IN THE HIGH COURT OF JUSTICE **Claim No CO/3206/2020**
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

B E T W E E N:

R (FRIENDS OF THE EARTH LIMITED)

Claimant

-and-

(1) SECRETARY OF STATE FOR INTERNATIONAL TRADE /
(2) EXPORT CREDITS GUARANTEE DEPARTMENT (UK EXPORT FINANCE) ("UKEF")
(3) HM TREASURY

Defendants

-and-

(1) TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA
(2) MOZ LNG1 FINANCING COMPANY LIMITED

Interested Parties

DEFENDANTS' SKELETON ARGUMENT

Pre-reading (in addition to C's list):

- Witness statements of Louis Taylor **[C1/7/173]** and Maxwell Griffin **[C1/8/198]**.
- Submission dated 1 June 2020 **[C2/17/145]**.
- Climate Change Report **[C2/21/246]**.

INTRODUCTION

1. On 1 July 2020, the Chief Executive Officer of UK Export Finance ("**UKEF**") formally exercised his delegated power under s.1 of the Export and Investment Guarantees Act 1991 (the "**1991 Act**") to provide up to USD 1.15 billion in export finance (by way of guarantees and loans) in relation to a liquefied natural gas ("**LNG**") project in Mozambique (the "**Project**") operated by the First Interested Party ("**Total**") and funded via the Second Interested Party (the "**Borrower**") (the "**Decision**"). C is seeking to quash that Decision, along with the decisions to provide prior approval to the same by the Secretary of State for International Trade (the "**SoS**") and HM Treasury ("**HMT**") on 10 and 12 June 2020.

2. The Decision was taken following the exercise of judgment at the highest levels of Government. In taking the Decision, UKEF was not obliged to consider the Paris Agreement ("**PA**"). It nevertheless decided that the provisions of the PA and the extent to

which the Project was consistent with those would be considered: **[CB1/7/186/78] [CB1/8/217/56(a)]**.[1]

3. To analyse that question, UKEF's in-house experts developed a framework for assessing the climate change impact of the Project. A dedicated climate change report ("**CCR**") was prepared by a cross-divisional team of specialists taking into account advice from an independent consultant (Wood Mackenzie Ltd, "**Wood Mackenzie**"): **[CB1/7/188/97]**. That was in addition to UKEF's usual Environmental, Social and Human Rights ("**ESHR**") report. The CCR is at **[CB2/21]**.

4. As part of the CCR, UKEF asked itself inter alia what was in Mozambique's nationally determined contribution plan under the PA ("**NDC**") (Q1), how the Project impacted Mozambique's NDC and other national climate strategies (Q11) and whether the Project contributed to fossil fuel transition/GHG emission reduction within Mozambique (Q10) or at an international level (Q14). It concluded that:

   4.1. Mozambique's NDC contained ambitious carbon emissions reduction estimates which were expressly conditional upon the provision of international financial assistance. Its NDC specifically referred to Mozambique's implementation of its 'Natural Gas Master Plan' as part of the mitigation measures it intended to take. That Plan expressly referred to the Project **[CB2/21/257-258]**.

   4.2. Whilst the Project would have a significant impact on Mozambique's GHG emissions, UKEF considered that it was nevertheless in alignment with Mozambique's NDC (and by extension its PA commitments). It sat within Mozambique's longer-term climate change plans which were designed to ensure strong social and economic stability **[CB2/21/256]**. The Project had capacity to bring economic benefits to the country which could then be used to contribute to achieving Mozambique's other stated goals: **[CB2/21/269-270]**.

   4.3. Providing support to the Project would therefore align with the UK Government's commitment under the PA to support developing countries respond to the challenges and opportunities of climate change (by implementing their NDCs) **[CB2/21/256]**.

   4.4. The Project would have a significant impact in climate change terms due to increased

[1] For the avoidance of doubt, it is not common ground that the Defendants intended to exercise their powers in line with the PA (cf. CSkel §34). The authority cited at CSkel fn 28 (*Assange v Swedish Prosecution Authority* [2012] 2 AC 471) is an example of the common law principle of compatible construction but that principle is only available where the legislative provision being construed is ambiguous (see *Pitman v State of Trinidad and Tobago* [2018] AC 35 at §38). There is no debate over the meaning of the provisions of the 1991 Act.

GHG emissions but would contribute to the overall global energy mix for the transition to a low carbon future **[CB2/21/267, 275-277]**.

4.5. It was more likely than not that, over its operational life, the Project would at least result in some displacement of more polluting fossil fuels, leading to an overall net reduction in GHG emissions when compared with a counter-factual scenario **[CB2/21/272-275]**.

5. As set out in his submission to the Secretary of State and HMT, Louis Taylor (UKEF's Chief Executive) had specifically taken into account "*the Climate Change report setting out the significant impact that the project will have due to increased GHG emissions but also taking account of gas as part of the overall energy mix for the world's power transition for the foreseeable future"* **[CB2/17/153/56e]**.

6. However, it is important to note that the climate change impact of the Project was just one of many public interest issues considered and weighed in the balance, including:

6.1. The benefit to UK businesses from the contracts supported by the export finance (the awarding of contracts worth hundreds of millions being made a condition of the financing, with further contracts being supported indirectly: see **[CB2/17/146/15-21]**).

6.2. The transformational economic benefits that would flow to Mozambique from the Project (the direct economic returns from the Project are expected to add USD 67 billion to Mozambique's GDP directly over 30 years, with even more accruing indirectly, having the "*potential to lift millions of Mozambicans out of poverty"*: see **[CB2/17/147/22-29] [CB2/7/11]** – see also [**CB2/19/268]** noting that Mozambique is one of the world's poorest and least developed countries).

6.3. The fact that gas can act as a 'transition fuel', displacing the use of more polluting fossil fuels such as coal and oil (and, as a result, the continued support of the World Bank for upstream gas projects including the Project in exceptional circumstances: see **[CB2/17/149/35-35]**).

7. UKEF was not the only institution to support the Project. By the date of the Decision, the export credit agencies ("**ECAs**") of a number of countries along with the African Development Bank ("**AfDB**"), the World Bank and the IMF had all resolved to support the Project: **[CB1/7/178/27 and 185/68]**.

8. Ground 1A contends that UKEF erroneously concluded that its Decision was broadly consistent with the provisions of the PA. In response:

8.1. The case-law is clear – the correct question is whether UKEF's view was rational/tenable. The issue is not whether UKEF's view was correct in the Court's judgment. Further, the Court should refrain from being drawn into any enquiry as to whether the Project was consistent with Mozambique's PA obligations by reason of the foreign act of state doctrine. C cannot evade that doctrine by attempting to frame the issue as whether the Decision breached the UK's obligation to support Mozambique in complying with its NDC.

