendants found:

- i. that Scope 1<sup>29</sup> and Scope 2<sup>30</sup> emissions would produce 5-10% of Mozambique’s 2015 NDC [MG/11/p.24/§83 [CB2/20/228]], assuming no scope 2 emissions [MG/11/p.24/§85 [CB2/20/228]];
  - ii. that Scope 3 emissions (namely the emissions from the LNG produced and sold) could not be assessed since “*there are currently no estimates of Scope 3 emissions from the Project due to considerable uncertainty in measurement and reporting of these data*” [MG/11/p.24/§85 [CB2/20/228]] and that “*this could not be resolved with further analysis or due diligence*” [DGD §75.2 [CB1/2/84]]
  - iii. that “*provided ...the Project LNG is used to replace and/or displace the use of more polluting fuels...the net effect may be a decrease in global emissions*” [LT/07/p.29-30 [CB2/21/274-275]]. See further: [DGD §75.3 [CB1/2/84]]<sup>31</sup>, and “*concluded that the net effect would be a decrease in future emissions.*” [DGD §75.3 [CB1/2/84]; LT/07/p.11 [CB2/21/256]]
- c. **As regards the UK Government’s commitment to support developing countries in line with its own obligations under the PA**, it concluded that:
- i. the Project “*aligns with the UK Government’s commitment to support developing countries to respond to the challenges and opportunities of climate change as part of its own Paris Agreement obligations*”, the Defendants say that they relied on the view of the Mozambique Government: that the project could be an important contributor to energy transition of Mozambique [LT/07/p.11 [CB2/21/256]] [DGD §75.4 [CB1/2/84]].
  - ii. that “*providing export finance would support Mozambique to respond to climate change as part of its PA commitments and would be consistent with a*

---

<sup>29</sup> Direct emissions from owned or controlled sources [MG/11/fn11 [CB2/20/228]]

<sup>30</sup> Indirect emissions from the generation of purchased electricity, steam, heating and cooling used by the company [MG/11/fn 12 [ibid]]

<sup>31</sup> The claim is also made there that using gas instead of coal reduces emissions by around half when producing electricity and by around a third when producing heat compared with coal. This is a matter for evidence but proceeds on the assumption that LNG is the same as natural pipeline gas; it is not. It involves additional liquefaction and re-gasification. It risks displacing not just renewables but pipeline natural gas [KA WS2 §16, §39 [CB1/6/160, 169]].

*pathway towards low GHG emissions and climate-resilient development*  
[DGD §75.8 [CB1/2/85]].

- d. This was despite the Defendants having noted that *“investment in renewable energy would offer a more environmentally sustainable pathway for Mozambique’s domestic energy needs and to meet the aims of the Paris Agreement”* [LT/07/p.24[CB2/21/269]] and *“a far more environmentally sustainable pathway for the global community in meeting the requirements of the Paris Agreement”* (emphasis added) [LT/07/p.31, p.24 [CB2/21/276, 269]]. The Defendants noted that Mozambique needed *“investment from the international community to develop its...renewable resources...”* but concluded that revenue from the Project could be used to enable Mozambique to fulfil its climate change plan. That was despite the Defendants having no *“information as to whether the [Mozambique] government has a plan in place as to how Project funds will be utilised”*: [LT/07/p.24 [CB2/21/269]].

37. For the reasons set out further below, each one of those conclusions was flawed as being based on erroneous determinations made without regard to relevant considerations and/or on the basis of fundamental errors of fact.

#### IV. LEGAL SUBMISSIONS

##### (i) GROUND 1A: Error of law.

38. The Defendants took their Decision on the basis that UKEF’s financing of the Project accorded with the UK’s obligations under the PA, including its obligations to assist Mozambique as a developing country Party, to meet and augment its climate change ambitions under the PA, as set out in paragraph 6 above. That constituted an error of law because the financing of the Project:

- a. is not consistent with a pathway to low greenhouse gas emissions and climate resilient development, as required by Articles 2(1)(c), 3(1) PA [GM §40-41, §56-59 [CB1/11/298-299, 304-305]]; [KA WS1 §45-49 [CB1/5/139-141]]; and/or
- b. undermines Mozambique in achieving its NDC contrary to the UK’s obligation to support developing country Parties to achieve: PA Articles

2(1)(c), 3, Articles 4(1)(3) (5), 9, 10(6), 11(3), 13 [GM §69, §77-79 and §82 [CB1/11/308, 310-311];] and [KA WS2 §10-22, §29-31 [CB1/6/158-162, 165].

**The PA requires the UK to make finance flows consistent with a low emissions pathway and to support developing country Parties to meet successive NDCs at the highest possible level of ambition.**

39. In determining the meaning and effect of the terms of the PA, the Court must interpret them in good faith and in accordance with the ordinary meaning to be given to their terms in their context and in the light of the Agreement's object and purpose: Article 31 Vienna Convention on the Law of Treaties ("VCLT"). Recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or where there is ambiguity: Article 32 VCLT. See *Fothergill v Monarch Airlines Ltd* [1981] AC 251 ILR 74; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 HL 508C-F per Lord Clyde; 495B-C per Lord Hope; *Al-Malki and another v Reyes (Secretary of State for Foreign and Commonwealth Affairs and another intervening)* [2019] AC 735 per Lord Sumption §10-12.

40. The Claimant submits that the ordinary meaning of Articles 2(1)(c), 3, PA, in light of their object and purpose, require the UK to ensure that flows of public finance are consistent "*with a low emissions pathway and sustainable development*". Article 2(1)(c) given its ordinary meaning applies to all finance flows and not merely to 'climate finance'. This has been clearly stated by the SCF: para 26 above.

41. In addition, the efforts that the UK is obliged to take under Article 3 PA to achieve the purpose in Article 2 are defined in Article 4(5) as including the obligation to provide support "*to developing country Parties for the implementation of this Article*", namely support for the implementation by developing countries Parties, in this case Mozambique, of domestic mitigation measures to achieve the objectives of successive, increasingly ambitious NDCs adopted pursuant to Articles 4(1)-(3), that is, to reflect the highest possible ambitions, with the objective of reaching global peaking of greenhouse gas emissions as soon as possible...in accordance with best available science. As provided in Article 4(5), support is to be provided



*inter alia* through the provision of finance: Articles 9(1), (3) (4). Necessarily, therefore, the UK cannot provide support to Mozambique that undermines those ambitions.<sup>32</sup>

**Defendants' position as to why the Project was compatible with a low emissions pathway and Mozambique's NDC.**

42. In line with the interpretation set out above, UKEF assessed the question of whether the Project was:

- a. Consistent with a low emissions pathway and sustainable development: [DGD §75.3, §75.7-75.9] [CB1/2/84-85];
- b. Consistent with Mozambique's PA commitments, including its NDC, such that it "*would align with the UK Government's commitment to support developing countries to respond to the challenges and opportunities of climate change, as part of its own PA commitment.*": [DGD §75.6, §75.7-75.9] [CB1/2/84-85].

43. UKEF concluded that the above requirements were met such that the decision to finance the Project was compatible with the UK's obligations under the PA. On that basis, both Defendants agreed to finance the Project [DGD §75.10] [CB1/2/85]:

- a. As regards the emissions pathway, as set out in the DGD, UKEF's conclusion was that *the Project would at least result in some displacement of more polluting fuels, with a consequence of some reduction in GHG emissions. On the basis that the Project LNG would replace or displace the use of more polluting fossil fuels – as was judged most likely – it was concluded that the net effect would be a decrease in future GHG emissions*" and "would be consistent with a pathway towards low GHG emissions and climate resilient development" [DGD §75.3, §75.8 (and §75.1)] [CB1/2/84-85]
- b. As regards Mozambique's commitments, as set out in the DGD: "*UKEF considered that it was in alignment with Mozambique's stated climate change policies and therefore its PA commitments*"; "*that Mozambique needed financial resources to support the country's climate resilience and that financial outputs from the Project*

---

<sup>32</sup> In adopting the PA, states agreed on the need to promote universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy [UNFCCC Decision 1/CP.21 (recital 14)] [AB/3/33]

*would act as a catalyst towards enabling its climate plans to be fulfilled” and that as such “UKEF concluded that providing export finance in connection with the Project would support Mozambique to respond to climate change as part of its PA commitments” [DGD§75.4, 75.5, 75.8 [CB1/2/84-85]]*

44. The above conclusions were both wrong and constituted errors of law, which vitiated the Decision.

**The provision of finance for the Project is not compatible with the PA.**

45. Applying the ordinary meaning to be given to the terms of PA Article 2(1)(c), read with Article 3(1), 4(5) and 9(1)-(4), the Claimant submits that the provision of finance to the Project would be contrary to its commitments under the PA for two reasons:

46. **First**, it is inconsistent with the obligation on the UK to make finance flows consistent with the low emissions pathway and sustainable development for the following reasons:

- a. The low emissions pathway is a pathway that enables the temperature of 1.5°C (and well below 2°C) to be met. In so far as any consideration of the Project as against a low emissions pathway was done at all, (and none of the methodologies available were used): [Greg Muttitt §6 [CB1/11/288]], it was done by reference to a 2°C increase: see Wood Mackenzie Report (“**WM Report**”) at [MG/12/p.3 [CB2/9/66]]. This appears to have been explicitly approved of by the second Defendant: [MG/23/E-mail from Joe Shephard UKEF 19.3.20 at 11.18 [SB/41.19/620]] and in part at least, based on US Exim’s approach: [MG/23/E-mail 18.3.20 [SB/41.19/621]]. Accordingly, the finding that the Project was consistent with the PA low emissions pathway was based on an analysis (albeit an erroneous analysis for the reasons set out by Greg Muttitt in his statement and further in Ground 1B below) that the Project was consistent with a pathway to 2°C. As such, it was itself based on an error of law. Even had the project been consistent with that pathway, which it is not, that would not have signified alignment with the low emissions pathway; the Decision maker asked itself the wrong question. For that reason alone, the Decision was vitiated.