8.2. UKEF's view of the PA was plainly tenable (indeed, correct). C's case seeks to transform high-level aims and objectives into hard-edged prohibitions of individual decisions which might, considered in isolation, run counter to those same. The PA recognises that GHG emissions may get worse before they get better (particularly in developing countries where the competing aims of eradicating poverty and ensuring the country has the capacity to cope with the effects of climate change are key) and that the action to be taken is for national governments to decide.

9. Ground 1B alleges that UKEF made various errors in its assessment of the climate change impacts of the Project. There is nothing in the PA or UKEF's policies which compelled UKEF to undertake the kind of prescriptive, quantitative benchmark assessment alleged by C. The nature and intensity of UKEF's climate change enquiry falls to be judged against the standard of irrationality. Moreover, in context, there is a substantial margin to be afforded- especially given that UKEF was conducting a voluntary assessment using a novel, pioneering framework which involved predictive assessments having regard to technical and expert advice.

LEGAL AND POLICY CONTEXT: EXPORT FINANCE DECISION-MAKING

Export and Investment Guarantees Act 1991 (the "1991 Act")

10. The 1991 Act grants the Secretary of State a broad power to grant export finance, to be exercised through UKEF (s.13). She need only consider the finance "*conducive to supporting or developing (whether directly or indirectly) supplies or potential supplies"* of UK goods and services abroad (s.1(1)), including exports already made (s.1A) and obtain the consent of HMT (s.4(2)).

UKEF's ESHR Policy

11. UKEF's statement of policy and practice on Environmental, Social and Human Rights due diligence and monitoring dated December 2018 (the "**ESHR Policy**") **[CB2/5/32]** did not mandate UKEF to consider the PA.

12. The ESHR Policy §3 provides that UKEF will conduct due diligence in accordance with "*international agreements which apply to the operation of ECAs [export credit agencies]"*. This language captures the OECD Common Approaches which expressly applies to ECAs. It does not capture the PA which cannot sensibly be described as an agreement governing ECAs **[CB1/7/179/32]**. ESHR Policy §3 also provides that UKEF will comply with the requirements of the Equator Principles (the third version of which, "**EP3**", applied at the time of the Decision).

13. The OECD Common Approaches and EP3 in turn required UKEF to assess whether a project it was proposing to finance complied with host country laws and a list of certain expressly designated "*international standards"*: see §§13 and 21-26 of the OECD Common Approaches and Principle 3 of EP3. That list of designated international standards includes the International Finance Corporation of the World Bank Group's Performance Standards on Social and Environmental Sustainability (the "**IFC PS**") and the World Bank Group Environmental, Health and Safety Guidelines (the "**WB EHS Guidelines**"). But it does not (directly or indirectly) include the PA. The reference in recital 9 of the OECD Common Approaches to the United Nations Framework Convention on Climate Change ("**UNFCCC**") does not mean that the drafters thereby intended to ensure all ECAs benchmarked projects against the UNFCCC (still less the PA, cf. CSkel §35). Had this been the intention, the drafters would have referred to these treaties in §§21-26.

14. The reference to whether projects comply with "*applicable local and relevant international laws"* in ESHR Policy §3 is not a hook to bring the PA into play (cf. CSkel §34). That language is intended to refer back to those international laws and standards expressly identified in the OECD Common Approaches and EP3 (as is clear from the preceding words "*In line with the OECD Common Approaches and Equator Principles..."*, which is a common refrain throughout the ESHR Policy).

15. The documents cited at CSkel §§8-9 and 11-13 all post-date the Decision and do not alter the policy position at the relevant time[2]. C accepts that the Green Finance Strategy cited at CSkel §10 applied to 'official development assistance' which did not encompass export finance **[SB/1576/Q8]**.

[2] With the exception of the statement from the EU Council in 2019 which merely "*encourages"* multilateral development banks (not ECAs) to "*phase out"* financing of fossil fuel projects "*taking into account the sustainable development, and energy needs, including energy security, of partner countries"* (§8) thereby recognising that this would be a process which would need to balance competing objectives for certain countries.

The PA

16. Article 2 PA declares three global aims and objectives which its provisions are designed to help achieve:

> *"1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*
>
> *(a) 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 impact of climate change;*
>
> *(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and*
>
> *(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*
>
> *2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."*

17. Article 3 is framed in terms of an obligation: "*As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2"*. Accordingly, the efforts to be undertaken are further elaborated in Articles 4, 7, 9, 10, 11 and 13.

18. Article 4(1) PA declares a further aim, namely that 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 ... 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"*.

19. The first sentence of Article 4(2) imposes a procedural obligation on each individual state to identify and communicate a set of nationally determined contributions which it "*intends to achieve"*.

20. The second sentence of Article 4(2) then imposes an obligation of action: "*Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such [nationally determined] contributions"*.

21. Article 4(3) provides that each successive NDC should represent a progression and the state's "*highest possible ambition.... in light of different national circumstances"*. Article 4(4) provides that developed countries should adopt "*economy-wide absolute emission reduction targets"*, whilst developing countries are only "*encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances"*. Article 4(6) provides that the least developed countries may communicate NDCs "*reflecting their special circumstances"*.

22. Article 4(5) provides that "*[s]upport shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11"*.

23. Article 7 is largely declarative of the "*global goal on adaptation"* and matters said to be recognised by the Parties. Adaptation is about strengthening the capacity and resilience of states to deal with the adverse effects of climate change. Article 7(9) provides that Parties "*shall, as appropriate, engage in adaptation planning processes and the implementation of actions"* (thus leaving the decision on what action to take to the states to decide "*as appropriate"*). Articles 7(10)-(11) impose another procedural obligation on parties to file and periodically update an "*adaptation communication, which may include its priorities, implementation and support needs, plan and actions, without creating any additional burden for developing country Parties"*. Article 7(13), mirroring Article 4(5), again says that support "*shall be provided to developing country Parties... in accordance with the provisions of Articles 9, 10 and 11"*.

24. Article 9(1) provides that "*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 [UNFCCC]"*. Article 9(3) provides that "*developed country Parties should continue to take the lead in mobilizing climate finance.... through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties"*. Article 9(5)-(8) then provide for an exchange of information on "*projected levels of public financial resources to be provided to developing country Parties"*.

25. Article 10 provides that parties "*shall strengthen cooperative action on technology development and transfer"*.

26. Article 11(2) provides that capacity-building should be "*country-driven, based on and*

responsive to national needs, and foster country ownership of Parties, in particular, for developing country Parties". Article 11(3) provides that all Parties "*should cooperate to enhance the capacity of developing country Parties to implement this Agreement"*.

27. Articles 14 and 15 establish mechanisms to assist with monitoring compliance with the PA's objectives and provisions. Article 14 provides for a "*global stocktake*" to occur every 5 years by a "*Conference of the Parties"* the results of which shall inform the Parties' actions. Article 15 establishes a committee that shall be "*expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive"* to "*facilitate implementation and promote compliance"* with the PA.

28. The following features of the PA are to be noted:

    28.1. The PA declares a set of agreed, global objectives but leaves it to the discretion of national states to determine what voluntary action or targets they will pursue "*in the light of different national circumstances"*, subject only to the 'ratcheting' requirement of increasingly progressive aims. As stated by the Divisional Court in *Spurrier v SSfT* [2020] PTSR 240 at §607, "*[i]t is clearly recognised on the face of the Paris Agreement that the assessment of the appropriate contribution will be complex and a matter of high level policy for the national government"*. There is no provision whereby the NDCs of individual states can be assessed as sufficient or compliant as against any particular benchmark. Rather, the sufficiency of cumulative efforts is designed to be assessed and communicated via 'global stocktakes'.

    28.2. The PA expressly recognises the unique challenges faced by developing countries, noting that peaking of GHG emissions will take them longer and that emission reductions need to occur in the context of efforts to eradicate poverty (Article 4(1)); that absolute emission reduction targets are not appropriate to demand of developing countries at this point in time in the way that they are for developed countries (Article 4(4)); and that the NDCs of developing countries will reflect their special circumstances (Article 4(6)).

    28.3. The PA contemplates that support will be provided to developing countries so as to implement Articles 4 and 7 (i.e. developing and taking measures with a view to achieving the goals or actions set out in their NDCs). That support is to be provided by the provision of financial resources (Article 9), cooperation on technology (Article 10) and cooperation on capacity-building (Article 11). But that obligation of support is framed at a high-level of abstraction. No minimum funding requirement is specified, and it is for the developing countries to determine and specify their objectives and priorities.

29. The UK's specific obligations under the PA are given effect in domestic law, in that the carbon emission reduction target specified in s.1 and the carbon budgets under s.4 of the Climate Change Act 2008 meet (and, indeed, go beyond) the UK's obligation to take measures to adhere to the NDCs communicated on its behalf: *R (Friends of the Earth) v SSfT* [2021] 2 All ER 967 at §122 (and it was for that reason that the Secretary of State reached a rational view that the UK's obligations under the PA were sufficiently taken into account by virtue of having regard to 2008 Act: §132). C has not suggested that the Decision breaches the UK's obligations under the 2008 Act, as the Act is concerned only with emissions from UK sources: s.29(1)(a)).

30. The scheme of the PA is further reflected in the Government's response to the Environmental Audit Committee report: "*the emissions released by UKEF supported projects overseas will be subject to the limitations imposed by the Nationally Determined Contributions agreed by host governments as part of their Paris Agreement commitments rather than any commitments made by the UK"* **[SB/344]**.

GROUND 1A: BREACH OF THE PA

31. By Ground 1A, C argues that UKEF erred in law in concluding that its Decision to provide export finance in respect of the Project would be consistent with the UK's international law obligations under the PA. CSkel §§40-41 pleads two obligations (cf. the three slightly differently formulated obligations at ASFG §76 **[CB1/1/28]**) namely: (i) an obligation to "*make finance flows consistent with the low emissions pathway and sustainable development"* (although at §38a, C refers instead to "*climate resilient development"*) and (ii) an obligation to provide "*support for the implementation by developing country Parties ... of domestic mitigation measures to achieve the objectives of successive, increasingly ambitious NDCs adopted"*.

Standard of review is tenability/reasonableness not correctness

32. In relation to interpretation, the question is whether the interpretation adopted by Government was a tenable one. In relation to the application of relevant international standards to the facts of any particular case or context by Government, the standard is that of rationality. See especially:

    32.1. Lord Brown (with whom Lord Rodger agreed) in *R (Corner House) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at §§64-68[3]; and see Lloyd Jones J in *R (ICO Satellite Limited) v Office of Communications* [2010] EWHC 2010

[3] The judgment relying on "*International law in Domestic Courts: The Developing framework"* LQR (July 2008) Vol.124, page 388 (Philip Sales QC and Joanne Clement).

(Admin) at §§88-95, a case concerning the interpretation of regulations published by the International Telecommunications Union which had been applied by Ofcom.

32.2. *Heathrow Airport Ltd v HM Treasury* [2021] EWCA Civ 783 at §§165-177. The Divisional Court held that where a provision of an unincorporated international treaty is properly justiciable (in the sense of it having been properly 'grounded' in domestic law and not subject to the foreign act of state doctrine), the applicable standard of review will be guided by "*whether there is anything about the [treaty] which makes it unsuited to adjudication ('intrinsic non-justiciability')"* (§§164-165). Relevant considerations would include "*the softness/hardness of the edges to the rule or provision in question"*, "*the extent to which the [treaty] is truly justiciable or is better characterised as a statement of political intent"* and "*the extent to which resolution of issues of interpretation are best achieved by negotiation and consensus building on the international plane"* (§166). Applying those factors to the case before it, the Court determined that it could interpret certain provisions of the General Agreement on Tariffs and Trade (GATT) for itself as they were "*closer to the prescriptive, hard edged, end of the scale",* were capable of being litigated and there was a copious body of guiding case law from the GATT Panels and the Appellate Body which had been cited by the parties (§174).

32.3. *R (Save Stonehenge World Heritage Site Limited) v SSfT* [2021] EWHC 2161. Holgate J held that if the treaty in question "*is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgement for the decision-maker, subject to review on grounds of irrationality"* (§215) and it "*should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable". This approach allows for the possibility that, so far as domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable". The issue is simply whether the decision-maker has adopted an interpretation falling within that range"* (§216).

33. The tenability standard was then specifically endorsed in respect of the PA in *R (Elliott-Smith) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (Admin) at §55 per Dove J (rejecting the argument that the Government misunderstood and failed to take into account the need to act urgently under the PA when designing the UK Emissions Trading Scheme). Dove J was right to do so:

33.1. The PA is best characterised as a treaty intended to be the subject of political discussion and consensus-building in the international sphere, rather than a treaty laying down precise obligations and prohibitions designed to be litigated.