- b. The CCR's conclusions based on the WM analysis proceeded on the basis that in 2040 over 50% of the world's energy demand will still be met by oil and gas: [MG/12/p.15 and p.3 [CB2/9/78 and 66]], see also [MG/23/p.3 – graph from US Exim [SB/41.19/622]] and that energy demand will increase, albeit that CO<sub>2</sub>e emissions must fall by 70% in the next 30 years. It looked at the matter wholly from a demand perspective, ignoring the consequences of that demand on the likelihood of meeting the temperature goal. Notably, the IPCC SR15 Report stated that *“In comparison to a 2°C limit, the transformations required to limit warming to 1.5°C are qualitatively similar but more pronounced and rapid over the next decades (high confidence). 1.5°C implies very ambitious, internationally cooperative policy environments that transform both supply and demand (high confidence)”*<sup>33</sup>; and *“Virtually all 1.5°C-consistent pathways decline net annual CO<sub>2</sub> emissions between 2020 and 2030, reaching carbon neutrality around mid-century. In 2030, below-1.5°C and 1.5°C-low-OS<sup>34</sup> pathways show maximum net CO<sub>2</sub> emissions in the coming decade of 18 and 28 GtCO<sub>2</sub> yr<sup>-1</sup>, respectively.”*<sup>35</sup>
- c. The fact that on stream fossil fuel production was already well in excess of this was well established at the time of the Decision. The UNEP Production Gap Report 2019 established that Governments were planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C pathway and 120% more than would be consistent with a 1.5°C pathway: see §31-32 above.
- d. Crucially, the WM Report did not even find what the CCR claims. On the contrary, even WM stated that it was not possible to determine whether the emissions would replace other emissions [MG/12/p.9-10, p.16 [CB2/9/72-73, 79]]. The view of US Exim was that they would not: [MG/23/p.2 [SB/41.19/621]]. There was simply no basis for the CCR to conclude that it was more likely than not that the Project would reduce rather than increase global emissions [LT/07/p.8] [CB2/21/253]](See further **Ground 1(b)** below). As US Exim noted, the best that could be hoped was that the gas would be used

---

<sup>33</sup> IPCC SR15 Report ch. 2 p. 95 [AB/4/90]

<sup>34</sup> OS = overshoot. Some pathways provide that for a temperature overshoot to be brought down subsequently using carbon dioxide removal (CDR).

<sup>35</sup> IPCC SR15 Report ch.2 table 2.5 p. 137 [AB/4/132]

instead of new coal developments. But as WM itself noted, the LNG could displace lower emitting energy sources such as renewables and nuclear [MG/12/p.16] [CB2/9/79]]. In view of the phase out of coal, this is indeed likely: GM WS §4(d), §23-30 [CB1/11/286-287, 293-295]. This was ignored for the purposes of reaching the conclusion that the Project was consistent with a low emissions pathway.

47. **Secondly**, the finance for the Project will not assist Mozambique to meet its current NDC, it will make it impossible in reality for it to do so. Further, it will not assist Mozambique to increase its NDC commitments/climate ambitions [KA WS2 §17-18 [CB1/6/160-161]]:

- a. Mozambique commits in its NDC to a total reduction of about 76,5 MtCO<sub>2</sub>eq in the period from 2020 to 2030, with 23,0 MtCO<sub>2</sub>eq by 2024 and 53,4 MtCO<sub>2</sub>eq from 2025 to 2030, condition on the provision of financial, technological and capacity building from the international community." (emphasis added) In its Intended Nationally Determined Contribution (INDC).<sup>36</sup>
- b. Assuming the Defendants' claim of 6MtCO<sub>2</sub>e p.a. Scope 1 emissions is correct, which for the reasons set out below it is not, and assuming production starts in 2024 and emissions are only counted from that date and ignored in respect of construction etc., then 30 MtCO<sub>2</sub> of additional CO<sub>2</sub> would be produced by 2030, that is an additional 50% over and above the entirety of Mozambique's reduction commitment. If the true minimum number of trains are taken, that is at least six, the Project can be expected to add between 76MtCO<sub>2</sub> and 84 MtCO<sub>2</sub> by 2030, that is more than 100% of the amount of CO<sub>2</sub> by which Mozambique has committed to reduce in its NDC. The consequence is that if Mozambique is to meet its NDC, it will have to double its efforts to compensate for the additional emissions produced by the LNG plant: [KA WS2 §10 [CB1/6/158]] (and that is on the assumption that Mozambique's use of any of

---

<sup>36</sup> The Intended Nationally Determined Contribution (INDC) document sets out the true story in relation to Mozambique's hazardous position in terms of climate change risks, noting its extreme vulnerability and the scale of the human, environmental and economic disasters already suffered as a result of climate change. Repeatedly, it states the need for financing of investment in green technology and notes its "*weak capacity to design projects to access climate change financing and funds,*" p.8 stating as one of its objectives to: "*[b]uild national technical and institutional capacity to design and manage projects to access climate financing.*" [CB2/2/12]

the LNG does not increase emissions). As explained in KA WS2 §12-22 that is simply not credible [CB1/6/159-162].

- c. The Defendants themselves recognise that the Scope 1 and 2 emissions from the Project will increase its national emissions by 6-10% [LT/07/p.6 [CB2/21/251]]. This does not include the Scope 3 emissions that will be produced from the 5% of the LNG, which is intended to be supplied to Mozambique. Despite recognising the “*significant impact on the country’s emissions*” UKEF nonetheless concluded that the Project was “*still in alignment with Mozambique’s stated policies and by extension their PA commitments,*” albeit that it recognised renewables would “*offer a more sustainable pathway for Mozambique’s domestic energy needs and to meet the aims of the Paris Agreement.*”: [LT/07/pp.7-8 [CB2/21/252-3]]. That simply makes no sense.
- d. The Defendants’ position is made even less credible by the fact that Mozambique expressed in its NDC is that meeting its commitments depends on “*financial, technological and capacity building from the international community.*” That necessarily meant financial assistance to reduce GHG emissions to meet its NDC (not finance that would increase emissions, so as to make meeting the NDC not just harder, but likely impossible).
- e. The Defendants’ response to Mozambique’s statement that it required such assistance to meet its NDC was to say that “*the project will generate increased domestic income that can contribute to these means*” [LT/07/p.25 [CB2/21/270]]. This is frankly extraordinary; the Defendants’ rationale appears to be that finance for a Project that creates a need for Mozambique to more than double its reduction efforts (and in fact make it impossible in reality to meet its NDC) should be considered to be funds that contribute to its reduction efforts, since they will generate revenue that *may* be used for that purpose. That position “is simply not cogent” [KA WS2 §17 and §21 [CB1/6/160-162]]. Nor is it compatible with a correct interpretation of Articles 2(1)(c), 3, 4(5) and 9(1) of the PA [AB/3/53, 57].
- f. This is even more surprising when one sees that the Defendants recognise not only the vast possibilities for the production of clean energy in Mozambique

(there being potential for hydropower to become 81% of installed capacity [LT/07/p.23 [CB2/21/268]] but also the fact that “investment in [such] renewable energy would offer a more sustainable pathway for Mozambique’s domestic energy needs and to meet the aims of the Paris Agreement” [LT/07/p.24 [CB2/21/269]].

- g. Finally, the Project will cause lock-in [GM WS §80-85 [CB1/11/311-312]; [KA WS2 §23-34 [CB1/6/163-166]]; Mozambique will be unable to reduce emissions from the Project itself (Scope 1 and 2) and will develop a gas infra-structure for its own domestic energy (Scope 3). As such it is not only incompatible with Mozambique’s NDC but with progressive and increasingly ambitious NDCs, which the UK is required to assist Mozambique to achieve in accordance with Articles 2(1)(c); 4(5) and 9(1)-(3) PA. In reaching the contrary view, the Defendants committed an error of law that vitiated their decision.

#### *The contradictory position of the Defendant*

48. The Defendants’ position is contradictory and inconsistent in several respects.
49. First, having concluded that the Project and its financing were compatible with the UK’s and Mozambique’s obligations under the PA, they argue that in fact, the PA is purely aspirational and has no legal meaning: [DGD §63.1, §70 [CB1/2/81-82]], claiming that it is “a very high level international treaty, with multi-faceted provisions which are ...drafted in language that is simply not capable of providing a benchmark against which individual decisions of public authorities can be tested for compliance” [permission skeleton §8(2) [SB/15/170]; DGD §63.1, §65-66 [CB1/2/81-82]].
50. Secondly, at DGD §74 [CB1/2/83], the Defendants contend that the PA does not prohibit the UK from providing finance to developing countries where that would result in net increases in GHG emissions. This is wrong for all the reasons set out above. However, it was in any event, not the basis on which the Decision was taken; the Defendants did not proceed on the basis that even though the Project will result in a net increase in GHG emissions the financing was nonetheless compatible with a pathway towards low GHG emissions and climate resilient development. The Defendants took the Decision on the basis that the Project would result in a net reduction in GHG emissions and for that reason it “would be

*consistent with a pathway towards low GHG emissions and climate resilient development*" [DGD §75.8 [CB1/2/85]]; [LT/07/p.8 [CB2/21/253]]. See also: §42 to 43 above.

51. If the Defendants now accept that the Project will in fact result in increases in GHG emissions then the Decision was taken on the basis of a fundamental error of fact (as well as law, for the reasons set out above).
52. Thirdly, the Defendants say that they cannot in any event be held responsible for the emissions because the Project would take place anyway and they are only providing finance and not responsible for the emissions: [DGD §101.2 [CB1/2/90]]. This ignores the centrality of finance to the PA, as well as the obligations of developed country Parties vis a vis developing country Parties. It also begs the question as to (a) why the Defendants purported to determine that the Project was compatible with the UK and Mozambique's obligations under the PA, (b) why the OECD Common Approaches requires compliance, (c) why other UK funds, such as ODA and CDC, all consider the emissions of projects they fund in order to ascertain the climate change consequences and (d) why they are all, now including UKEF, aligning their funding with a net zero pathway, which involves the ending of finance for fossil fuels; and (f) why they are divesting their portfolios so as to achieve a net zero portfolio by 2050. The point is plainly a bad one.

### *Standard of Review*

53. It is trite law (and not disputed by the Defendants) that a Court may review a decision in light of a treaty obligation where the decision maker expressly purported to have regard to it, in order for the Court to ensure that the decision-maker properly understood the law: *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 866-867 [AB/17/390] and *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 341-342, 367, 375-376 [AB/18/421]. Case law treats as critical as to whether the Court can examine the issue, the question whether the decision maker has taken the international law into account in its decision making: *Heathrow Airport Limited v HM Treasury* [2021] EWCA Civ 783 §164 and 169-177 per Green LJ [AB/46/2229]. If the international law measure descends from the international plane and becomes embedded or assumes a foothold into domestic law then the Courts acquire the right and duty of

supervision”: *Heathrow Airport Limited v Her Majesty's* §138. Put another way, the UK Courts are “bound to interpret and determine the question”: *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2019] A.C. 777 §35-36 per Lord Sumption [AB/33/1586].

54. The default position in an ordinary public law case is that if in the exercise of a power or discretion, a decision maker commits an error of law which is material then the court has power to set aside the decision and remit the issue to be retaken, this time applying the law correctly: *Heathrow Airport Limited* §135. The same applies in respect of errors of international law. The decision maker is given the opportunity take its decision again on a correct legal basis: *Heathrow* ibid §152-153 by reference to *Launder* and *Kebiline*. As Green LJ noted, there was no suggestion in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 [AB/25/990], the facts of which were very different, that either of those cases was wrongly decided §156-157 (and §66 *Corner House*, cited there).
55. The Defendants accept that the issue of whether UKEF erred in law is justiciable. However, they argue that the standard of review is tenability, that is, even if the Court takes the view that the Defendants were wrong in law, the Decision will nonetheless be lawful unless the Defendants’ view of the law was ‘untenable’.
56. The Government made the same argument in *Heathrow Airport Ltd*. It was rejected. Such an approach undermines the rule of law, the principle of good administration and “risks fostering legal uncertainty at the international level; damning with faint praise.”, *Heathrow Airport Ltd* §181-182. Lord Sumption in *Benkharbouche*, with whom the other Judges agreed, thought similarly: “[i]f it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer.” *Benkharbouche*, §35. “If there is a rule [of international law], the court must identify it and determine” its application (in that case, state immunity): ibid §36.
57. The Defendants intended to comply with the law in the provision of UK finance. If their decision was based on a mistake of law, it is in the public interest that it should be re-made on the basis of a correct understanding of the law.



58. The Defendants say however, that errors of international law are only exceptionally subject to the normal approach, namely that the error of law vitiates the decision. That exception, they say, applies only, where the relevant Treaty provides a means for its provisions to be litigated, that is, provides for the “*adversarial resolution of disputes*”: DGD §31 [CB1/2/31]. Here, they say that the PA, by Articles 14 and 15 provides for the “*facilitation of implementation by a non-adversarial and non-punitive committee, and for “global stocktake” meetings at five-year intervals*” and as such, say that it would be “*wrong...for the PA to be interpreted and applied in determining the lawfulness of the decision as if it were a domestic statute.*” DGD §29 [CB1/2/72].

59. The Claimant responds as follows:

- a. First, the PA should not be interpreted as a domestic statute. As an international treaty, it must be interpreted in accordance with Articles 31 and 32 VCLT.
- b. Secondly, there is no requirement for a Treaty to have an adversarial dispute resolution procedure for the domestic courts to be able to discharge their supervisory function of determining the correct meaning of the law. And ironically, the Government made the opposite argument in *Heathrow Airport Limited* §175, claiming that the existence of a dispute resolution mechanism was a reason to “*stand back*”. Domestic courts are perfectly able to carry out the interpretative techniques in Article 31 and 32 VCLT without international tribunal jurisprudence, which will often not exist even when a dispute resolution procedure exists in respect of a Treaty. Domestic courts across the world carry out that exercise day in day out.
- c. Thirdly, our domestic courts have applied international law where no such adversarial dispute resolution procedure applies, including customary international law: e.g. *Benkharbouche; Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* - [2002] 2 WLR 1353 §28-29 per Lord Nicholls, §114-115 per Lord

Steyn<sup>37</sup>; §138-140, 144-149 per Lord Hope [AB/21/546]. In so doing, they have not applied a ‘tenability approach’: see above and further, *A and others v Secretary of State for the Home Department. X and another v Secretary of State for the Home Department* [2005] 2 AC 68 §68 per Lord Bingham [AB/23/815]; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1, §44–45, per Lord Steyn, and §98–100, per Baroness Hale of Richmond [AB/24/923].

- d. As regards *Benkharbouche*, the Defendants stated at the permission hearing “that [*Benkharbouche*] was a case where the court was willing to consider an identifiable rule of customary international law because there was an ascertainable answer to a point which it was necessary to consider to decide a justiciable issue,” [Transcript p. 41F [SB/17/230]] , which they said was not the case here. The Claimants submit that it is precisely the case here, save that we are concerned with specific Treaty provisions that must be interpreted in accordance with the rules laid down in the Vienna Convention, rather than a rule of customary international law.
- e. Fourthly, there is nothing that prevents the Courts from determining whether the Defendants erred in law. Numerous courts across the world have considered in different contexts the obligations of Governments and even corporations deriving from the PA and climate science: Dutch Supreme Court 20 December 2019: *Urgenda Foundation v. State of the Netherlands* ECLI:NL:PHR:2019:887 at §2.2.2-3; 3.4; 4.8; 5.7.2-5.7.4; 7.2.1; 7.2.8-11; 7.3.1-7.3.6; 7.4.6; 7.3.2; 7.5.1 [AB/55/2751]; Paris Administrative Court 3 February 2021: *Notre Affaire à Tous and Others v. France* n° 1904967, §18; 21; 29-31; the French Conseil D’Etat 1 July 2021: *Commune de Grande Synthe & Ors v France* N° 427301;; the Hague District Court 26 May 2021 in *Milieudefensie et al. v. Royal Dutch Shell plc* C/09/571932 / HA ZA 19-379, §2.4.7; 2.6.1; 3.1.1; 4.1; 4.4.26-4.4.39, 4.4.52, 5; the German Constitutional Court 24 March 2021 *Neubauer, et*

---

<sup>37</sup> “Moreover, in the light of the letter of Sir Franklin Berman, the Legal Adviser of the Foreign and Commonwealth Office, of 7 November 1997, describing the United Kingdom’s consistent position as to the binding effect of the Security Council Resolutions, it would have been contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United Nations Charter and under the relevant Security Council Resolutions. It follows that it would be contrary to domestic public policy to give effect to Resolution 369 in any way.”

*al. v. Germany* 1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20; the Federal Court of Australia; *Sharma v Minister for the Environment* [2021] FCA 560 90 [AB/56/2791]. It would be strange indeed if only UK courts could not do so.

- f. Fifthly, there are significant public policy reasons why the UK courts accepting a tenable but incorrect approach by the UK to its PA obligations would be extremely detrimental. As Lord Nicholls noted in *Kuwait Airways Corpn* at §28 in the context of applying a UN Security Council resolution in order to deny the application of a foreign law: “[a]s nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important.” That is more than ever the case with climate change, where the acts and omissions of one state have implications for other nations.
  - g. The implications of UK Courts ruling that whilst incorrect, the Defendants could tenably have taken the view that financing the Project was in alignment with the PA and that as such, the Defendants’ decision must be accepted as lawful, would cause legal uncertainty at a global level. Rulings on the PA are considered globally, and the UK Courts’ ruling in relation to the meaning and effect of Article 2(1)(c), 3, 4(5) and 9 in this case will be relied on by other actors.
60. There is no logical or principled basis for the approach advocated for by the Defendants. It makes no sense even from the perspective of the executive, within which there was significant dispute about whether or not this funding should be provided [LT/02 [CB2/8/62]; FDB/03 [CB2/26/297]; FDB/04 [CB2/23/292]]. The executive as well as the public, whose money is being used, are entitled to know the correct interpretation of the law not just for this Decision but for future decisions. The judiciary cannot close their eyes to this critical public policy need: *Kuwait*, Lord Hope §145.
61. None of the *obiter* statements from *Corner House, R (ICO Satellite Limited) v Office of Communications* [2010] EWHC 2010; *R (Elliott-Smith) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (DGD §28 [CB1/2/70]), on which the Defendants’ rely, provide a basis for the Court not discharging its primary function of determining the law.

62. If the Court considers that it is only entitled to determine whether the Defendants' interpretation of the law was 'tenable', the Claimant submits that it was not.
63. Moreover, the Defendants have provided no explanation as to what they consider these provisions to entail or mean, let alone how the facts of the case align with any such interpretation. Their position appears to be that these provisions have no meaning, being purely aspirational: DGD §63.1 and "*not admit[ing] of interpretation and application*": §65 DGD [CB1/2/81]; [see also IP DGD §60 [CB1/3/114]; §76, §78 [CB1/3/118-119]]. It states that it "*would be surprising and unworkable if decisions of individual public bodies...had to be tested against obligations of the kind that are found in the PA*": §67 DGD, see also §70 [CB1/2/82]. That is plainly wrong (and begs the question as to how they concluded that the financing was compatible: [DGD §102.2 [CB1/2/91]]).
64. The Claimant submits that such an interpretation is manifestly wrong, undermines the entirety of the PA and is contrary to the stated approach of other Government departments, governments and financial bodies. It is not tenable.