33.2. Its provisions are often declarative of broadly framed aims, its obligations largely procedural (cf. the obligation to file and review NDCs) or otherwise so broadly framed as to provide no workable benchmark against which individual decisions can be assessed as compliant or in breach (cf. the obligation on developed countries to provide financial support to help developing countries pursue their NDCs). See by analogy the distinction between interpretation and application of policies (the latter being reviewable on rationality grounds only where the application of provisions requires an exercise of judgment): *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] 3 All ER 527 at §§21, 39-40.

33.3. That is reinforced by Articles 14 and 15 establishing a "*facilitative"* committee charged with promoting compliance in a "*non-adversarial and non-punitive"* manner along with a "*global stocktake"* every 5 years (§27 above).

34. None of the cases cited in CSkel §§53-61 are authority for the proposition that once a question of international law is justiciable, the standard of review is correctness:

34.1. *R v SSHD ex p Launder* [1997] 1 WLR 839 and *R v DPP ex p Kebilene* [2000] 2 AC 326 merely serve to illustrate the distinction drawn in cases like *Heathrow*. Each concerned the (then unincorporated) ECHR, a treaty whose provisions were explicitly designed to be litigated in adversarial legal proceedings. In *Launder* there was no issue between the parties as to the interpretation of the relevant articles whilst in *Kebilene* there was a body of ECHR jurisprudence on which the court could draw to resolve the issue. Further, each case concerned decisions allegedly affecting fundamental human rights of the individual claimants. These cases were exceptions to the general rule (see *Corner House* at §44 per Lord Bingham and §66 per Lord Brown).

34.2. *Heathrow* §§164 and 169-177 concerned the prior question of whether the international law issue is justiciable in the sense that it can be considered by a domestic court at all. At §164, Green LJ notes that the 'intrinsic justiciability' of the provision in question is less critical to justiciability precisely because "*it can be taken into account in applying the flexible tenability test which arises only in relation to a*

measure which is justiciable... and which enables the court to adjust the test for reviewability accordingly".

34.3. *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 was about whether a statutory provision was incompatible with the (clearly justiciable) rights conferred by Article 6 ECHR. That turned on whether those Article 6 rights were effectively disapplied by a supervening principle of customary international law. The Supreme Court did not disapprove of the "*tenable view"* approach in other types of cases because it was not necessary for it to do so. On the contrary, Lord Sumption expressly noted (§35) that: "*[t]here are circumstances in which an English court considering the international law obligations of the United Kingdom may properly limit itself to asking whether the United Kingdom has acted on a 'tenable' viewof those obligations.*" See also *Heathrow* at §§146-147 distinguishing those cases in which customary international law can be indirectly invoked and adjudicated upon in the domestic courts.

34.4. *Kuwait Airways Corporation v Iraqi Airways Co.* [2002] 2 AC 883 is a case in which the public policy exception to the foreign act of state rule applied and demanded that the court recognise an international law breach. The offending Iraqi law was a clear, determined and serious breach of Article 2(4) of the UN Charter which Lord Steyn noted had the character of *jus cogens* (§114). See the discussion of this case in *Belhaj v Straw* [2017] AC 964 at §§153-154 per Lord Neuberger and §255-257 per Lord Sumption.

34.5. *A v SSHD* [2005] 2 AC 68 and *R (European Roma Rights Centre) v Immigration Officer* [2005] 2 AC 1 were cases in which provisions of international law were considered either as aides to the construction of domestic law rights arising under incorporated international treaties or in their own right because it was said that they formed part of domestic law either via incorporation or otherwise formed part of the common law.

35. No assistance is to be gained from the foreign judgments cited at CSkel §59(e). These are cases in which the objectives set out in international climate change agreements were considered in broad terms by the relevant courts as aides to the interpretation of domestic law rights arising under their respective national laws, the ECHR and/or EU law.

Obligation to "make finance flows consistent with low emissions pathway"

36. C's arguments distort the language of the PA and seeks to transform broad objectives into hard-edged prohibitions. C argues that the PA requires the UK to make finance flows consistent with a low emissions pathway; that this obligation arises from Articles 2(1)(c) and 3(1); and that this prohibits the funding of projects which (viewed in isolation) might hinder rather than help the achievement of the global temperature objective defined in Article 2(1)(a). See CSkel §40, 46.

37. Properly interpreted, Article 2(1)(c) PA declares a broad aim that national states will make finance flows consistent with a low emissions pathway. C impermissibly seeks to transform a broadly defined objective into a specific prohibition. That interpretation of Article 2(1)(c) is inconsistent with the PA's 'bottom-up' approach of requiring voluntary commitments to be communicated in with a broadly defined obligation to take "*domestic mitigation measures, with the aim of achieving the objectives"* set out in those NDCs (§§19-20 above). The need for a purposive construction under the Vienna Convention cannot be taken too far – the Court's task remains one of interpreting the written document to which the contracting states have committed themselves (see ***A v SSHD*** at §18 per Lord Bingham).

38. Article 3(1) provides no further assistance to C. That only reiterates the fact that the obligation on states is to undertake those efforts which are further specified in Articles 4, 7, 9, 10, 11 and 13 (§17 above). The principal efforts are to communicate NDCs and to undertake measures with a view to achieving the objectives set out therein.

39. Even if Articles 2(1) and 3(1) could be interpreted as imposing some freestanding obligation to take efforts to achieve the goal of making all finance flows consistent with a low emissions pathway, that does not mean it contains an implied prohibition on the provision of export finance in respect of any project which (viewed in isolation) might increase GHG emissions. Again, this interpretation is inconsistent with the drafting of the PA viewed as a whole, which recognises that emissions may get worse before they get better (i.e. peak later) particularly because of the competing demands on developing countries to eradicate poverty and ensure their economies are resilient in the face of adverse climate changes impacts (§28.2 above). Considering consistency with the PA is not a quantitative or numerical exercise.

40. Accordingly, UKEF's CCR did not err in law by failing to recognise some alleged prohibition on the financing of any project which might (when viewed in isolation) increase GHG emissions or hinder achievement of the global long-term temperature goal. On the contrary, the understanding of the CCR team and Mr Taylor that the PA's broad objectives left room for consideration of fossil fuel projects which might nevertheless

bring important economic benefits to a developing country, particularly given LNG is a less polluting form of fossil fuel and is expected to form part of the global energy mix for a transition to a low carbon future, was not merely plainly tenable but correct.