**(ii) GROUND 1B: FAILURE TO TAKE ACCOUNT OF ESSENTIAL RELEVANT CONSIDERATIONS**

65. The Second Defendant purported to address the question of the Project's compatibility with the low emissions pathway and Mozambique's NDC in its CCR. This was heavily based on a report commissioned and paid for by Total WM on behalf of the lenders. Further, it also purported to address stranded assets. None of this analysis met the most basic requirements of a consideration of climate change impacts: GM WS [CB1/11/297].
66. The conclusions in the CCR [LT/07] [CB2/21/246-288] on PA compatibility and stranded assets were reached on the basis of fundamental errors; including failures to have regard to essential relevant information and considerations and/or applying erroneous facts to its analysis. As such they constituted conclusions that no reasonable decision maker, properly directing himself, could reach and rendered the Decision unlawful: *Secretary of State for Education and Science v*

*Tameside MBC* [1977] 1014 per Lord Diplock; cf. *Gloucester Resources Limited v Minister of Planning* [2019] NSWLEC 7, §439-441; 486-513 [AB/54/2546]; *Earthlife Africa Johannesburg v Minister of Environmental Affairs Case* 65662/16 §100-101 [AB/53/2496]; *R (Refugee Action) v S/S Home Department* [2014] EWHC 1033 [121] [AB/28/1228]. Since the conclusions in the CCR were reached without basic essential information, the question of latitude available to the Decision-maker does not arise; without that information, the Decision was necessarily one that no rational decision-maker could reach.

67. In purporting to determine the climate change impact of the Project to ascertain its consistency with the UK and Mozambique's obligations under the PA [MG WS §45, §48 [CB1/8/212, 213]], the Defendants needed to consider whether the Project was:

- a. consistent with the long-term temperature goals of the Paris Agreement, in particular the 1.5° goal, taking into account the requirement that emissions peak as soon as possible and that net zero is achieved by 2050; and
- b. consistent with Mozambique's current NDC and what should be increasingly ambitious future NDCs over the 32 years of the Project.

68. Those questions could not be answered without quantification, consideration and analysis of:

- a. the quantity of GHG emissions that would be generated by the LNG from the Project over its lifetime (scope 3 emissions);
- b. the quantity of scope 1 and 2 emissions, including methane, having regard to the planned or reasonably foreseeable number of production trains over the lifetime of the Project;
- c. those Scope 1, 2 and 3 emissions, including methane, considered against PA low emissions pathways to 1.5°C, as provided in the IPCC SR15 Report and having regard to the UNEP Emissions and Production Gap Reports.

69. In fact, the Defendants

- a. Failed to quantify or obtain a quantification of Scope 3 emissions at all and therefore did not properly take them into account in their analysis: KA WS1 §19, §23-26 [CB1/4/133-134]; KA WS2 §37 [CB1/6/167-168] and GM WS §46 [CB1/11/300].
  - b. Failed to carry out any analysis against a 1.5°C low emissions pathway, failing to consider budgets or baselines at all let alone by reference the IPCC SR15 Report or the UNEP emissions and productions gap reports, as they should have done: [GM WS §4(c), §13-15 and §59-62 [CB1/11/287, 290-291, 305]].
  - c. Wrongly relied on WM, which had looked at an outdated 2°C pathway by reference to a scope of work drawn up by Total, which was not intended to assess PA compatibility at all but rather was commissioned for the purposes of providing lenders with an argument that higher emissions would be displaced by the LNG produced<sup>38</sup>: MG WS §37-9 [CB1/8/209-10]; GM WS §6-35 [CB1/11/288-97]
  - d. Wrongly, went further than even WM was willing to go, in concluding in the CCR that the LNG from the Project would result in reduced global emissions: GM WS §42-44 [CB1/11/299-300]; LT/07/p.8, 29 [CB2/21/253, 274].
  - e. Failed properly to assess the likely Scope 1 and 2 emissions over the lifetime of the Project: GM WS §82-84 [CB1/11/311-12]; KA WS2 §6-9[CB1/6/156-7].
  - f. Failed to consider lock-in and transition risk [GM WS §80-85 [CB1/11/311-312]] and [KA WS2 §23-34 [CB1/6/163-166]].
70. The inadequacy of the CCR was pointed out by UKEF's advisers, including those on the EGAC: Ben Caldicott and Alistair Heath [FDB/19-21 [CB2/12/105-120]], and moreover, was recognised by the Head of Policy and Climate Change at UKEF, Helen Meekings, who noted that the CCR: *“doesn't set out an assessment [of] the climate impact of the project in the traditional sense of an environmental impact assessment – what would be the base-line for example. But the impact would essentially be the result*

---

<sup>38</sup> The Defendants say in their DGD §19 fn5 [CB1/2/67] that the Wood MacKenzie Report was commissioned by the lenders. However, their CCR states that it was commissioned by Total: [LT/07 p.27 [CB2/21/272]].

of all the GHG emissions expected from the project, hence Ben’s point about Scope 3...” being “a big gap in the analysis.” [FDB/21/E-mail 07 May 2020 [CB2/12/114]]. UKEF was fully aware that climate consultancies could have carried out a proper quantification and analysis; [MG/17/§6 [CB2/11/103]]. To that extent, the statement in the DGD and in the CCR that “the remaining uncertainty could not be resolved with further analysis or due diligence”: [DGD §75.2 [CB1/2/84]] [LT/07/p.8, p.31 [CB2/21/253, 276]] was untrue.

71. The gaps and mistakes in the analysis [GM WS §4-85 [CB1/11/286-312]]; [KA WS2 §5-41 [CB1/6/156-170]], considered further below, rendered the conclusion reached irrational.

**A. Failed to quantify scope 3 emissions**

72. The Scope 3 emissions from the Project will dwarf its Scope 1 and 2 emissions [KA WS1 §19 [CB1/4/133]]. Despite acknowledging this, the Defendants did not quantify them and reached their conclusions on PA low emissions pathway compatibility without knowing even an estimate of the quantity of emissions that would be produced. For obvious reasons, this is the “first necessary stop in any serious climate analysis of a project”: GM WS §4(a), §45 [CB1/11/286, 300]. As has been held in numerous courts across the world, including in Commonwealth jurisdictions, a proper assessment of all GHG emissions must be carried out to reach a conclusion on the impact on global emissions (the low emissions pathway), *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, §486-513.

73. Ben Caldicott of EGAC internally advised UKEF that it was “a big gap in the analysis”: [FDB/21/E-mail 07 May 2020 [CB2/12/114]], which Helen Meekings, accepted as a “fair point” [FDB/21/E-mail 07 May 2020 15.30 [CB2/12/114]]. The Director General, Energy Transformation and Clean Growth at BEIS (BEIS), Julian Critchlow described it as “undermin[ing] the credibility of the CCR” [FDB/11/E-mail of 29 June 2020 17.20[CB2/30/315]].

74. Whilst recognising that Scope 3 emissions were relevant, as they plainly are, the Defendants concluded in their ESHR Report that there was too much uncertainty for them to be quantified [MG/11/p.24/§85 [CB2/20/228]] and in their CCR stated that the energy consultant WM commissioned by Total “for the benefit of the lender

group”<sup>39</sup> to carry out an emissions impact had “concluded that it was impossible to state with any certainty what [they] would be” [LT/07/p.27] [CB2/21/272]. Further, they claim that there is no recognised methodology for their calculation: [DGD §84 [CB1/2/87]]. In the UKEF BG underwriting minute of 30 June 2020 it is further stated that ‘To calculate the Project’s Scope 3 emissions, details on where the Project’s gas volumes will be used, when it will be used, how it will be combusted (including with what technology and the efficiency of that technology), and in what volumes, is required.’ [FDB/31/ §68 [CB2/31/338]].

75. Those claims are wrong [GM WS §46-48 [CB1/11/300-301]; KA WS2 §35, §40-41 [CB1/6/166, 169-170]]. There are well-established methods for calculating Scope 3 emissions, including the Greenhouse Gas Protocol Methodology (“GHG Protocol”) [GM WS §47-48 [CB1/11/301]; KA WS2 §36 [CB1/6/167]], and see *Gloucester* §489). Indeed, unsurprisingly, perhaps since it is required to and does report Scope 3 emissions as part of its business, Total acknowledges this [IPS DGD §44 [CB1/3/109]].

76. The GHG methodology is mandated in the TCFD, which states that “GHG emissions should be calculated in line with the GHG Protocol methodology to allow for aggregation and comparability across organizations and jurisdictions.”<sup>40</sup> Whilst the Defendants dismiss the TCFD (and indeed GHG Protocol) as not applicable [DGD §57-58 [CB1/2/79-80]] that is to miss the point; the question is whether it was possible to apply that methodology. It plainly was. Indeed, the UK has committed to apply the TCFD as soon as practicable after the close of the 2020/21 financial year.<sup>41</sup>

---

<sup>39</sup> The Defendants state in fn 67 of their DGD [CB1/2/97] that Wood McKenzie was independent and not a consultant to Total. The documents show that that is incorrect. Further, MG’s statement makes it clear that at best it was a joint instruction by Total and the lenders: MG WS §37-40 [CB1/8/209-210]

<sup>40</sup> <https://www.tcfhub.org/metrics-and-targets/Recommendations> of the Task Force on Climate-related Financial Disclosures (<https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>) p. 22, p.36 fn 55 [SB/41.6/474, 488] referring to the GHG Protocol calculation tool: <https://ghgprotocol.org/calculationg-tools-faq>

<sup>41</sup> UKEF Annual Report 2019-20 p.98 [[SB/39/358]]: “In July 2019 it was announced in the UK Government’s Green Finance Strategy that UKEF will be making financial disclosures in line with the Task Force on Climate-Related Financial Disclosure (TCFD) as soon as practicable following the close of the 2020-21 financial year. A project is underway to implement the TCFD recommendations through 2020, as well as further develop the integration of climate change considerations across all the products and services that UKEF provide in alignment with wider government policy and practice, including that provided as part of the UK’s hosting of the UN Climate Change Conference of Parties (COP) 26 in 2021.”