41. Further and in any event, C is wrong to assert that the CCR erred because it considered a *"non-PA consistent pathway (2 °C rather than 1.5 °C)"* (CSkel §46a). The long-term temperature goal in Article 2(1)(a) of the PA is to hold the increase in temperature to well below 2 °C and pursue efforts to limit the increase to 1.5 °C. The CCR correctly noted both aspects of the long-term temperature goal: **[CB2/21/276]**. There is no basis for the proposition that the PA's temperature goal requires there to be no new gas production in the future, having regard to the analysis of the International Energy Agency on this point which analysis adopted *"well below 2 °C"*: **[CB1/8/227/92-95]**. It is also noted that Professor Anderson and his colleagues had calculated emissions budgets by reference to a likely chance of achieving 2 °C: **[CB1/4/130/11]**.

42. As regards UKEF's conclusion about the displacement capacity of the Project and its overall impact on GHG emissions, it is important to read the CCR's conclusions on this in full when considering rationality:

    42.1. The CCR considered whether the Project was likely to lead to a net reduction or increase in global GHG emissions through a scenario analysis. UKEF articulated and considered 'best', 'worst' and 'mid' case scenarios from the standpoint of assessing whether the LNG produced by the Project could replace/displace more polluting fossil fuels (such as coal or oil). UKEF considered the mid-case scenario to be more likely and that "*a combination of replacement and displacement of coal and oil power generation will lead to a net reduction in future GHG emissions <u>when compared with fossil fuel alternatives</u>*" (underline added) **[CB2/21/274-275]**. The risk that the Project may displace some renewable energy production was taken into account: **[CB2/21/276]**.

    42.2. C focuses upon the drafting of Ds' DGD and in particular the phrase "*it was concluded that the net effect would be a decrease in future GHG emissions"*. But it is crucial to read the CCR in full as it explains the counterfactual being adopted. The CCR still described the Project's impact on Mozambique's emissions as being "*significant"* **[CB2/21/270]** but explained why that impact was nevertheless consistent with the PA objectives and Mozambique's NDC. That was clearly understood by Mr Taylor who framed his 1 June Submission in similar terms (§5 above).

42.3. The suggestion that UKEF then erred in law in conducting this scenario analysis because there was no rational evidence base for its conclusions is addressed further under Ground 1B at §78 below.

Obligation to support Mozambique in complying with its current/future NDCs

Foreign act of state doctrine

43. C argues that the Decision breached the UK's obligation "*to assist Mozambique as a developing country Party to meet and augment its climate change ambitions"* because financing the Project will make it impossible for Mozambique to meet its current NDC or any future augmented NDCs (CSkel §§38, 44, 47). Assessment of that argument will necessarily entail this Court being drawn into determining whether projects within the territory of a foreign state mean that state will be in breach of its own international law obligations. That is impermissible pursuant to the foreign act of state doctrine. See *Belhaj* at §123 per Lord Neuberger articulating the 'third rule' of the doctrine; and *Al Maktoum v Al Hussein* [2020] EWHC 2883 (Fam) at §§48-65 considering the third rule (which analysis was upheld on appeal: [2021] EWCA Civ 129). C is inviting the Court to enquire into whether Mozambique, in its capacity as a sovereign state, will breach obligations allegedly arising on the international plane pursuant to a treaty which expressly envisages dispute resolution via facilitative inter-state consensus. This is not a case involving an alleged infringement of an individual's fundamental human rights or some *jus cogens* norm of international law which it would be contrary to English public policy to ignore.

44. The doctrine is not circumvented by C's attempts to frame the enquiry as being one of the UK's obligation to support Mozambique in complying with its own obligations. See *Ukraine v The Law Debenture Trust Corporation PLC* [2019] QB 1121 at §§155, 161-163 (whether or not there is a 'domestic legal foothold' is only the first stage of the enquiry) and *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 at §25 and 36-37 (what matters is what enquiry would be conducted in substance and how it would be perceived).

No error of law

45. In any event, UKEF did not err in law in considering its obligation to support Mozambique.

46. C argues that Article 4(5) imposes an obligation on the UK to support Mozambique to achieve the goals set out in its existing and future NDCs; that this entailed a prohibition against financing any project which might significantly increase Mozambique's GHG emissions beyond the emission reduction targets set out in its current NDC; and that this

prohibition was breached in this case because financing the Project will make it "*impossible"* for Mozambique to meet its current NDC and/or because lock-in will prevent Mozambique from making future emission reductions (CSkel §§41, 47).

47. First, the CCR considered the Project's consistency with Mozambique's NDC and reached an entirely rational and tenable conclusion that it was "*in alignment"* with its contents and, "*by extension"*, Mozambique's PA commitments **[CB2/21/271]**.

48. This NDC set out various emission reduction estimates which Mozambique believes will be achieved "*based on the policy actions and programmes"* listed elsewhere in its NDC: see **[CB2/2/13]**. However, their achievement is said to be conditional upon Mozambique obtaining sufficient international support.

49. The NDC then defines Mozambique's contributions as comprising the implementation of various designated 'policy actions and programmes'. One of these is its 'Master Plan for Natural Gas (2014 to 2030)' which envisages delivery of the Project: **[CB/833]**. The CCR also noted that Mozambique's NDC refers to the priorities set out in its National Climate Change Adaptation and Mitigation Strategy which provides that mitigation efforts with "*multiple benefits"* will be prioritised in order to achieve (inter alia) the exploration and more sustainable use of Mozambique's energy resources, promoting access to resources, the alleviation of poverty and "*guaranteed basic social services and infrastructure"* **[CB2/21/257] [SB/899]**.

50. The CCR expressly recognised the internal tension in Mozambique's NDC commitments stating that "*[t]he issue of reconciling sustainable development priorities for developing nations such as Mozambique is complicated"* **[CB2/21/269]**. It reached the conclusion that the Project was nevertheless in alignment with Mozambique's NDC not simply because it is incorporated within it but also because:

    50.1. Mozambique needs financial resources to support the country's climate resilience **[CB2/21/255]**.

    50.2. Whilst the Project would increase Mozambique's emissions in the short-term, it is also likely to provide it with the financial means to do something to address the country's emissions in the longer-term by enabling investment in the electricity distribution network and renewable energy developments. Without this, there are unlikely to be the means to achieve the emissions mitigation sought by Mozambique's NDC. In this way the Project could act as a 'transformational catalyst' and offer an energy bridge as the country moves to renewable energy

sources. See **[CB2/21/252, 255, 268-270]**.[4] In reaching this conclusion UKEF had regard to (inter alia):

(i) The advice of the Department of International Trade Oil and Gas Team in April 2020 that renewables cannot yet provide an alternative for an energy project of this scale, that Mozambique's biggest challenge is enhancing grid resilience, and that the revenue streams from LNG will allow Mozambique to invest in infrastructure and sustainably realise its clean energy potential, including reinforcement and development of its electricity grid. See **[SB/1070]**.