Moreover, UKEF's submission now made before this Court had been rejected by the Environmental Audit Committee ("EAC") more than a year before the Decision. In its Report of 10 June 2019 the EAC indeed, advised UKEF that quantification of Scope 3 emissions was not only essential to assess the climate change impacts of a Project but could also be done using the GHG Protocol:<sup>42</sup>

"148. Scope 3 emissions are essential for calculating the full emissions impact of a product, asset or portfolio. Scope 3 emissions are particularly high for fossil fuel-related projects. UKEF claim that there is no universally accepted measure for Scope 3 emissions. However, Scope 3 emissions are already being used in many private sector companies using the GHG Protocol, and the Canadian Export Credit Agency has already expressed its ambition to work towards the G20 Taskforce on Climate-related Financial Disclosure (TCFD) standards (which would include Scope 3 emissions).

149. UKEF should report the Scope 3 emissions of all projects, and in particular of all fossil fuel-related projects where Scope 3 emissions are particularly high. The GHG Protocol provides a methodology for calculating Scope 3 emissions, and the TCFD recommendations provide a readily-available source of guidance for this work. If Government considers that existing methodologies for modelling Scope 3 emissions are inadequate, it should support research to develop an agreed model, and should promote this model amongst its ECA peers." (emphasis added)

77. There was nothing special about the Project that made it different from any other Project for these purposes, let alone the contracts for purchase (SPAs), as the Defendants claim.

78. The Defendants' response is to say that they did not need to quantify the emissions: [DGD §75.2, §80-91 [CB1/2/84, 86-88]]; that it was enough for them to carry out "*a high level qualitative assessment of Scope 3 emissions*" [DGD §75.2 [ibid]]. Indeed, they go further and say that there is "*nothing which required them to undertake any specific analysis*", that they did not even have to consider Scope 3 emissions and that "[i]t was sufficient that UKEF had regard to GHG emissions, including Scope 3 emissions to the extent it considered appropriate" [DGD §81, §115.3 [CB1/2/86, 96]]: "*no requirement...to quantify and consider cumulative emissions or Scope 3 emissions*" [DGD §53[CB1/2/78]]. Their position is that "*on any view [it was] rational to consider scope*

---

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895102/ukef-annual-report-and-accounts-2019-to-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895102/ukef-annual-report-and-accounts-2019-to-2020.pdf)

<sup>42</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1804/180407.htm> §149 [see [SB/38/350] for gov response citing recommendation]

3 *in qualitative terms*”, justifying that approach on the basis that quantification would be “*misleading*” [DGD §87 [CB1/2/87]] and [LT WS §90(b) [CB1/7/189]]. Instead, Scope 3 emissions were considered ‘*in qualitative terms*.’ Further claim they pray in aid the fact that other ECAs did not carry out such an analysis either: [DGD §89[CB1/2/88]].

79. For obvious reasons and as expanded below, that is incorrect; it is impossible to ascertain climate impacts of a Project without having an estimate of the quantities of GHG that will be emitted as a consequence: [GM WS §45-9 [CB1/11/300-302]] including methane emissions from leakage which were not assessed by the Defendants, see [GM WS §31-34 [CB1/11/296]]. In fact, UKEF knew that and did consider it necessary to quantify Scope 3 emissions (their CCR assessment-form even contains a section entitled “*what are the estimated scope 3 emissions of the project?*” [LT/07/p.27 [CB2/21/272]]). They were also informed by EGAC that it was a serious gap in their analysis. They claim to have attempted to get the information from WM and to have been told that it was not possible to provide it: MG WS §37-42 [CB1/8/209-211] and CCR [LT/07/p.27 [CB2/21/272]]. They accept however, that they never asked WM to use the GHG Protocol, which the EAC had told UKEF to use, and they provide no explanation for that failure: [Part 18 Response §44 [SB/46/1589]]. They claim to have considered using methodologies used by other Government Departments but for some unexplained reason dismissed all of them: [Part 18 Response §51(a) [SB/46/1592]].

80. The fact that it was perfectly possible to estimate Scope 3 emissions is indeed shown by the fact that after the Decision had been taken, the PM demanded they be calculated in order to assess whether the UK could pay for Carbon Capture and Storage in respect of the part of the emissions financed by UKEF. A rough and ready calculation was done within 24 hours on 30 June 2021): see [LT WS §42-43, §103-4 [CB1/7/181, 192]]; [Part 18 §18 [SB/46/1579-1581]]; [MG/38/Email 30 June 2020 13:07, 11:07 [CB2/30/306, 311]].

***B. Defendants failed to assess climate impacts by reference to carbon budgets and pathways aligned with the PA and failed to consider the UNEP Production Gap Report.***

81. In order to determine the consistency of the Project with the PA low emissions pathways (to 1.5°C), it was necessary for the Defendants to consider at least:
- a. The totality of the emissions from the Project against the remaining available carbon budgets having regard to the relevant timescales for their use, as set out by the IPCC and
  - b. The UNEP Production and Emissions Gap Reports of 2019 [AB/5/170; AB/6/176].
82. The Defendants failed to carry out any such analysis; they did not consider the climate impacts of the Project by reference to any budgets or timescales. There was no consideration at all of emissions pathways aligned with the Paris goal of 1.5°C: GM WS §4(c) [CB1/11/287]. In so far as any consideration was given to any emissions pathway, the WM Report referred only to the SDS scenario, which provides for a 2°C pathway, which is not in alignment with the PA: GM WS §9-15 [CB1/11/288-291]. This is not the right yardstick for measuring consistency with agreed climate limits [GM WS §13-15 [CB1/11/290-291]]. Without comparing the Project's emissions with carbon emission and production 'budgets', its compatibility with the PA simply could not be determined [GM WS §17-18 [CB1/11/292]]. That benchmark or baseline had, as a matter of the best available science, to take into account the production gap (as addressed in the 2019 UNEP Report [AB/5/170-175]). However, the Defendants carried out no benchmarked quantitative analysis at all, whether by reference to UNEP scientific modelling or otherwise. [ASFG §76.1, §77-82, §112.1-112.3 [CB1/1/28, 29-30, 39-40]].
83. **The Defendants failed to consider any PA compliant pathways and budgets** and did not consider those provided in the IPCC SR15 Report (drawn up pursuant to Decision 1/CP.21 of 12 December 2015 by which the PA was adopted (see §28 above), which established that “[v]irtually all 1.5°C-consistent pathways decline net annual CO<sub>2</sub> emissions between 2020 and 2030, reaching carbon neutrality around mid-century. In 2030, below-1.5°C and 1.5°C-low-OS pathways show maximum net CO<sub>2</sub> emissions in the coming decade of 18 and 28 GtCO<sub>2</sub> yr<sup>-1</sup>, respectively.”<sup>43</sup> As explained by Greg Muttitt, pathways aligned with this goal see gas production and use

---

<sup>43</sup> IPCC SR15 ch.2 table 2.5 p. 137 [AB/4/132].

decline at around 3-4% per year, which is equal to the natural decline from existing fields [GM WS §4(c) [CB1/11/287]]. Given carbon lock in, this means that new oil and gas production is not consistent with the Paris goals, a conclusion reinforced by the IEA net zero scenario-

84. Astonishingly, the Defendants state that *'there are no such published budgets for the Paris Agreement'* [DGD §90 [CB1/2/88]]. This is to ignore the IPCC reports, which are integrally connected to the PA, the UNEP reports and the nature of the Paris Agreement goals themselves. It is to disregard, in its entirety, the scientific work done by the IPCC and UNEP [see GM WS §18, §64-66 [CB1/11/292, 306-7]].
85. As to the fact that the PA does not require an assessment against budgets [MG WS §126 [CB1/8/236]], whilst the PA contains no prescriptive methodology for assessment of consistency/alignment, the IPCC and UNEP Reports inform Parties of the scope and nature of action required for the PA goals. Failure to have any regard at all to these critical documents (or any other equivalent) rendered the assessment of climate impact meaningless. Carbon budgets by reference to remaining available emissions is the way that the IPCC and UNEP approach consideration of low emissions pathways and Paris alignment. Carbon budgets are indeed the approach used by the Climate Change Act 2008.
86. Without an assessment of budgets and emissions, it is impossible to see how any rational conclusions as to the 'consistency' of a Project such as this one with the low emissions pathway can be reached. A finger in the air view that something might or might not happen (here that the LNG might displace coal somewhere) will plainly not be good enough. The fact that the *"aims and goals of the Paris Agreement, as set out for example in Articles 2, 3 and 4"* are *"broadly cast"* [DGD §75.9 [CB1/2/85]] does not make them devoid of meaning. The temperature goals are quantified and the relevant IPCC and UNEP science establishes that they can only be met if states adhere to the carbon budgets identified by reference to certain time-frames.
87. It is no answer for the Defendant to ignore the science and say *"it is not simply about figures"* [DGD §86 [CB1/2/87]]. The science makes it clear that meeting the PA goals is all about figures. As explained by GM WS §4(c), §17, §37-9 [CB1/11/287, 292, 297-

298], there is only one thing that matters in deciding whether the temperature goals are met and that is the cumulative global emissions of GHGs that enter the atmosphere. There is direct relationship between those emissions and temperature increases, as explained and calculated in IPCC SR15 and the UNEP Reports: IPCC SR15 Report SPM C.1.3 SPM C.2; [AB/4/78] “Consistency” or alignment with a PA compliant low emissions pathway relies on numerical analysis.