(ii) The indication given by the Government of Mozambique during AfDB's due diligence that proceeds from the Project will improve the country's overall resilience and ability to respond and adapt to a changing climate: see **[SB/628] [SB/658]**.[5] AfDB concluded that Mozambique recognises natural gas as a transition fuel and specifies the implementation of the Master Plan as a mitigation strategy in its NDC.

See further **[CB1/8/224-226]** and **[CB1/7/184-185]**.

51. This approach is entirely consistent with the PA's express recognition of the special circumstances of developing countries and the competing objectives of combatting climate change whilst eradicating poverty and becoming climate resilient (see §§16 and 18 above). The view reached by UKEF on this matter was rational and tenable. Indeed, it is supported by the evidence of Dr Hawkes: **[CB1/10/271-272]**.

52. It is also important to keep in mind that UKEF was conducting due diligence on an export finance decision relating to a project that is taking place in different host country. Whilst C's witnesses challenge Mozambique's NDC, it is not for UKEF to police whether a foreign state's NDC is sufficient or internally consistent having regard to the PA objectives.

53. The next step in C's logic is also flawed, namely that UKEF's provision of export finance in relation to the Project would make it impossible for Mozambique to achieve the goals set out in its NDC. C wrongly proceeds as though the Decision were a decision to construct and operate the Project i.e. as though it will act as a 'but for' cause of the GHG emissions

[4] It is noted that Professor Anderson accepts that external funding is required for Mozambique to develop its energy system: **[CB1/6/162/20]**.

[5] C is wrong to suggest (CSkel §36(d)) that the CCR said that UKEF had no information about how the project funds would be utilised. The CCR said that there was "*no further information*" beyond what had been provided by the AfDB: **[CB2/21/269]**.

complained of. However, by the time of the Decision, the Project was already underway and UKEF's judgment was that it would proceed whether UKEF provided export finance or not: **[CB1/7/192-193/105-108]**.

GROUND 1B: OTHER ERRORS IN UKEF'S CLIMATE ANALYSIS

Applicable standard of review

54. Ground 1B argues that UKEF's assessment of the climate change impact of the Project was otherwise contrary to general principles of English public law. Absent statutory requirements, the considerations to take into account, the weight they should be given and the nature/intensity of inquiries into them are all matters for the decision-maker reviewable only on grounds of irrationality[6] which is a deliberately strict standard.[7]

55. The following factors also justify a substantial margin being accorded to UKEF: (i) the Decision was taken within the context of a statutory framework according significant discretion (§10 above); (ii) the Decision involved balancing a number of public interest factors at a high, strategic level (§5 above); and (iii) UKEF's assessment of climate change impact was inherently predictive, requiring an exercise of judgment as to what might happen having regard to scientific and/or technical material including the advice of independent consultants. Cf. *R (Spurrier) v SST* [2020] PTSR 240 at §§148-152 and 176-181.

56. There is no single prescribed or recognised way in which climate change and consistency with the PA must be considered. This is apparent from the differences in the views expressed by C's witnesses over what UKEF ought to have done and indeed over the role of gas in transition. The appropriate approach was a matter for UKEF and there is no basis for suggesting that its approach was irrational. UKEF's judgment on how to undertake its consideration in the CCR, and what information to take into account, was informed by expert input and extensive discussions: see **[CB1/7/186-188] [CB1/8/207-210, 212-216, 229, 237] [CB2/11/102]**. UKEF relied on the advice of Wood Mackenzie (see its report at **[CB2/9/64]**) but did not just accept it. It is also relevant that the CCR undertaken in May 2020 was the first of its kind. No similar exercise had been undertaken before within Government or by another ECA: **[CB1/7/187/82]** and **[CB1/8/209/35-36]**. UKEF's

[6] *R (Khatun) v Newham LBC* [2005] QB 37 at §35; *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261 at §100; *R (DSD) v Parole Board* [2019] QB 285 at §141.

[7] *R (CAAT) v Secretary of State for International Trade* [2019] 1 WLR 5765 at §152. Courts have warned against requiring an "*unrealistic counsel of perfection"* even in the context of heavily regulated environmental impact assessments: *R (Blewett) v Derbyshire CC* [2004 Env LR 29 at §41 (endorsed by the Court of Appeal in *R (Plan B Earth) v SSfT* [2020] PTSR 1446 at §§126-144).

approach to the CCR cannot be irrational when it not only reflected the consideration given to the issue by AfDB and other ECAs but went further than that.

57. At their highest, C's arguments amount to a difference of opinion between C's witnesses and the views of the Ds, the IPs and their witnesses. This does not suffice to show an error of law. C is inviting the Court to enter into the forbidden territory of adjudicating between the competing but rational views of experts.

Quantification of Scope 3 emissions

58. C argues that the Ds erred in law by taking decisions without having obtained a quantitative estimate of the Project's Scope 3 emissions because it is impossible to consider climate change impacts without doing so (CSkel §§69(a), 72).

59. UKEF's CCR conducted a high-level qualitative assessment of the likely Scope 3 emissions that will result from the Project, finding that these would be "*very high and will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities, as well as exceeding 25,000 tonnes CO_{2e} per year (the threshold set by the IFC to determining whether GHG emissions are considered 'significant')"* **[CB2/21/253]**. Having reviewed the CCR, Mr Taylor was under no illusions as to the scale of these emissions. His submission dated 1 June 2020, provided to both the Secretary of State and HMT, stated that he had specifically taken into account "*the significant impact that the project will have due to increased GHG emissions"* **[CB2/17/153/56e]**.

60. UKEF's ESHR Policy did not require it to consider Scope 3 emissions, let alone quantify them. Neither the OECD Common Approaches, EP3 nor any of the expressly designated international standards referred to therein required UKEF to quantify or benchmark the Scope 3 emissions of any project being considered. IFC PS 3 merely requires project sponsors to quantify Scope 1 and 2 emissions for projects expected to produce more than 25,000 tonnes of CO2e annually, whilst the WB EHS Guidelines merely set out possible actions that can be taken by project sponsors to reduce GHG emissions in high-level terms. The OECD Common Approaches similarly provide that "*where relevant and feasible, Adherents shall try to obtain and report the estimated annual direct and indirect greenhouse gas emissions (Scope I and Scope II respectively) …"* (para.46). EP3 Principle 2 (read with Annex A) provides that Scope 1 and 2 emissions (i.e. not Scope 3) shall be quantified and reported where they are expected to exceed 100,000 tonnes of CO2e per year.

61. C notes that the GHG Protocol methodology is referred to in the Recommendations of the

Task Force on Climate-Related Financial Disclosures ("**TCFD**") (CSkel §76). C now appears to accept Ds' argument (DGR §57 **[CB1/2/79]**) that it was not obliged to apply the TCFD and that in any event neither the TCFD nor the GHG Protocol mandate the quantification of Scope 3 emissions. C argues instead that the crucial point is that this methodology was available. However, in circumstances in which no applicable law or policy required UKEF to undertake this analysis, the question for the Court is whether its failure to do so was irrational. The absence of any applicable policy or standard requiring the same is telling (as it was in *Packham v SSfT* [2021] Env LR 10 where the Court of Appeal rejected an argument that considering the implications of the PA required a more intensive assessment than had been carried out: see in particular §§95-99).

62. The qualitative assessment of the Project's Scope 3 emissions also needs to be viewed in the light of UKEF's assessment that it was appropriate to focus on the net climate change impact of the Project (which would also take into account any reductions in emissions as a result of the Project's gas displacing more polluting fuels such as oil or gas). For the reasons given in the CCR, and by Wood Mackenzie (**[CB2/9/71-73, 78-79]**), it was rational to consider the impact of Scope 3 emissions in qualitative terms. UKEF was advised by Wood Mackenzie that there was unavoidable uncertainty arising from the Project's off-taking arrangements meaning that it was impossible to state with certainty what the impact of the Project's Scope 3 emissions would be. The CCR gave the matter reasonable consideration to the extent judged appropriate in light of that uncertainty. Uncertainty over the method of assessment is a relevant consideration when judging whether and how to take something into account: *Friends of the Earth* at §166.

63. Further, by the time that Mr Taylor took the Decision he had seen some high-level quantitative estimates of the absolute Scope 3 emissions that would be generated by the Project (produced after the CCR in the context of assessing possible carbon offsetting actions). He concluded that these simply confirmed the qualitative conclusion expressed in the CCR and so did not affect his conclusions: see **[CB1/7/192/103-104]**, **[SB/1584, 1587] [CB2/28-30]**.

64. C relies upon the comments from Ben Caldecott, but those related to an earlier draft of the CCR and a qualitative assessment of Scope 3 emissions was subsequently conducted and added as noted above.

65. The Australian case of *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 is far removed from the context of an ECA conducting due diligence and considered a different policy and statutory framework. It is not authority for the

proposition that the only rational way to reach conclusions about the impact of a project on global GHG emissions is to undertake some benchmarked quantitative analysis. The case is also distinguishable. Here, UKEF did consider Scope 3 emissions, explained the way that it did so, and why, in its CCR.

66. The opinions of Professor Anderson and Mr Muttitt as to what UKEF ought to have done are bare opinions, not rooted in any applicable legal standard or policy. Their criticisms are in reality a series of disagreements about the merits of UKEF's judgments in compiling the CCR. See, in any event *Gardner v Secretary of State for Health and Social Care* [2021] EWHC 2946 (Admin).

Budgets, pathways and the UNEP Production Gap Report

67. C contends that it was necessary to benchmark emissions against carbon budgets and pathways in order to assess consistency of the Decision or Project with the PA (CSkel §82). C cites no standard in support of that but again simply relies on the bare opinion of Mr Muttitt. There is no official publication which makes good C's argument that it was necessary to undertake a quantified analysis of climate change impacts against a budget or pathway benchmark.

68. C contends that UKEF failed to use the right "yardstick" when considering consistency with the PA, but there is no single PA "yardstick". The long-term temperature goal in Article 2(1)(a) of the PA is to hold the increase in temperature to well below 2 °C and pursue efforts to limit the increase to 1.5 °C. This does not present a single defined goal but covers a range of potential outcomes.

69. There is no published carbon budget for the PA: **[CB1/8/237/127]**. Indeed, there is no other kind of single pathway or budget for a PA-consistent future which would provide an official or even accepted benchmark. In any event, the long-term temperature goal in Article 2(1)(a) is only one element of the PA.

70. C relies on an approach and 'budgets' produced by Professor Anderson in his witness evidence, drawing on his academic work which was first published the day before the CCR was completed: **[CB1/8/236/126]** and **[CB1/4/130-131]**. It cannot be contended that using the approach in Professor Anderson's evidence was the only rational approach.

71. C also says that regard should have been had to the IPCC SR15 Report and the UNEP 2019 Production Gap Report. Neither of these documents was so obviously material that

it would be irrational not to specifically take them into account.

72. As to the 1.5°C pathways from the IPCC SR15 report, see §41 above. UKEF's CCR expressly had regard to both limbs of the PA temperature goal and C's own witness based his own analysis on a budget aligned with a likely chance of achieving the 2 °C target.

73. As to the UNEP 2019 Production Gap Report, UKEF was well aware of the issues discussed in that Report including that production levels are currently too high to achieve the 1.5°C target (see **[CB1/7/190/92]**) and that not all of the world's existing fossil fuels can be exploited within the PA temperature goals (see **[CB1/7/190/§93]**, **[CB1/8/237/128]** and **[CB2/21/276]** noting the *Nature* paper cited by Professor Anderson).

Reliance on the Wood Mackenzie Report

74. C contends that UKEF was wrong to rely on the Wood Mackenzie Report, given the scope of work for the Report and Total's involvement in it (CSkel §§92-100). However, it fails to identify anything which could amount to an error of law.

75. Wood Mackenzie were not instructed to provide a comprehensive climate change report. The scope of work covered Scope 3 emissions impacts, which is what the Lender Group judged to be necessary: **[CB1/8/209/37]** and **[CB2/10/93]**. The scope of work was drawn-up in consultation with the Lender Group and discussed by UKEF internally: **[CB1/8/209-210] [CB2/10/88-101]** and **[SB/1587-1589]**. UKEF challenged Wood Mackenzie about some of its underlying assumptions in a series of calls, which led to changes being made: **[CB1/8/211/41-42]**. UKEF was well-aware of the scope of the work and the limitations of it, which is why it produced its own CCR: **[CB1/8/211/44]**.