88. **Further, nowhere in the CCR or ESHR did the Defendants consider or address the production gap as set out in the UNEP Reports.** The Production Gap Report 2019 had established that current global intended production of fossil fuels was more than double the amount (120% more) consistent with a 1.5° rise in temperature and 50% more than is consistent with 2°C: ([KA WS1 §41-46 [CB1/4/138-9]]; [KA WS2 §34-37 [CB1/6/166-7]]; [GM WS §65-66 [CB1/11/306-7]]). This was confirmed in 2020 and 2021.

*The Defendants' position*

89. The Defendants contend that it was open to them to make a wholly “*qualitative assessment*” (whatever that means) and “*were not obliged to undertake...a quantitative assessment against the remaining global, regional and national budgets*” [DGD §91 [CB1/2/88]]. A qualitative assessment without regard to quantities, budgets and time is wholly meaningless. It is not a proper rational assessment capable of reaching a rational conclusion – its result is arbitrary: see *Gloucester* §510-513.

90. In so far as they chose to follow the IEA analysis [LT/07/p.10, p.30-1, p.36 [CB2/21/255, 275-6, 281]], that did not mean they could ignore IPCC SR15 low emissions pathways and the UNEP Production Gap Report; both integral to PA implementation. Particularly, where UKEF's own advisors expressed concerns regarding the IEA's assumption (at that time) about future use of gas for transition as being “*highly debatable*” and potentially problematic, [FDB/19 BC8 [CB2/12/107]], or that the 2018 IEA World Energy Outlook was ‘seriously out of date.’ [FDB/19 BC14 [CB2/12/108]]. Notably, in May 2021, the IEA published a 1.5°C-aligned Net

Zero Emissions (NZE) scenario<sup>44</sup>. [GM WS §13-15 [CB1/11/290-1]], recognising that the implications of the production gap cannot be avoided.

91. For the Defendants to say that in any event, they *take a different view* and reject the figures in the UNEP reports (presumably ex-post facto since they say the CCR did not look at them) [DGD §117.4 [CB1/2/96-7]] is somewhat surprising. But in any event, their ‘disagreement’ is based on a misunderstanding of why the UNEP production gap is important. The fact that the 2019 World Energy Outlook Report stated that “*gas will make up 24% of the world’s energy mix in 2040, even whilst keeping within 2°C increase*” [DGD §117.4 [CB1/2/96-7]] referring to [LT/07/p.30/box 14 [CB2/21/275-6]] tells you absolutely nothing about whether bringing this Project onstream aligns with a low emissions pathway, that is whether there is already sufficient production to meet 24% of the world’s energy mix in 2040. The UNEP Production Gap Report dealt with that. It does not even tell you that the IEA takes a different view to that of UNEP in this context, as the Defendants assert [DGD §117.4 [CB1/2/96-7]].

***C. Wood MacKenzie was not instructed to consider the relevant issues, did not consider the relevant issues, looked at a 2°C pathway and was not independent of Total.***

92. WM was not in truth instructed to carry out an assessment of the climate impact of the Project and certainly not as against the PA emissions pathways. It was instructed to produce a report that could be used before ECA Boards to persuade them that the Project could reduce global emissions.
93. In response to a Part 18 and specific disclosure request, the Defendants stated that the scope of work (SoW) had been discussed between Total and WM and was first disclosed to UKEF on 13 February: Part 18 Response §42 [SB/46/1587-1589]. It is headed as follows “***Objective: The ECAs are trying to inform their boards and stakeholders as to the potential reduction in CO2 emissions associated with use of LNG from MZLNG***”. [FDB/16/Email of 13 February 11:31am [CB2/10/92-93]]. It goes on:

---

<sup>44</sup> <https://www.iea.org/reports/net-zero-by-2050>

### **“Suggested approach”**

Therefore we have suggested to the ECAs that we could calculate by how much CO2 emissions would be reduced if you assume that 1 mtpa of LNG from MZLNG was used to generate electricity in a power plant in an Asian country instead of using the amount of coal and oil required to generate an equivalent amount of electricity. For coal we could consider an existing older and less efficient plant and a newer state of the art one...

The ECAs could then use this in their Board/stakeholder discussions/approval request to give an indication of the possible carbon emission reductions...To be clear though, we cannot provide a definitive answer as to what the impact of MZLNG would be...It would be for the ECAs to decide how to present our analysis to their own boards and stakeholders.” [FDB/16/11:31 [CB2/10/92-93]].

94. The SoW/terms of reference was agreed between WM and Total following input from the ECAs but without the ECAs having a chance to review it: [FDB/16/ mails 12.2.20 19:50; 15.58; 23:31 [CB2/10/93-95]]. It was eventually provided on 13.3.20 in the terms set out above. The Defendants say that it was discussed in E-mails within UKEF between that date and 24.2.20, at FDB/17[CB2/10/96-98]: §42 Part 18 response [SB/46/1587-1589]. However, the relevant questions/ discussion, referred to in the mail of 24 February 2020, 10.17 are wholly redacted in the email of 09:39am. Similarly, there is a mail of 19 February 2020 to UKEF (possibly internal or from White and Case), which says that *“to the extent that there is the opportunity to adjust the WoodMac SoW my view from a legal perspective is that...”* Everything following is redacted [FDB/16 [CB2/10/90]].
95. The Defendants say that they decided potentially to raise the issue of widening the SOW *“when the draft was circulated”*: §42 Part 18 [SB/46/1587-1589]. That apparently happened on 27.2.20: §42(b) Part 18 [SB/46/1588]. Joe Shephard of UKEF confirms that the information being sought was as set out in the SoW above, namely the potential for avoided emissions: *“It is clear from the draft that assumptions would need to be made which make it very difficult to be precise on a level of avoided carbon emissions, however at a somewhat simplistic level it appears that one can say that LNG as a fuel feedstock for power generation has considerably less emissions than coal, fuel oil and gas oil. I would welcome comments and proposals for an extension to the scope.”* [FDB/16/Email of 28 February 2020 14:02 [CB2/10/89]].

96. According to the Response to the Part 18 request, the first Defendant asked WM about Scope 3 emission in calls on 9 and 13 March 2020 [Part 18]§42 (a) [SB/46/1588]. Of the discussions of 19.11.19, 20.2.20, 9.3.20 and 13.3.20 no formal minutes were taken [Part 18 Response §42(d) [SB/46/1588-9]]. The only minutes are by a UKEF attendee, Joe Shephard, on 9.3.20 and 13.3.20 [FDB/18 [CB2/10/99-101]]. They do not evidence any attempt to change the SoW as set out above. At no point is there any written instruction changing the SoW set out above.
97. The fact that the SoW failed to ask the right question and was directed at providing an answer that assisted lenders to provide funds is unsurprising in light of the lack of independence that WM has from Total. The Defendants claim in their Grounds that: “[Wood McKenzie] was the *independent energy consultant to the lenders, including UKEF (not Total)*” [DGD §19 fn5 [CB1/1/67]] and “the Claimant is wrong to say that they were “the consultant to Total” [DGD §117.5 fn 67 [CB1/2/97]]. However, this is contradicted by what is stated in their CCR, where it is said that the lenders asked Total to commission an assessment of Scope 3 emissions for the benefit of the lenders and that Total commissioned Wood McKenzie [LT/07/p.27 [CB2/21/272]]. It is also contrary to the E-mail evidence which shows that Total agreed and approved the SoW: [FDB/16 [CB2/10/88-95]] and to the evidence now given by Maxwell Griffin, who says that “the lender group *and* Total (the Project sponsor) agreed to instruct [WM]” and that Total commissioned and paid for the Report [MG WS/§37-38 [CB1/8/209-210]].
98. WM carries out all Total’s reports, including its quarterly reports and in 2020 WM awarded Total France its “*upstream industry’s most-admired explorer*” award. This information is found through google and on WM’s website, although access to the Total reports has been removed.<sup>45</sup> If the Defendants approached any of the WM analysis on the basis that it was independent of Total, as it appears to have done,

---

<sup>45</sup> See for example: <https://www.woodmac.com/reports/upstream-oil-and-gas-total-corporate-latest-wm-quarterly-data-19658130>; <https://www.woodmac.com/reports/upstream-oil-and-gas-total-corporate-report-16819548>. There are numerous such reports although the Total ones have been removed. In July 2020 Wood McKenzie named “Total ...the upstream industry’s most-admired explorer, an accolade awarded in conjunction with Wood Mackenzie’s industry-leading annual Exploration Survey.”: [https://www.woodmac.com/press-releases/exploration\\_awards\\_2020/](https://www.woodmac.com/press-releases/exploration_awards_2020/)



that is another serious error – an error that would also go to the legality of the Decision.

99. The WM Report did what was asked of it in the SoW set out above. On [MG/12/p.10 [CB2/9/73]], having concluded on the previous page that it could not “say with any degree of certainty where the volumes will be used for what purposes and when” it stated:

“That said, there appears to be particular scope for MZLNG volumes to displace coal in power generation in China, India and Indonesia. We therefore focus on this to give ECAs some indicative guidance as to who MZLNG could potentially reduce emissions.”

100. The WM was never a climate impact assessment; there was no real attempt to quantify emissions, let alone consider them against a low emissions pathway. It is unsurprising that the Defendant resisted disclosing it even after the Claimant’s specific disclosure application, which Swift J. refused.

***D. CCR went further than WM without any basis, concluding that emissions would be reduced because they would displace higher emitting fuels***

101. The Defendant based its decision that the project was 'overall' in alignment with the Paris Agreement on the finding in the CCR that: *'it was more likely than not that, over its operational life, the Project would result in at least some displacement of more polluting fuels, with a consequence of some net reduction in GHG emissions'*. [LT/07/p8 [CB2/21/253]]; [LT WS §90(c) [CB1/7/189]] and [DGD §75.3 [CB1/2/84]], [MG WS §121-22 [CB1/8/235]].