76. UKEF was involved in asking Total to procure the services of Wood Mackenzie: **[CB1/8/209/37]**. That was in line with industry practice and does not display a lack of independence: **[CB1/8/210/38]**. Wood Mackenzie owed its duty of care to the Lender Group and its report itself records that it was produced *"for the benefit of Lenders"*: **[CB2/9/86]**.

Capacity of the Project to displace more polluting fossil fuels

77. The Court is invited to read the full reasoning on this point in the body of the CCR. See **[CB2/21/274-275]** discussed at §42 above.

78. UKEF's analysis was not fatally flawed simply because it went beyond that conducted by

Wood Mackenzie or because it did not entail some kind of quantitative comparison. The reasons for its conclusions are set out in the CCR. The conclusions drawn were predictive assessments by UKEF, drawing on all of the evidence available to it. That included the advice in the Wood Mackenzie Report (such as the analysis of the likely LNG markets and that key Asian markets had particular scope for coal displacement: **[CB2/9/68-78] [CB2/19/182-183]** and **[SB/649-650]**) alongside other information which UKEF had obtained from other enquiries (see **[CB1/8/217/55] [CB2/21/274-275]** citing, for example, analysis from US EXIM and the IEA World Energy Outlook report).

Error of fact in quantification of Scope 1 emissions: 2 trains vs. 6 trains

79. UKEF's quantitative estimate of the Scope 1 emissions in respect of the Project was based on it comprising of two liquefaction units/trains. C argues that UKEF thereby proceeded on the basis of an error of fact because it should have taken into account "*the likely further expansion of the project to 6 or more production trains"* (CSkel §§108-109).

80. There was no error about the number of trains involved in the Project. The CCR set out to consider the Project, meaning the development defined in the financing agreements in relation to which UKEF was proposing to provide export finance (**[CB1/8/229-231]**. The Project, as defined, is a two-train project (see **[CB1/9/251/35]**). This approach was consistent with the OECD Common Approaches (p.5) and EP3 (p.18) which both define the 'project' to be considered by reference to the new undertaking for which the export support is proposed (**[CB1/8/231/105]**).

81. C's references to the 2014 EIA are outdated because the scope of the Project was reduced after 2014: **[CB1/8/229/101]**. Other ECAs, including EKN, considered the two-train project (see, for example **[SB/1534]**).

82. IFC PS1 refers to an assessment of impacts resulting *"from other existing, planned or reasonably defined developments"*. However, UKEF did not consider that there was any existing, planned or reasonably defined development to expand the number of trains such as to fall within the ambit of this standard: **[CB1/8/230/102]**. In forming that judgment, it took account of the fact that separate projects had been put on hold and the complexity of even developing the two-train Project which made the development of additional trains in no way certain or likely: **[CB1/8/230/103]** [8]. There is no certainty about whether the Project would expand in the future, and, if so, by how much and when and UKEF has not

[8] Contrary to what is said at CSkel §§111 and 113, the Ds do not accept that the Project will expand; DGD §98 says nothing of the sort **[CB1/2/90]**.

committed to provide export finance to support funding of the same. There is in any event no obligation for UKEF to consider cumulative impacts for the reasons set out in DGD §96 **[CB1/2/89]**.

83. In reality, this is not an 'error of fact' argument. There was no mistake as to an established existing fact (cf. *E v SSHD* [2004] QB 1044 at §66). Matters of opinion and evaluation cannot give rise to a mistake of fact challenge: *R (Institute of Chartered Accountants) v Lord Chancellor* [2019] EWHC 461 (Admin) at §79. What C really complains about is UKEF's application of IFC PS1 to the facts before it, which required a judgment as to whether there was any existing, planned or reasonably defined development to expand the Project. That judgment is only reviewable if irrational, which it plainly was not.

Failure to properly consider lock-in

84. Lock-in and transition risk was considered in the CCR. UKEF was aware of the issues, including the global picture (**[CB2/21/275-277]**) and the potential impact for renewables **[CB2/21/282]**. It expressly identified the risk of lock-in but noted that the Project would be an *"important contributor to the energy transition"* **[CB2/21/254]**. C's assertion that this assessment was flawed because there was a significant risk of lock-in is simply a disagreement with the merits of UKEF's judgment (cf. CSkel §116).

85. There was no policy or standard which required UKEF to undertake any kind of quantitative analysis of this risk and there is no basis for suggesting that UKEF's failure to undertake such an analysis is irrational (cf. CSkel §§117-118). UKEF carefully considered the possibility of calculating Committed Cumulative Carbon Emissions ("**CCCE**") for the Project but ruled it out for entirely rational reasons including the fact this calculation would need to be undertaken by specialist experts, that the methodology is not widely adopted and is still being pioneered and would need contributions from the Mozambique Government: **[CB1/8/241/§139] [CB2/21/268/23]**. Professor Anderson also confirms that LNG projects are not covered by the CCCE methodology and that the CCCE approach does not quantify 'systemic' or indirect lock-in: **[CB1/6/164/§26-27]**.

Stranded assets

86. Stranded asset risk was considered in the CCR and by UKEF's risk analysts: see **[CB2/19/201-203]** and **[CB2/21/254, 256, 283-285]**. Both concluded this risk was low. UKEF considered that it could appropriately assess this risk by means of a broad evaluative judgment. Nothing in the nature of the risk or any policy or applicable standard required that UKEF quantify the risk. Dr Hawkes agrees: **[CB1/10/264, 266/12, 17]**.

Many of the relevant factors identified as bearing on stranded asset risk are not even amenable to quantification.

87. C's criticism of UKEF's risk analysis on the basis that it did not expressly consider the 'production gap issue' (cf. CSkel §§121, 124) goes nowhere. Consider the RAD analysis at **[CB2/19/202]** which expressly refers to the fact that the Project is state of the art, in the top quartile of LNG cost producers and compares favourably in terms of carbon intensity compared with peers. All of these are reasons why the Project can rationally be considered to be at low risk of becoming stranded *even* in the event that global gas demand reduces in light of global aims to reduce GHG emissions. That is made expressly clear in the CCR ("*as the Project compares favourably to its peers (in that it is more efficient and benefits from modern liquidation* [sic.] *plant resulting in fewer GHG emissions) it is less likely to be affected by the introduction of any future global carbon/environmental tax or regulation compared to those projects"*) **[CB2/21/254]**.

CONCLUSION

88. The Court is invited to dismiss the claim for judicial review.

SIR JAMES EADIE QC
RICHARD HONEY QC
HOLLIE HIGGINS
CONOR FEGAN

23 November 2021