102. This involved two fundamental errors.

- a. First, it had no basis in evidence or fact. It was not even supported by the finding of WM: GM WS §24-29, §42-44 [CB1/11/294-295, 299-300].
- b. Secondly, climate impacts must be assessed by reference to the absolute amount of emissions that the relevant Project involves not by reference to some possibility that the Project may have the result of displacing other emissions: GM WS §4(a), 9(b), 16 and 30 [CB1/11/286, 289, 291-2, 295].

103. As to the first, the conclusion that net global emissions would be reduced by the Project was not grounded in any evidence or proper analysis. The WM Report had reached no such conclusion, nor was there any other evidence before the first Defendant. Greg Muttitt describes this as: '*a remarkable claim in the absence of evidence*' [GM WS §42 [CB1/11/299]] and likely to be unfounded [GM WS §23-30 [CB1/11/293-295] [See also KA WS2 §24-29 [CB1/6/163-165]]. In that regard, since no proposals for retirement of existing assets are being made, it should be assumed that the emissions from new gas production, including this Project, will be in addition to those associated with existing economically recoverable reserves of fossil fuels, particularly oil and gas. For this reason, new capacity, including the Mozambique LNG Project, will directly contribute to still higher levels of warming above the Paris Agreement goal [KA WS1 §42-44 [CB1/4/139]; [GM WS §60 [CB1/11/305]].
104. The scenario chosen by UKEF as 'most likely' was not based on any substantive evidence [FDB/19/p.3 [CB2/12/107]]. Indeed, UKEF itself stated that it did not know with any confidence how and where the Project's LNG volumes would be used and could not therefore know whether the LNG would in fact displace renewables or lower carbon fuels (such as natural gas) and as such have the consequence of hindering transition [LT/07/p.8, p.31 [CB2/21/253, 276]]. However, despite these uncertainties, the Defendant considered that 'on balance', it was more likely that the LNG produced would lead to "*some net reduction*" in future GHG emissions [LT/07/p.32 [CB2/21/277]].
105. There are clear reasons to doubt the assumption on which the conclusion was based [GM WS §23-30, 43-44 [CB1/11/293-295, 299-300]] and the Defendant did not provide any evidence with which to back up its assumption of 'some' net reduction in emissions [GM WS §24-29 [CB1/11/294-295]]. This was essentially what is described in *Gloucester Resources* as "*a facile conclusion... insufficient to comply with the obligation to take a hard look at the cumulative effects of the proposed action*" (§511, §532-533 [See KA WS2/§39 [CB1/6/169]]; [GM WS §23-29 [CB1/11/293-295]]. It is highly unlikely that Mozambique LNG will displace coal from power generation in the countries referred to [GM WS §24-29 [CB1/11/294-295]].

106. As to the second point, the use of "avoided emissions" is a methodologically flawed concept, inappropriate to assessing consistency with the Paris agreement [GM WS §4(a), 9(b), 16-22 [CB1/11/286, 289, 291-293]]. As acknowledged in an internal UKEF email exchange on 5 May 2020, *"Whether the Project displaces more fossil fuel (or not) is considered under the transition fuel argument section. It is not considered in the calculation of Scope 3 emissions as it will not change the Project's Scope 3 emissions."* [FDB/22/p. 1 [CB2/12/121]].
107. The CCR confuses these two distinct issues: the quantity of Scope 3 emissions and avoided emissions. In attempting to answer a question about Scope 3 emissions, the CCR instead assesses avoided emissions, in three scenarios of displacement. [GM WS §49 [CB1/11/302]]. The GHG Protocol expressly states that if avoided emissions are addressed this must be done separately [see GM WS §49 [CB1/11/302]] ref and GHG Protocol Technical Guidance for Calculating Scope 3 Emissions Version1.0 (2013), Category 11 page 114 [AB/11/297].

#### *E. Erroneous quantification of Scope 1 emissions*

108. The Defendants erroneously quantified the Scope 1 emissions. The Defendants proceeded on the basis that the Project would have Scope 1 emissions of 6MtCO<sub>2</sub> per year over the Project's operational life (i.e. from 2024-2049 [LT/07/p.19 box 5 [CB2/21/264]]. This involved a fundamental error, namely that, for the duration of its existence the Project would have only two "trains" (essentially liquification units or LNG production lines), each of which would be capable of producing 6 million tonnes of LNG p.a. [MG WS §102 [CB1/8/230]; KA WS2 §6-9 [CB1/6/156-157]]. In fact, once in full production, the Project will produce at least 18MtCO<sub>2</sub> p.a. in Scope 1 emissions [KA WS2 §6-9 [CB1/6/156-157]].
109. For the Defendants to look at the impacts of the Project over 30 years in terms only of the level of Scope 1 emissions emitted during the first year (and at best thereby under-estimating them by 300%), was to fail to apply the facts [KA WS2 §29 [CB1/6/165]]. The Defendants should have taken into account the likely further expansion of the project to 6 or more production trains within its 30 year lifespan on the basis of the project documentation, which refers to expansion to at least 6 trains in order to produce the intended 43 million tonnes of LNG p.a.

110. These references to expansion of the number of trains date back as far as 2012 and include those in the 2014 EIA, in UKEF's 2020 ESHR Review [MG/11/p.10/§14 [CB2/20/214]] and in the AFDB's 2019 memorandum to the Board of Directors, [MG/24/p.3 [SB/41.20/628]]; [MG/25/Annex16/page XXVIII [SB/41.21/689]]. The 2014 EIA Anadarko Project Description postulates fourteen trains added at a rate of one every six months after production starts in 2024 (see, Chapter 4 at para 4.4.2<sup>46</sup> (see [KA WS2 §8 footnote 5 [CB1/6/257]]). The RAD paper [FDB/15 [SB/46.10/1806-1812]] refers to "gas reserves of up to 150TCF sufficient to develop up to 8 further trains and a total estimated economic value of U\$150bn" ([FDB/15/§276 [SB/46.10/1811]]). The Project Information Memorandum of December 2018 states that the Area 1 site is capable of hosting up to ten trains [FDB/25/§1 [CB1/4/29]] The IMF report on Mozambique LNG dated 15 May 2019 and referenced in AH WS/§17 fn9 [CB1/10/266] refers to the expansion of trains for Area 1.<sup>47</sup>
111. The Defendants' answer at the SGD stage was that expansion beyond two trains were nothing more than "inchoate proposals": [SGD §57 [SB/6/55]], albeit it now accepts that the Project will expand: [DGD §98 [CB1/2/90]]. The Defendants nonetheless argue that "it was a matter of judgement what it should consider in terms of Scope 1 emissions" [DGD §98 [CB1/2/90]]. That is not correct.
112. Cumulative emissions are the critical question in assessing climate change impacts: GM WS §17 [CB1/11/292]. It is not possible to assess climate change impacts without considering them. Support for the initial two trains increases the likelihood that the further trains will come into production: GM WS §41 [CB1/11/299]. In the context of the UK's commitments under the PA, including to Mozambique, it was essential therefore for UKEF to determine whether it was assisting (and not undermining) Mozambique to meet increasingly ambitious NDCs.
113. Further, the Defendants were obliged to take these future expansions into account under IFC PS 1, with which it purported to comply [MG WS §12-13, §55

---

<sup>46</sup> [https://mzlng.totalenergies.co.mz/sites/g/files/wompond2311/f/atoms/files/chapter\\_4-\\_lng\\_final\\_eia\\_sept\\_2014\\_eng.pdf](https://mzlng.totalenergies.co.mz/sites/g/files/wompond2311/f/atoms/files/chapter_4-_lng_final_eia_sept_2014_eng.pdf)

<sup>47</sup> <https://www.imf.org/-/media/Files/Publications/CR/2019/1MOZEA2019003.ashx> pp.4-5

[CB1/8/202, 217]] [DGD §18, 46-47 [CB1/2/66, 77]]. IFC PS1 refers to cumulative impacts resulting from the incremental impact, on areas or resources used or directly impacted by the project as being those that result "from other existing, planned or reasonably defined developments".<sup>48</sup> The 2014 EIA states that: "While this EIA covers up to 6 trains (which is a reasonably foreseeable number of trains), space for the construction of up to 14 LNG Trains (in total) has also been allocated..." [4.4.2, emphasis added]<sup>49</sup>. The Defendant however judged that IFC PS 1 did not cover the expansion of trains in this project [DGD 96.5 [CB1/2/89]]; [MG §102 [CB1/8/230]], despite accepting that the Project will not remain at two trains for its duration: [DGD §98 [CB1/2/90]]. This is an unreasonable interpretation of the plain words of ICF PS1, and undermines its purpose.

114. It is immaterial that "UKEF has no commitment to provide any support in relation to any future expansion" [DGD §98 [CB1/2/90]]. The whole point about the direction to assess cumulative emissions/impacts is that support for the commencement of a Project (initial two trains) increases the likelihood that further trains coming into production [GM WS §41 [CB1/11/299]]. The need to look at cumulative impacts is also provided for in the OECD Common Approaches and EP3: Annex II to the OECD Common Approaches sets out information on the typical items to be included in an ESIA report prepared by the Project sponsor and refers at (5) to examination of "cumulative impacts as appropriate" [ASFG §42 [CB1/17-8]]. Cumulative impacts are also mentioned in EP3 as part of the "Illustrative List of Potential Environmental and Social Issues to be Addressed in the Environmental and Social Assessment Documentation" at (k) [DGD §96.3 [CB1/2/89]]; [MG WS §137 [CB1/8/240]].

#### F. Defendants did not properly consider lock in.

115. The Defendants failed properly to consider lock-in/transition risk. Carbon lock-in/transition risk comprises: "[t]he tendency for certain carbon-intensive technological systems to persist over time, 'locking out' lower-carbon alternatives, owing to a combination of linked technical, economic, and institutional factors": UNEP

---

<sup>48</sup> [https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1\\_English\\_2012.pdf?MOD=AJPERES&CVID=jiVQlfe](https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQlfe) p.3, §8 [AB/9/245].

<sup>49</sup> [https://mzlng.totalenergies.co.mz/sites/g/files/wompond2311/f/atoms/files/chapter\\_4-\\_lng\\_final\\_eia\\_sept\\_2014\\_eng.pdf](https://mzlng.totalenergies.co.mz/sites/g/files/wompond2311/f/atoms/files/chapter_4-_lng_final_eia_sept_2014_eng.pdf)

Production Gap Report 2019 [AB/5/170-175].<sup>50</sup> In relation to fossil fuel production: “[t]he more fossil fuel infrastructure that is built, the harder it is to shift away from fossil-based energy, for reasons both financial and political.... Government support reduces the capital and operational costs of extraction to fossil fuel producers, thus unlocking projects that would otherwise not be commercially viable.”<sup>51</sup>

116. First, the Defendants in failing to assess the risk against the lifespan of the project did not properly assess the risk of lock-in, KA WS1 §47-48 [CB1/4/140]; GM WS §82-84 [CB1/11/311-2]. The Project raises significant risks of ‘lock in’/transition risk in view of its 30-year or more service life span, in terms of both (a) direct lock-in through emissions from onsite power generation for the plant’s operational needs, and (b) systemic, indirect lock-in by contributing to the continued production and use of technology that emits GHGs: KA WS2 §23 [CB1/6/163]; GM WS §82 [CB1/11/311-2]. The Defendants’ CCR failed to determine the potential for fossil fuel lock in in relation to either (a) or (b). Further, it failed to consider that potential for both Mozambique and export markets.

117. Second (and relatedly see GM §82 [CB1/11/311-2]), the Defendants said that quantitative assessments were impossible, relying on a claim that “Committed Cumulative Carbon Emissions (“CCCE”)” could not be calculated because a sufficiently developed methodology for doing so does not exist yet [MG §139 [CB1/8/241]; [LT/07/p.23 [CB2/21/268]]. This not only misunderstands what the CCCE methodology is, it ignores the fact that the GHG Protocol enables emissions to be assessed for the lifespan of the Project: KA WS2 §25-26 [CB1/6/163-4]; GM WS §83-84 [CB1/11/312]. All that the Defendants did in terms of ‘assessment’ of cumulative emissions was to repeat its findings as to the quantification of Scope 1 emissions [LT/07/p.23 [CB2/21/268]], which as explained above the Defendants underestimated by at least 300% [KA WS2 §29-34 [CB1/6/165-6]].

118. The Defendants argue that there is nothing in the nature of the risk that demands a quantified assessment, [DGD §117.9 [CB1/2/98]]. Maxwell Griffin states that no CCCE data was available for the Project, arguing that the text on CCCE included within the CCR was developed following advice from EGAC on 20<sup>th</sup> May

---

<sup>50</sup> UNEP Production Gap Report 2019 p. 6

<sup>51</sup> Ibid. p.24

2020. [MG§ 139 [CB1/8/241]]. In fact, one of those advisors did express the view in April 2020 that CCCE should be used to assess whether projects are compatible with Paris [FDB 19/BC 7/p.3 [CB2/12/107]]. For the same reasons as set out above, quantification is crucial to a proper assessment of these issues for obvious reasons.

119. Thirdly, as indicated above, there are two aspects to lock-in, and CCCE is relevant only to one of these, (a) direct lock-in [KA WS2 §25 [CB/6/163-4]]; [GM §82 [CB1/11/311]]. The second, systemic or indirect lock-in is arguably even more important, with profound long-run implications [KA WS2 §28 [CB/6/164]]. The Defendant did not attempt to analyse lock-in from either perspective [KA WS2 §23-28 [CB1/6/163-4]]; [GM WS §83-85 [CB1/11/312]]. In relation to (b) systemic lock-in, the Defendant made no attempt consider the specific and quantified implications of a 30 year project on the infrastructure of those countries importing the gas. Nor did the Defendants attempt to consider the long-term emission consequence of creating fossil fuel dependency rather than developing renewable resources, which prevent lock in. [ASFG §112.4 -112.6 [CB1/1/41-2]]. Maxwell Griffin notes that in their Appraisal Report, AfDB acknowledged that noted that investments such as the project *“may contribute to fossil fuel lock-in for Mozambique and encourage future and further development of the country’s gas resources....”* [see MG §141 [CB1/8/242]]. Failure to carry out this exercise was a fatal omission in any assessment of whether the Project was consistent with the carbon budgets that need to be met if the Paris goals are to be achieved.

### ***G. Stranded Assets***

120. The Project involves a real risk of stranded assets, the assessment of which was crucial to the protection of taxpayers’ interests, in particular because of the duration of its operation [GM WS §77 [CB1/11/310]]; [KA WS1 §47-49 [CB1/4/140-1] and KA WS2 §26 [CB1/6/164]]. The Claimant notes, that without addressing Scope 3 emissions, the emissions production gaps and the risks of lock-in, no proper determination of the risks of stranded assets could have been carried out (See KA WS2 §11-12, §17, §20, §33-34 [CB1/6/158-159, 160, 162 ,166] [ASFG §114 [CB1/1/42]] As noted in the TCFD [to which Total is an adherent [IPSGR §54 [SB/7/84]]. , *“Transition risk scenarios [which includes stranded asset risk] are particularly relevant for resource-intensive organizations with high GHG emissions within*

*their value chains, where policy actions, technology, or market changes aimed at emissions reductions, energy efficiency, subsidies or taxes, or other constraints or incentives may have a particularly direct effect”.*<sup>52</sup>

121. The Defendants contend that they considered this risk: [PAP Response §34, §62 [SB/2/16, 21-22]]. Louis Taylor states that the risk was assessed on the basis of WM’s view that gas would be required until 2040, which is beyond the timeframe for UKEF support [LT WS §121 [CB1/7/195]]. As indicated above, this assumption disregards essential information as to the production gap and 1.5 goal and appears to be based on an IEA SDS framework which is flawed and has now been replaced by one aligned with the 1.5 goal [GM WS §13-15 [CB1/11/290-291]].

122. Once again, UKEF claims to have assessed this risk in purely qualitative rather than quantitative terms, arguing that this risk “*is not directly related to the quantum of GHG emissions associated with the Project*”. [DGD §121 [CB1/2/99]] The Defendants say that they did not have to use “*metrics and parameters*” because they were not bound to follow the TCFD, which did not apply to the decision nor did they have to do any quantified analysis [DGD §119 [CB1/2/99]]. To argue that an assessment of the risk of stranded assets could be done without regard to any metrics, parameters or quantification at all is difficult to comprehend and that is so quite apart from whether the TCFD applied.

123. The risk of the project becoming a stranded asset for the Government of Mozambique was apparently not addressed. Since gas projects are structured to prioritise returns on the companies’ invested capital before providing revenue to the Mozambique government, the government is not set to receive a significant share of revenues until well into the 2030s [GM WS §69 [CB1/11/308]]. This undermines the Defendant’s argument that the project is a catalyst for transition in Mozambique. [DGD §21 [CB1/2/67]]. The risk that the project would become a stranded asset as a result of climate change policy is not addressed in the AfDB 2019 Memorandum [MG/25 [SB/41.21/631-706]] or in the email sent from the AfDB to the Defendant in February 2020 [MG/24 [SB/41.20/625-630]], despite the acknowledgment in the ~~former~~ latter, that under the Paris Agreement, developing

---

<sup>52</sup> <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> p.27 [SB/41.6/479]



countries are expected to achieve net zero emissions by 2050 [MG/24 [SB/41.20/626]].

124. In its Part 18 Response §37 [SB/46/1587] the Defendant states that the risk of stranded assets was considered in the RAD analysis prepared for the ERiCC meeting held on 30 April 2020 [FDB/15 [SB/46.10/1806-1812]]. However this paper does not address the critical issue of the production gap and only refers to the possibility of carbon taxes and environmental regulation and as such, was fundamentally flawed. No rational decision-maker seeking to justify support on the basis that this project would support the Government of Mozambique's energy transition could make that decision without determining whether the project was likely to become a stranded asset, causing debt distress for the Government of Mozambique.<sup>53</sup>

125. As to the source of the funding, the Defendants reject the Claimant's suggestion that UKEF has used "public taxpayers' money to fund" the Project: [§120 DGD [CB1/2/99]]. This is incomprehensible – UKEF lends money that comes from British taxpayers. The guarantee is backed by British taxpayers' money. Indeed, UKEF itself states this in its own guidance to applicants.<sup>54</sup>

## CONCLUSION

126. For the reasons set out above, the Claimant seeks:

- i. a Declaration that the Decision was reached on the basis of an erroneous understanding that the Project and its financing were compatible with the UK's obligation under the PA; and
- ii. an Order quashing the Decision.

---

<sup>53</sup> The Claimant notes that the IEA state in their World Energy Outlook 2021 <https://www.iea.org/reports/world-energy-outlook-2021> that "Given the low prices of natural gas in the NZE [as to which see para 90 above], any LNG projects with a break-even price of more than USD 5 per million British thermal units (MBtu) would be at risk of failing to recoup their investment costs in this [NZE] scenario" (section 5.3.1 page 231). The breakeven price of Mozambique LNG is reported as being US\$6 per million British thermal units (MBtu), see LT/6 section 7.5.2 paragraph 150 [CB2/19/184] and MG/25 paragraph 2.52, p12 [SB/41.21/651]. This would seem to indicate that the Project, by the IEA's measure, is at risk of failing to recoup its investment costs

<sup>54</sup> [UKEF Guidance to Applicants: Processes and factors in UK Export Finance Consideration of Applications](#)

JESSICA SIMOR QC

KATE COOK

ANITA DAVIES

Matrix Chambers